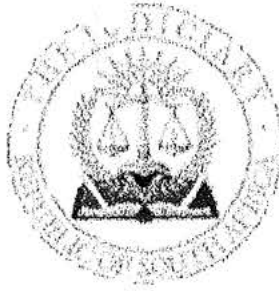


REPUBLIC OF SOUTH AFRICA



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

Case Number: 2024-011156

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

DATE: 22 June 2026

SIGNATURE OF JUDGE:

In the matter between:

SOLOMON MAKHUBELA

Applicant

and

NATIONAL COUNCIL FOR CORRECTIONAL SERVICE

1st Respondent

THE MINISTER FOR CORRECTIONAL SERVICES

2nd Respondent

THE CORRECTIONAL SUPERVISION AND PAROLE BOARD,

GAUTENG – PRETORIA

3rd Respondent

JUDGMENT

D van den Bogert AJ

- [1] The central question in this case is what a court must do in a review, absent an opposing decisionmaker's version on oath.
- [2] Before that question is addressed, I deal with the following. The Constitutional Court in the case of *Khumalo*¹ restates the following fundamental principle applicable to the state and its functionaries:

*"36 Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of s 7(2) of the Constitution, to 'respect, protect and promote and fulfil the rights in the Bill of Rights.' As bearers of this duty and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to address it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration."*²

- [3] The three respondents in this case are public functionaries and as the arms of the state carry similar responsibilities. The state's responsibility is heightened when it engages in litigation with private individuals. It must approach such legal proceedings respectfully bearing in mind its obligation as envisaged in section 7(2) of the Constitution. The respondents' approach in the present case falls short of such an earnest resolve to litigation.
- [4] Where an organ of state, faced with a review application, has no legally sustainable defence to the merits of the application, it must say so. To raise all sorts of procedural and technical defences without dealing or properly engaging with the merits of a review application, constitutes conduct, unbecoming of functionaries of the state. This is more particularly so in a case such as the

¹ *Khumalo an Another v MEC for Education, KwaZulu Natal* 2014 (5) SA 579 (CC)

² See also - *Lee v Minister of Correctional Services* 2011 (6) SA 564 (WCC)

present where the applicant's section 12 constitutional right, being his right to freedom, is at play.

- [5] The applicant seeks to review the decision of the second respondent, the Minister of Correctional Services (herein referred to as "*the Minister*") of 1 November 2024, to refuse him parole and to have that decision set aside. The first respondent is the National Council for Correctional Services (the "*NCCS*"). The second respondent is the Minister. The third respondent is the Correctional Supervision and Parole Board Gauteng, Pretoria (herein "*the parole board*").
- [6] The applicant is Solomon Makhubela. His birth date is 14 December 1964. He is accordingly presently 61 years old. The crimes he was found guilty of, he committed at the age of 33 years old. It is today some 28 years later. On 5 October 2024, he was sentenced to life imprisonment. He was found guilty, together with 14 accomplices, on 6 counts of murder, a count of robbery with aggravating circumstances, 4 counts attempted murder, and guilty of theft and the unlawful possession of firearms and ammunition. These are facts that cannot be changed.
- [7] The applicant launched his review application on 29 January 2025, which is well within the 180-day period from the day that the Minister had taken his decision to refuse parole. The respondents delivered their initial record on 4 March 2025. No reasons were provided by the Minister for his decision to refuse the parole and several other documents were also not provided. This caused the applicant to deliver on 10 March 2025 a notice in terms of rule 30A whereby numerous reports are requested as well as reasons for the decision of the Minister. A response thereto was filed on 13 March 2025. Several additional reports were indeed provided, but no reasons from the Minister.
- [8] One of the documents found in the record, is the decision of the Minister, which is signed on 1 November 2024, by Minister Groenewald. It reads, and I quote:

"Having considered the documentation of the aforesaid offender and the recommendations of the NCCS, parole is not approved. The matter should be placed before the Council after twelve months. The offender is presently urged to improve his situation as follows:

- 1 *To undergo individual psychotherapy to further reduce his risk of reoffending.*
- 2 *A risk assessment by a non-treating Psychologist should be conducted indicating the risk level and tools used, if any."*

[9] That decision was taken absent any written reasons. The decision is in stark contrast of the recommendations and motivations of the parole board, who, premised on several reports, unequivocally supported the release of the applicant on day parole.

