

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 013953/2024

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

In the matter between:

JOHANNES ALLY SHIBAMBO

APPLICANT

and

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

FIRST RESPONDENT

**COMMISSIONER OF CORRECTIONAL
SERVICES**

SECOND RESPONDENT

**CHAIRPERSON, NATIONAL COUNCIL
FOR CORRECTIONAL SERVICES**

THIRD RESPONDENT

JUDGMENT

TISANI, AJ

Introduction

- [1] The Applicant, Mr Johannes Ally Shibambo, is a prisoner currently incarcerated at Kgoshi Mampuru II Correctional Centre, Pretoria.
- [2] The present application is an opposed review application against the decision of the First Respondent (**Minister**) to reject the Applicant's application for parole. At the time the decision was taken, and the present application launched, the 'Minister' responsible for correctional services – as defined by section 1 of the *Correctional Services Act*¹(**1998 Act**) – was the Minister of Justice & Correctional Services². With effect from 11 October 2024, the functions of the Minister responsible for correctional services have been transferred from the Minister of Justice & Correctional Services, to the Minister of Correctional Services, in terms of section 97 of the Constitution³.
- [3] The National Commissioner for Correctional Services, and the Chairperson of the National Council for Correctional Services have also been cited in the application as the Second and Third Respondents respectively.
- [4] The Applicant seeks an order reviewing and setting aside the Minister's decision rejecting the Applicant's application for parole. The Applicant further seeks an order substituting the decision of the Minister with an order by this Court placing the Applicant on parole within 15 (fifteen) days, and on such terms as the Court may deem fit. The Applicant finally seeks costs against the Minister, and against the Second and Third Respondents, in the event of opposition.
- [5] The review application has been brought in terms of section 6(2) of the *Promotion of Administrative Justice Act*⁴ (**PAJA**), alternatively on the grounds of legality.

¹ Act 111 of 1998

² *Proc* 47 in GG37839 of 15 July 2014

³ *Proc* 199 in GG 51368 of 11 October 2024

⁴ Act 3 of 2000

Background facts salient to the present application

- [6] The offences for which the Applicant was convicted and sentenced are appalling. On 04 September 2003 at or near Chili's Farm Moloto, in the district of KwaMhlanga, the Applicant, unlawfully armed with a firearm and ammunition, robbed one Mr Sense Banda of a motor vehicle, and subsequently murdered Mr Banda.
- [7] The Applicant was charged with one count of murder, one count of armed robbery with aggravating circumstances as defined in Section 1 of the *Criminal Procedure Act*⁵(CPA), one count of the unlawful possession of a firearm in contravention of s2 of the *Arms and Ammunition Act*⁶, and one count of unlawful possession of ammunition in contravention of s36 of the *Arms and Ammunition Act*⁷.
- [8] The matter proceeded before the Transvaal Provincial Division of the High Court (as it then was) with Mr Acting Justice Ranchod (as he then was) presiding. The Applicant pleaded not guilty to all charges and pleaded an *alibi* in his defence. The Applicant's *alibi* defence was rejected by the High Court, and the Applicant was convicted on all four counts on 02 May 2006.
- [9] The sentencing proceedings with respect to the murder and armed robbery convictions was subject to the minimum sentencing provisions as set out in section 51 of the *Criminal Law Amendment Act*⁸. The High Court, having found neither substantial nor compelling circumstances justifying a departure from the minimum sentencing provisions, sentenced the applicant on 09 May 2006 to life imprisonment in respect to murder, 15 (fifteen) years with respect to armed robbery with aggravating circumstances, and 3 (three) years imprisonment for unlawful possession of a firearm and ammunition. The sentences of 15 (fifteen) years, and 3 (three) years respectively, were ordered to run concurrently with the sentence of life imprisonment.

⁵ Act 51 of 1977

⁶ Act 75 of 1969. This Act was subsequently repealed and replaced by the Firearms Control Act 60 of 2000.