[10] According to the parole board memorandum, it is confirmed that the crimes were committed on 17 December 1997 and that the applicant was convicted on 4 October 2005. He was 33 years of age when he committed the crimes. The applicant attended several rehabilitation correctional programmes, including, but not limited to, a life skills programme with a social worker and the several other correctional programmes being for example "*Anger In- Anger Out*", "*Cross-Roads*", "*Economic crimes program – Theft and Fraud*", "*Change is Possible*", "*Robbery and Related Offences*", "*Restorative Justice*", "*New Beginnings*", and "*Behaviour Modification in Gangsterism*". This list is not exhaustive.

[11] The applicant completed matric (Grade 12) inside the correctional facility. He obtained N4, N5 and N6 marketing management certificates. He also completed an "*electrical aid module with the directorate Northern Group Training Centres*", and Electrical Engineering Skills Level 2. This list is similarly not exhaustive. He advanced his education significantly. There is not one single report in the record that would suggest that the applicant is not ready to be released on parole, or that he remains a danger to the community.

[12] The parole board did a detailed consideration of all reports, which are naturally not all mentioned in this judgment, and recommended that the applicant be placed on "*Day Placement*" with the following remarks:

"Offender has been in custody since 1998; he was not granted bail. Therefore, he has been detained for twenty-six (26) years. Day parole is recommended for offender to be able to transition back to the community."

- [13] That report is dated 26 April 2024. Presently, the applicant's time in prison is 28 years. The record evinces only favourable reports about the applicant, which includes psychological evaluations done by Social Work Services. All reports make positive findings about the applicant. Absent cogent and rational reasons provided by the Minister why this court must ignore those reports and the recommendation of the parole board, the review, at least prima facie, ought to succeed.
- [14] The applicant initially did not file a supplementary affidavit, because the applicant held the view that the record was incomplete and persisted with the application it had brought on 20 March 2025 seeking further reports and particularly the reasons for the decision to refuse parole. The respondents delivered an answer to the application to compel a proper record on 21 May 2025. At the hearing, I was informed by counsel for the respondents that this court must accept that that specific answering affidavit does not only constitute the answering affidavit to the application to compel, but also all the respondents' answers to the merits.
- [15] Notwithstanding the fact that the applicant had not yet filed its supplementary affidavit, counsel for the respondents assured me that the May 2025 answering affidavit is the only and final answering affidavit and that no further affidavit would be forthcoming. This approach might have been a response to the fact that this court in prior interlocutory applications, after the filing of the May 2025 answering affidavit, ordered the respondents to file an answering affidavit to the merits and to provide reasons for the Minister's decision.
- [16] In this respect, shortly prior to the hearing of the review application, the respondents launched an interlocutory application whereby they sought an order removing the review application from the court roll, alternatively to strike the application from the roll. The respondents argued that such an order was justified in circumstances where they had shortly before that removal application launched rescission applications in respect of numerous interlocutory orders that had been granted by this court.
- [17] Considerable court time was spent in dealing with the application to remove the case from the roll, alternatively to strike it. I dismissed that application, because

it constituted a cynical attempt by the respondents to bring about a further postponement of the applicant's review.

[18] This should be read against the backdrop of the fact that this court had directed in the last of a series of interlocutory orders, which are now the subject of a rescission application, that the postponement, then granted, was a final postponement. The new interlocutory application was nothing but an application for a postponement disguised as a removal application or striking application. It was sought pending the outcome of the rescission application. The rescission applications, however, have no bearing upon the main review application and therefore do not constitute a justifiable reason to, yet again, postpone the inevitable hearing of the review.

[19] I also mention this. Much of the argument at the hearing of this case on Wednesday 27 May 2026, dealt with the fact that the Minister had not provided reasons for his decision to refuse the parole of the applicant. The Minister did not provide reasons and did not provide an affidavit explaining what went on in his mind when he took the decision to refuse parole. Because much of the allocated time was taken up by the interlocutory skirmishes on 27 May 2026, the matter had to stand down to the Friday, 29 May 2026. Again, most of the argument turned on the fact that the Minister had not provided reasons and that he had not provided any explanation on oath.

[20] During replying argument of the applicant's counsel, the respondents' attorney, suddenly uploaded onto the CaseLines system, the Minister's reasons without any affidavit. I allowed the parties to provide further heads on what to do with the reasons, filed late, without an affidavit.

[21] Prior with me dealing with the case of the applicant, I deem it prudent to say something about the respondents' answering affidavit of 21 May 2025. It is deposed to by a Ms LA Vilakazi, who describes herself as a practicing attorney and a member the National Council of Correctional Services. She specifically claims that she is authorised to oppose the application and to depose to the answering affidavit in the stead of all the respondents.

- [22] The first point then taken by Ms Vilakazi, allegedly on behalf of the respondents, is an issue of *lis pendens*. This point is premised on the notion that there are two applications of a similar nature. The respondents refer to an earlier application that was brought under case number 2023-051164. In that application the present applicant also seeks to review a decision of the previous Minister of Correctional Services, refusing parole. The present application seeks to review a decision taken on 11 November 2024. Naturally, the 2023 case does not seek to review that decision, because when the 2023 case was launched, the second decision did not exist.
- [23] The second refusal to release the applicant on parole, taken in November 2024 constitutes the subject of the present application. The first decision, that was the subject of the 2023 application, became academic and moot, because it was overtaken by a second parole board hearing and a second decision to refuse parole.
- [24] These are therefore two distinctly different decisions that are the subject of two distinctly different reviews and the notion that the case is *lis pendens*, is wrong. As such, the *lis pendens* point cannot succeed and stands to be dismissed.
- [25] The further problem with the way the answering affidavit is drafted is this. Although Ms Vilakazi seems to complain about how the applicant litigates, her own statements on oath, offends the constitutional responsible manner in which the state is required to litigate. It is firstly difficult to discern, considering the way the affidavit is drafted, what exactly the respondents seek to convey. Much of it is repetitive, but nowhere a cogent response to the merits of the review is to be found.
- [26] Disconcerting, however, is that whilst she criticises the applicant about his papers, the deponent makes remarks such as that “*the applicant and his attorneys attempt to mislead the above Honourable Court which is woeful*”. That remark is not justified by any of the objective facts. Ms Vilakazi further accuses the applicant that subparagraphs 4.1 up until 6.1 of the applicant’s founding affidavit “*are not only contemptuous, but equally laughable*”. Again, no basis in fact exists for such a remark. It is also derogatory.

[27] The deponent then later in her affidavit says that she reserves the right to seek costs de bonis propriis against the applicant's legal representatives for they have attempted to mislead this court. She then later in fact seeks a punitive cost order de bonis propriis. No basis in fact exists that would justify such an approach.

[28] She also says the following in paragraph 7.2 of her answering affidavit, and I quote:

"In the light of the above, the frivolous, meritless, argumentative and misleading allegations contained in the Applicant's Application and/or founding Affidavit will not assist him, but aggravates his situation, as such may not speak well of his rehabilitation, as he may appear to be having a propensity of baselessly attacking the Respondents in rendering their parole systems, and/or programmes in utter disrepute."

[29] Again, there exist no basis at all to make these ill-conceived remarks. The answering affidavit continues in a similar vein and shows disdain and disrespect towards the applicant. Given the fact that the applicant in his founding affidavit simply states his case and sets out the basis on which he seeks to review the Minister's decision of 11 November 2024, the accusations levelled by Vilakazi against him are not only meritless, but they are devoid of truth. Ms Vilakazi represents the state in this litigation, and she is, concededly, a functionary of the state. In addition, she claims to be an attorney of this court.

[30] Her accusations are levelled against an inmate who does not have the resources and the powerful machinery of the state behind him to litigate. As such, the accusations levelled against the applicant and the applicant's legal representatives, which are wrong, offend the notion that organs of state are required to litigate in a responsible fashion. It is uncalled for and disrespectful. The way the respondents elected to litigate in this case, is deserving of the censure and rebuke of this court. This shall be dealt with hereinafter.