⁷ Ibid

⁸ Act 105 of 1997.

- [10] It is common cause that the Applicant falls within the category of prisoners covered by the judgment of the Constitutional Court in *Phaahla v Minister of Justice and Correctional Services*⁹ which found that the correct interpretation of section 136 of the 1998 Act was that offenders are entitled to the parole regime that was enacted at the time when the crime was committed, rather than when the offender was sentenced. In respect to the Applicant, the applicable parole regime in place was in accordance with the provisions of the *Correctional Services Act* 8 of 1959 (**1959 Act**) read with the policy and guidelines applied by the former Parole Boards under the 1959 Act. It is further common cause that the Applicant reached the minimum detention period under the 1959 Act and relevant policy and guidelines, on 08 March 2019.
- [11] Pursuant thereto, the Applicant on 30 August 2021 appeared before the Correctional Supervision and Parole Board for the Kgosi Mampuru II Management Area (**Parole Board**) seeking a recommendation on possible placement on parole. After having considered a correctional services plan approved by the case management committee dated 23 September 2020, together with an educational report, a unit manager's report, a spiritual caregiver's report, a social workers report by Ms E Dhlamini and Ms Leshabane dated 02 March 2021, and a clinical psychologists report compiled by one JJ Morolong dated 20 November 2020, as well as submissions from the Applicant, the Parole Board on 30 August 2021 recommended the release of the Applicant on parole, and the placement of the parole recommendation for approval before the National Council for Correctional Services, the Third Respondent, in terms of section 75(1)(c) read with section 78(1) of the 1998 Act.
- [12] The Third Respondent having considered the recommendations of the Parole Board during meetings of 31 August 2022 – 02 September 2022, took a decision dated 13 December 2022 not to recommend parole for the Applicant. The grounds of the decision taken by the Third Respondent were predicated on the findings cited in the assessment and report on the Applicant by the clinical psychologist JJ Morolong dated 20 November 2020. The Applicant was instead

⁹ 2019 (2) SACR 88 (CC) at paras 46 – 54, 62 and 70.

advised by the Third Respondent to improve his situation by undergoing individual psychotherapy to address his aggressive violent behaviour, lack of insight and victim empathy. The Applicant was further advised to undergo a risk assessment conducted by a non – treating psychologist. The Third Respondent finally recommended that the parole application be placed before the Third Respondent for reconsideration after a further period of 12 (twelve) months had elapsed.

[13] The Minister, per decision dated 28 April 2023, and acting in terms of section 78(2) of the 1998 Act, approved the recommendation of the Third Respondent not to place the Applicant on parole. The Minister further directed that a further profile of the Applicant be conducted and the matter be placed before the Third Respondent after 28 April 2024.

[14] Aggrieved by the decision of the Minister, the Applicant brought the present application.

Issues to be determined

[15] The issues to be determined are the following:

15.1 Is the decision taken by the Minister lawful and reasonable?

15.2 Is the Court entitled to substitute the decision of the Minister, if the Minister's decision is found not to be lawful and reasonable?

Applicable law

[16] The appalling occurrences of 04 September 2003 notwithstanding, the Constitutional Court in *Janusz Jakub Walusz v Minister of Justice and Correctional Services & others*¹⁰ (**Walusz**) reminds us that:

¹⁰ 2023 (2) SA 473 (CC) at paras 43 – 44, 47

16.1 An important objective of imprisonment in our correctional facilities (prisons) is aimed at rehabilitating the prisoner so that he or she can lead a crime-free life after being released from prison and rejoining society.

16.2 The broad policy applicable under section 136 of the 1998 Act, which utilised the policy and guidelines under the 1959 Act, was that the placement of a prisoner on parole should be as soon as possible after the date from which such prisoner becomes eligible for consideration for parole. Furthermore, the evaluation of a prisoner for parole must be done fairly and justly.

[17] The Court in *Mazingane and others v Minister of Correctional Services and others*¹¹ remarked as follows pertaining to parole decisions:

“[75] Once a person has been incarcerated for a long time and has satisfied all the principles and the requirements for parole, they should not continue to be incarcerated when they have become eligible for parole unless the Minister has legitimate reason to deny parole. In the absence of sound reasons, denials of parole applications of this kind may rob prisoners of hope as they are left with no clear way to demonstrate rehabilitation and earn their freedom. A decision not to release a sentenced offender under these circumstances may be irrational in that the evidence and information do not support the decision and do not justify the decision-maker’s conclusion. It can thus be reviewed in terms of PAJA on such grounds”

[18] The above notwithstanding, placement on parole is not a right. The right that exists under section 73 of the 1998 Act, is the right to be considered for parole. Implicit in the right to be considered for parole, is that such determination must be made on rational grounds.

¹¹ [2024] ZAGPJHC 1092 (28 October 2024) at para 75

[19] The decision by the Minister constitutes the exercise of a public power and must accordingly comply with the Constitution and the doctrine of legality¹². Indeed, every exercise of public power, including every executive act must comply with the principle of legality, irrespective of whether the provisions of the *Promotion of Administrative Justice Act*¹³ (**PAJA**) also applies¹⁴.

[20] The principles of legality, as set out in *Democratic Alliance vs President of the Republic of South Africa and others*¹⁵, require that:

20.1 The functionary may not exercise a power or perform a function beyond that conferred by law¹⁶.

20.2 The power must not be misconstrued¹⁷.

20.3 The decision must be rationally connected to the purpose for which the power was conferred¹⁸.

20.4 The decision must not be arbitrary.

[21] With respect to administrative action, Section 33 of the Constitution provides that:

'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must –

¹² *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 49.

¹³ Act 3 of 2000

¹⁴ *Minister of Defence & Military Veterans v Motau* 2014 (5) SA 69 (CC) at para 69

¹⁵ 2013 (1) SA 248 (CC).

¹⁶ *Fedsure Life Assurance Limited and others vs Greater Johannesburg Transitional Metropolitan Council and other* 1999 (1) SA 374 (CC) at para 58.

¹⁷ *Masetla vs President of the Republic of South Africa and another* 2008 (1) SA 566 (CC) at para 81.

¹⁸ Footnote 9. *Ibid* at para 75.

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
- (b) impose a duty on the State to give effect to the rights in ss (1) and (2); and*
- (c) promote an efficient administration.'*

[22] Section 1 of PAJA defines administrative action as:

“administrative action” means any decision taken, or any failure to take a decision,
by—

- (a) an organ of state, when—*
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or*
 - (ii) exercising a public power or performing a public function in terms of any legislation; or*
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...”*

[23] Section 6(2) of PAJA identifies the circumstances under which a court or tribunal has the powers to judicially review administrative action:

‘(2) A court or tribunal has the power to judicially review an administrative action if -

- (a) the administrator who took it -*
 - (i) was not authorised to do so by the empowering provision;*
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or*
 - (iii) was biased or reasonably suspected of bias;*
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
- (c) the action was procedurally unfair;*

- (d) *the action was materially influenced by an error of law;*
- (e) *the action was taken -*
 - (i) *for a reason not authorised by the empowering provision;*
 - (ii) *for an ulterior purpose or motive;*
 - (iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*
 - (iv) *because of the unauthorised or unwarranted dictates of another person or body;*
 - (v) *in bad faith; or*
 - (vi) *arbitrarily or capriciously;*
- (f) *the action itself -*
 - (i) *contravenes a law or is not authorised by the empowering provision; or*
 - (ii) *is not rationally connected to -*
 - (aa) *the purpose for which it was taken;*
 - (bb) *the purpose of the empowering provision;*
 - (cc) *the information before the administrator; or*
 - (dd) *the reasons given for it by the administrator;*
 - (g) *the action concerned consists of a failure to take a decision;*
 - (h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
 - (i) *the action is otherwise unconstitutional or unlawful'*

[24] Rationality is the cornerstone of decision making and the exercise of public power, and is one of the primary determining factors of the legality of a decision. The Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*¹⁹ made the following observations pertaining to the content of the requirements of rationality:

¹⁹ 2000 (2) SA 674 (CC) at paras 85 – 90

24.1 Rationality is the minimum threshold requirement applicable to exercise all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful.