[31] The second *in limine* issue raised by the respondents is that the applicant brought a review application without complying with rule 41A and the applicant should, according to the respondents have first sought to mediate the refusals of the Minister to release him on parole. It is then alleged that that failure to comply with

rule 41A to the review application is fatal, and premised on that, it ought to be dismissed.

[32] Important is the fact that the respondents provide no indication about how they envisage this mediation process would unfold and why it would lead to a speedy resolve. Given the fact that the applicant is incarcerated and doesn't have the litigation advantages that the respondents have, the approach is misguided.

[33] Furthermore, the mediation process is a voluntary process and had the applicant delivered a notice in terms of rule 41A that he does not believe that there is any sense in mediating, it would have been the end of the matter. It is highly doubtful that the Minister would have submitted to attend such mediation and/or would have conceded a parole during the mediation. The second point *in limine* is therefore also to be dismissed.

[34] Although not specifically raised in the answering affidavit, the following issue found its way to the removal/striking application and has been repeated numerous times in argument before me. It is this. The respondents argue that because, in the second review application, being the subject of the present judgment, the decision to be reviewed was not properly identified, the application must be dismissed. It is undoubtedly true that prayer 1 of the review application is not that clear, but in my view that is not fatal. The applicant claims and I quote:

"1 *The First and Second Respondents' decision are unlawful and offend rule of Audi alteram partem, they lack reasonableness and should be declared as such and set aside and be substituted with an order that, I be released on parole or day parole on condition to be issued by the Respondents and that I attend all these stipulated programs by the Respondents and Respondents to ensure that programs are made available to ensure compliance within 30 days of this order.*"

[35] What is discernible from the relief sought, is that the decision to refuse parole, must be reviewed and set aside and be substituted with a decision that the applicant be allowed day parole or parole. This is then amplified in paragraph 4.10 of the founding affidavit where specific reference is made to the decision of Minister Groenewald of 1 November 2024 and where it is then requested in paragraph 5 thereof that this decision be reviewed. Further, the respondents

themselves in the record provided, dealt with the reports and the Minister's decision that particularly relates to the 1 November 2024 decision. There can be no doubt in the mind of the respondents that the review pertains to that specific decision.

[36] My view in this regard, namely that the respondents' attack is again over technical, is fortified by the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at par 27, which I quote:

"[27] *The Minister and the Chief Director argue that the applicant did not disclose its causes of action sufficiently clearly or precisely for the respondents to be able to respond to them. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action.*"

[37] As indicated, in the founding affidavit, at a minimum, the decision sought to be reviewed is with sufficient clarity identified.

[38] I now turn to deal with the applicant's case as well as the respondents' failure to have provided an affidavit by the Minister who took a decision explaining the basis for his decision.

[39] The applicant seeks to review the decision of the Minister, if consideration is given to paragraph 5 and its subparagraphs of the founding affidavit. The basis for the review is that that the decision is irrational, constitutionally impermissible, unreasonable and procedurally unlawful.

[40] Considering the programmes that the Minister requires the applicant to repeat, it, in my view requires an applicant specific (i.e. not a generalised) explanation from the Minister. It is evident from the record that the applicant has successfully completed similar psychotherapeutic assessments as well as risk assessments.

Why the applicant should repeat those assessments, and why the previous ones were not good enough for the Minister is something he must explain in an affidavit.

- [41] I have already dealt with the positive reports that were placed before the parole board, and both the parole board and the NCCS were in favour of the applicant's release. The department's own psychotherapy report prepared by a clinical psychologist, N Ndaba, in August 2023, concludes:

"In conclusion, based on the interaction with Mr Makhubela, over the course of therapy, it appears that he gained remorse for his victims and is able to conceptualize a life ahead that does not involve crime or infringes on the rights of others. Mr Makhubela took responsibility of the index offence and explored his role in the index offence.

Mr Makhubela successfully engaged with therapeutic intervention. He was able to reflect on his life decisions, which led to his incarceration. He demonstrates a sense of remorse and guilt, and he became involved in skills development and made an effort in his rehabilitation process."