24.2 Rationality is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.

24.3 The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner.

[25] Reasonableness relates to the question of whether or not the decision is one that a reasonable decision-maker could reach. Relevant considerations may include an analysis of whether there is an abuse of discretion, whether a decision taken was irrational, whether the decision taken was proportional, whether the decision was vague, and/or whether the decision was objectively generally unreasonable. The Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism and others*²⁰ (**Bato Star Fishing**) stated it thus with respect to what constituted a reasonable decision:

[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the

²⁰ 2004 (4) SA 490 (CC) at para 45

nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected...'

[26] Leaving aside the questions pertaining to the legality and reasonableness of the Minister's decision, the Applicant in the present review application, seeks exceptional relief under s8(1)(c)(ii) of PAJA in that the Applicant seeks an order substituting the decision of the Minister, and the placing of the Applicant on parole within 15 (fifteen) days, and on such terms as the Court may deem fit.

[27] It is trite law in respect to reviews of administrative decisions that the court should be very hesitant to step into the shoes of an administrator. The rationale for this principle is the doctrine of the separation of powers, in terms of which the court should avoid usurping the decision making powers of an administrator unless exceptional circumstances warrant interference by the court²¹.

[28] The Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa*²²(**Trencon**), has articulated the following principles governing the circumstances in which the courts can step into the shoes of an administrator, and effectively substitute the decision of the administrator with its own:

28.1 Firstly, where the end result is a foregone conclusion, the court may substitute its decision for that of the administrator, on the grounds that it would serve no purpose to refer the matter back to the original decision maker²³. This can be evidenced by circumstances where the information before the administrator allows for no other rational conclusion other than the relief sought by the applicant²⁴. The situation can also manifest in circumstances where the administrator is prevented from acting in a manner which would accord procedural fairness to the applicant²⁵.

²¹ *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 76

²² 2015 (5) SA 245 (CC) at paras 34 to 55.

²³ *Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA) at para 28

²⁴ *Grinaker LTA Ltd v Tender Board, Mpumalanga* (2002) 3 All SA 336 (T) at para 86

²⁵ *Premier, Province of Mpumalanga v Executive Committee, Association of Governing Bodies of State Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 52

- 28.2 Secondly, the court further carefully examines whether further delay of the administrative decision would cause undue prejudice to the applicant²⁶. This consideration notwithstanding, the presence of delay does not in and of itself entitle the judicial officer to substitute its decision for that of the administrator. The test is that the remittance of the matter back to the administrator, and the resultant delay, must objectively result in undue prejudice to the applicant²⁷.
- 28.3 Thirdly, public policy also plays a crucial role. The more pressing the public policy considerations in favour of the applicant, the more likely the court will be to substitute its decision for that of the administrator²⁸.
- 28.4 Finally, the court may elect to substitute its decision for that of the administrator in circumstances where the administrator exhibits bias and/or incompetence to such a degree that it would be unfair to submit the applicant to the jurisdiction of the administrator again²⁹. This can be evidenced by circumstances where the administrator made a decision which was wholly unwarranted and entirely unsupported by the available evidence³⁰, alternatively where the administrator has conducted himself in a manner which suggests that he is completely closed to reapplying his mind, or reconsidering his position if required to do so by the court³¹.

Is the Minister's decision rational and reasonable

[29] Approving the recommendation of the Third Respondent not to place the Applicant on parole, and directing that a further profile of the Applicant be conducted, and that the matter be placed before the Third Respondent after 28

²⁶ *Ruyobeza v Minister of Home Affairs* 2003 (5) SA 51 (C) at 65 – 66

²⁷ *Tripartite Steering Committee & another v Minister of Basic Education & another* 2015 (5) SA 107 (ECG) paras 49 – 58, and 77.

²⁸ *WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board* 1982 (4) SA 427 (A) at 449

²⁹ *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 494F – G

³⁰ *Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board* 1985 (2) SA 234 (SE) at 247

³¹ *Minister of Local Government & Land Tenure v Inkosinathi Property Developers (Pty) Ltd* 1992 (2) SA 234 (TskA)

April 2024, are all administrative decisions in that the Minister is exercising a public power, and performing a public function in terms of legislation.

[30] A key requirement of rational decision making is that the decision itself must be rationally connected to the facts before the decision maker. A decision is rationally connected to the purpose for which it was taken if it is connected to that purpose by reason, as opposed to being arbitrary or capricious³².

[31] What then are the Minister's reasons for the decision to reject the Applicant's parole application? This question presents a fundamental problem in the present application. The Minister is not the deponent to the answering affidavit.

[32] The deponent to the answering affidavit is Marothi Aaron Mashifane (**Mashifane**). Mr Mashifane is a member of the National Council for Correctional Services, the Third Respondent, and has deposed to the answering affidavit on its behalf. The Third Respondent fully supports the decision not to recommend the Applicant for parole, and further supports the referral of the Applicant back for psychotherapy on account of the report of the clinical psychologist. There is no confirmatory affidavit from the Minister.

[33] The present application is not directed at challenging the recommendation of the Third Respondent. The ultimate decision maker on parole is the Minister. It is the Minister's decision that is being challenged.

[34] The admissibility of evidence is not a discretionary question for the court. It is a substantive finding of law³³. The admission of hearsay evidence in particular is governed by s3 of the *Law of Evidence Amendment Act*³⁴, the relevant provisions of which holds as follows:

³² *Calibre Clinical Consultants (Pty) Ltd & Another v National Bargaining Council for the Road Freight Industry & Another* 2010 (5) SA 457 (SCA) at para 58

³³ *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC* 1997 (1) SA 1 (A) at para 27 D – E.

³⁴ Act 45 of 1988

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice...

(4) For the purposes of this section -

"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence..."

[35] Section 3 of the *Law of Evidence Amendment Act* enjoins a court in determining whether it is in the interests of justice to admit hearsay evidence to have regard

to every factor that should be taken into account³⁵. The court must carefully consider the factors set out in s 3(1)(c) of the Law of Evidence Amendment Act, and only if, having regard to all the factors contained therein cumulatively, finds that it would be in the interests of justice to admit the hearsay evidence, should the court then admit the evidence. Most pertinently, the framework created by the provisions of the Law of Evidence Amendment Act is exclusionary. Hearsay evidence not admitted in accordance with its provisions is not evidence at all³⁶.

[36] This has profound implications for the present application. The Full Court of this division in *Minister of Home Affairs v Helen Suzman Foundation & others*³⁷ has determined – on the strength of the principle confirmed by the Supreme Court of Appeal in *Freedom Under Law v Judicial Services Commission*³⁸ – that it is only the decision maker who can tender evidence as to what passed through the mind of the decision maker, as well as evidence on which factors the decision maker has taken into consideration in arriving at a decision. If a decision maker has failed to depose to an affidavit it is impermissible for a functionary to do so on behalf of the decision maker in that same constitutes inadmissible hearsay in the absence of positive confirmation from the decision maker. More pertinently inadmissible affidavits should not be considered in adjudicating a matter.

[37] The affidavit of Mr Mashifane can thus at best constitute a synopsis of the salient background information, and an analysis of the relevant factors taken into consideration by the Third Respondent in arriving at its decision to recommend to the Minister not to approve parole for the Applicant. It does not constitute evidence of the Minister.