- [42] It is uncontested that the applicant poses no demonstratable danger to the community. The only person that rejected his parole is the Minister. It is thus the Minister's decision that is on review. As already indicated, the Minister did not depose to an affidavit. The respondent, on the testimony of Ms Vilakazi, did not provide any cogent reason for the Minister's decision to reject the parole recommendation.

- [43] In any event, the NCCS cannot testify about that would have been the Minister's mind when he took the decision to refuse parole. The affidavit of Ms AL Vilakazi constitutes hearsay evidence in respect of the Minister's decision. In this respect, I refer to the case of *Anderson v Minister of Justice and Correctional Services and Another* (022949/2024) [2024] ZAGPPHC 1355 (23 December 2024). The court dealt with the same issue in respect of the same deponent, as follows:

"[8] Undoubtedly, it is the decision of the Minister that is called into question. The only functionary who can defend the impugned decision is the Minister. Sadly, Mr Anderson is unrepresented in the present application. His Court papers are haphazardly prepared. The papers were not appropriately indexed and numbered.

There was a lot of duplication. It was difficult for this Court to identify the opposing affidavit. After trawling through three ring-bound bundles, the Court stumbled into an affidavit titled 'first and second respondents' answering affidavit'. This affidavit was deposed to by one Ms Amanda Lindokuhle Vilakazi (Ms Vilakazi). This Court must remark, included in the papers before Court was an unsigned version of an answering affidavit. As an indication that the answering affidavit stumbled into is one relied upon by the respondents, Minister included, the heads of arguments submitted on behalf of the respondents, almost word for word, regurgitated the contents of that affidavit.

- [9] *Ms Vilakazi is a practising attorney and a member of the NCCS. She alleged that the facts she deposed to were within her own personal knowledge. The only mention by the deponent of the Minister, relates to submissions of a legal nature which she accepts as being both sound and correct, given to her by the legal representatives of the Minister and herself. Of utmost significance, there is no confirmatory affidavit deposed to by the Minister. With regard to the impugned decision of the Minister, in an attempt to justify the decision, she testified as follows:*

... ”

- [44] The court then repeats the testimony. In paragraph 10 the following is stated:

- [10] *All of the above allegations constitute inadmissible hearsay evidence. These allegations were not confirmed by the Minister. That which is allegedly logical and rational was made in hollow and was not sufficiently expatiated. The full Court of this Division in the matter of The Minister of Home Affairs and another v The Hellen Suzman Foundation and others (Foundation) aptly stated the law to be as follows:*

“What renders the Minister’s application destined for failure is the Minister’s failure to depose to the answering affidavit in the review proceedings. Only the Minister, as the decision maker, could give evidence as to what passed through his mind and how he exercised it. The affidavit deposed to by the Director-General... constitutes inadmissible evidence. As was held by the Supreme Court of Appeal in Freedom Under Law v Judicial Services Commission if the decision maker has failed to depose to an affidavit it is impermissible for a functionary in the office to do so on behalf of the decision maker. In those circumstances the affidavit of the functionary falls to be declared inadmissible. The court in FUL proceeded on the basis that on the merits the application was to fail in any event. However, the principle is that inadmissible affidavits should not be considered in adjudicating a matter...”

[11] *Based on the principles deduced from Foundation, the evidence of Ms Vilakazi is inadmissible to the extent it seeks to justify the decision taken by the Minister on 26 October 2023. This Court per the erudite Acting Justice Ally, in Mbatha v Minister of Justice and Correctional Services and another (Mbatha) felicitously stated the following:*

“...The deponent to the answering affidavit requests the Court to accept hearsay evidence where no confirmatory affidavit has been filed. No explanation is given as to why ‘the Minister’ has not deposed to the answering affidavit nor why no confirmatory affidavit by him has been filed. The exceptions to the hearsay rule do not cater for circumstances wherein a person could have deposed to an affidavit and one wherein a reasonable explanation has been provided for the failure to depose to an affidavit. In my view, the request to accept hearsay evidence in this matter cannot be acceded to for the reason that it is clearly prejudicial to the Applicant and sufficient grounds have not been provided for the acceptance of such hearsay evidence.”