[38] In the present application it is common cause from the papers that the Parole Board, the correctional services plan approved by the case management committee dated 23 September 2020, an educational report, a unit manager's report, a spiritual caregiver's report, and a social workers report by Ms E Dhlamini

³⁵ *S v Shaik and others* 2007 (1) SA 240 (SCA) at para 170

³⁶ *S v Ndhlovu & others* 2002 (2) SACR 325 (SCA) at para 14.

³⁷ [2023] ZAGPPHC 1835 (16 October 2023) at para 12

³⁸ 2023 (3) All SA 631 (SCA) at para 27

and Ms Leshabane dated 02 March 2021 are all favourable towards the Applicant, and the Parole Board has on the strength of same recommended the release of the Applicant on parole. The Parole Board has further considered the assessment and report on the Applicant by the clinical psychologist JJ Morolong dated 20 November 2020 and is evidently unpersuaded that the concerns raised by the clinical psychologist warrant a rejection of the parole application.

[39] The Third Respondent has taken a contrary view – based on its reading and analysis of the findings cited in the assessment and report on the Applicant by the clinical psychologist JJ Morolong dated 20 November 2020, and has instead recommended the rejection of the Applicant’s parole application, and has further recommended that the Applicant undergo further psychological assessment to address his apparent aggressive violent behaviour, lack of insight and victim empathy, and finally for the Applicant’s application to be reconsidered after a period of 12 (twelve) months to allow for the above interventions.

[40] This Court is left in the dark as to the reasons why the Minister has in the present instance preferred one viewpoint and parole recommendation over the other. The discretionary power to place a life sentenced offender on parole in terms of either section 78 or section 136 of the 1998 Act vests with the Minister. The Minister is not merely a rubberstamp of the Third Respondent. In exercising his discretion, the Minister is obliged to act rationally. More pertinently, in order to be rational, a decision must be based on objectively accurate findings of fact, and a correct application of law³⁹. In essence there must be a rationally objective basis justifying the decision⁴⁰.

[41] There is no admissible evidence before this Court about the objective basis on which the Minister has decided to reject the Applicants application for parole – which decision of necessity requires the Minister to prefer one viewpoint and parole recommendation over the other. It is not for the Applicant or this Court to

³⁹ *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA) at para 40

⁴⁰ *Merafong Demarcation Forum v President of the Republic of South African & Others* 2008 (5) SA 171 (CC) at para 63

speculate about the reasons for the Minister's decision. It was incumbent on the Minister to take the Court into his confidence and explain his reasoning to the Applicant and to the Court. The Minister has not done so, and this renders his decision irrational. It is settled law that irrational parole decisions stand to be reviewed and set aside⁴¹.

Is the Court entitled to substitute the decision of the Minister?

[42] As a starting point, the factors under the exceptional circumstances' enquiry are independent rather than cumulative, and as such in principle, if any factor is established as being present, that may alone justify an order of substitution.⁴²

[43] The above notwithstanding, the Court in *Trencon*⁴³ set out the methodology according to which a court was enjoined to approach the question of whether exceptional circumstances were sufficiently present such that the court could make an order substituting the decision of the administrator.

[44] Firstly⁴⁴, a fundamental precondition for the court to entertain any review application in which exceptional relief is sought is that the court must be in as good a position as the administrator to take the decision⁴⁵. The court must have all the facts in the papers before it that are necessary, in order to be able to substitute its decision for that of the administrator. If it does not have the necessary information, the court can itself not take a proper, rational decision⁴⁶.

[45] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This of necessity involves a careful evaluation of the stage at which the administrator was in when the decision was taken. Generally, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge.

⁴¹ Footnote 10. Ibid at para 60

⁴² Footnote 22. Ibid at para 39

⁴³ Footnote 22. Ibid

⁴⁴ Footnote 22. Ibid at paras 47 – 48

⁴⁵ *Traube v Administrator Transvaal & others* 1989 (2) SA 396 (T)

⁴⁶ Footnote 19. Ibid at paras 52 – 54

[46] Secondly⁴⁷ however, even where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator. This consideration finds its origins in the second precondition for entertaining any review application in which exceptional relief is sought, namely that the decision of the administrator must be a foregone conclusion.

[47] A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and it would merely be a waste of time to order the administrator to reconsider the matter. In practical terms this involves a determination of whether the decision of the administrator is guided purely by particular rules and legislation – in which case the court can itself apply such rules and legislation – or whether the decision is policy laden and polycentric in nature, in which case the court should be cautious and careful to exercise judicial deference.

[48] Applied to the facts of the present application there are 3 (three) factors that militate against the granting of the exceptional relief sought by the Applicant. Firstly, the court has been placed in possession of a correctional services plan approved by the case management committee dated 23 September 2020, together with an educational report, a unit manager's report, a spiritual caregiver's report, a social workers report by Ms E Dhlamini and Ms Leshabane dated 02 March 2021, and a clinical psychologists report compiled by one JJ Morolong dated 20 November 2020, the recommendation of the Parole Board of 30 August 2021, the recommendation of the Third Respondent 13 December 2022, and the decision of the Minister dated 28 April 2023. What the Court does not have is an engagement in the affidavits filed on the substantive and comparative conclusions of each of the reports and recommendations, and the reasons why one viewpoint and parole recommendation should be preferred over the other.

⁴⁷ Footnote 22. Ibid at paras 47 – 50

[49] Secondly, a parole decision applicable to the category of life sentenced offenders such as the Applicant is determined with reference to the parole regime in place which was in accordance with the provisions of the 1959 Act, read with the policy and guidelines applied by the former Parole Boards under the 1959 Act. The relevant policy documents and guidelines do not form part of the record in the present application, nor have they been addressed in the affidavits filed. This Court is thus not in a position to assess whether the facts peculiar to the Applicant, when compared with the applicable policies and guidelines, would support the release of the Applicant on parole.

[50] Finally, what is clear is that a parole decision pertaining to a life sentenced offender in the category of offenders as the Applicant, involves a careful interplay between the applicable legislation, facts peculiar to the offender, and the applicable policies and guidelines under the 1959 Act. This is eminently a terrain as articulated in *Bato Star Fishing*⁴⁸ where courts must demonstrate:

“...a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies...”

[51] This Court is accordingly neither in as good a position as the administrator to take the decision, nor is the decision itself a forgone conclusion. The decision in question is furthermore policy laden and polycentric in nature, and the Court

⁴⁸ Footnote 20. Ibid at para 46

should be cautious and careful to exercise judicial deference. The Court consequently declines to order the exceptional relief sought by the Applicant.

Costs:

[52] The final consideration relates to costs. The Applicant has been successful in reviewing and setting aside the decision of the Minister on grounds of rationality. The Court has declined to order the exceptional relief sought – not on substantive grounds pertaining to the objective merits of the decision to reject the Applicant’s parole application – but rather on grounds of judicial deference to policy driven decision making. The Applicant has thus been substantially successful in the present application, and there is not reason why the costs should not follow the result. Given the complexity involved, the scale of costs is on scale B.

Order

[53] For the above reasons, I make the following order:

1. The decision of the Minister of Justice and Correctional Services dated 28 April 2023, to refuse the release of the Applicant on parole, is reviewed and set aside.
2. The ‘Minister responsible for correctional services – as defined by section 1 of *Correctional Services Act* 111 of 1998 is ordered to reconsider the refusal to release the Applicant on parole, and to provide the Applicant with written reasons within 60 days of this order.
3. The Respondents are ordered to pay the costs of the Application, jointly and severally, the one paying, the other to be absolved, on a party and party scale, on scale B.



SM TISANI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of hand – down is deemed to be 17 June 2026.

APPEARANCES:

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