[12] *Likewise, no explanation is given as to why the Minister did not depose to either an answering affidavit or a confirmatory affidavit. In the heads of argument submitted on behalf of the Minister there is no scintilla of a submission regarding the application of section 3 of the Law of Evidence Amendment Act. Accordingly, in considering whether the decision of the Minister is rational and not arbitrary, the evidence of Ms Vilakazi remains inadmissible.”*

[45] On the same principle, in this case, the evidence of Ms Vilakazi insofar as she seeks to defend that what went on in the Minister’s mind, when taking the impugned decision, is inadmissible and not allowed. There is no affidavit of the Minister. There is no explanation why the Minister ignored the review application and decided not to file an affidavit. It is important, in this respect, to mention that the Minister was well aware of this application, because when this court ordered the Minister in one of the prior interlocutory applications to file reasons, he did so. It is these reasons that were belatedly uploaded onto CaseLines.

[46] Although, in my view, the belated filing of reasons ought to be ignored, there is no evidence on oath about the content of these reasons allegedly signed by the Minister. There is no acceptable evidence before court that it was indeed signed by the Minister. It is not confirmed on oath. The reasons, without any explanation on oath, should not be accepted in evidence.

[47] Even if I am wrong in adopting that approach, the reasons belatedly delivered, do not assist the respondents. Although the filing notice that accompanied the reasons, is dated 20 November 2025, it was only placed before this court when the applicant argued in reply. The reasons themselves seem to have been signed by the Minister on the same day. This was presumably in response to an order of this Court issued by Judge Minnaar AJ on 24 October 2024 compelling the Minister to provide reasons. It is apparent that the applicant was unaware of the fact that reasons existed, because he launched a contempt application on 9 December 2025, against the Minister for failing to give reasons as ordered by this Court.

[48] Given the fact that the Minister was aware of this application, it is somewhat astonishing that he decided not to provide his version on oath. It is also surprising that Ms Vilakazi, who was aware of the Lee Anderson Judgment, of December 2024, referred to above, elected to deliver an answering affidavit in May 2025 without the version of the Minister.

[49] The Minister in his so-called reasons concedes that the parole board and the NCCS have recommended the release on parole of the applicant. He accepts that the previous minister had already refused parole and directed the applicant to undergo individual psychotherapy, a risk assessment and additional rehabilitation programs. He accepts that the applicant attended several rehabilitation programs and has developed himself educationally and vocationally. He deals then with the social worker's report of 6 March 2023. It is a report that was prepared by SN Dlamini, a social worker.

[50] The mentioned report is generally supportive of a release on parole. The only negative matter that the Minister could extract from all the reports, on which he seemingly sought to justify his refusal decision seem to be this. He says:

“1.7 *The risk assessment reports indicates that the offender may present with a moderate risk for re-offending.*”

[51] This ignores what the social worker report recommends, being:

“Mr Dlamini noted that the offender has served approximately 26 years of his life sentence conviction. That is relatively a long period. Such time has offered him an opportunity to reform his life morals towards self-discipline. He has matured as an individual to be of better influence to the younger generation. Continuous imprisonment might not serve much of a purpose, observing how he has developed himself. The chance of reoffending appears to be minimal as he has empowered himself with skill and knowledge. He takes responsibility of his crime and is remorseful of the crime committed. He attends the Body of Christ Church every Sunday. That has assisted him develop further life principles as his life has been modified.”

[52] The Minister also ignored the clinical psychologist's report referred to above. If one considers the reasons in context, it constitutes a concession that the Minister did not recognise any of the other reports save for the risk assessment report wherefrom he only took one negative, namely that there might be a moderate change of re-offending. Most reports gainsay that notion.

[53] Bearing in mind that the Correctional Services system is there to rehabilitate inmates, and should that be attained, to restore the freedom of those incarcerated, the extracting of a single negative consideration, namely the remote chance of re-offending, from an overwhelming majority of evidence that parole should be granted, is irrational.

[54] According to section 78 of the Correctional Services Act, 111 of 1998, the Minister has a discretion to grant parole to a so-called lifer on the recommendation of the Parole Board and the NCCS. That discretion must be exercised rationally. In this respect, I refer to *Walus v Minister of Justice and Correctional Services and Others* 2023 (2) SA 473 (CC) where the Constitutional Court says in paragraph 3:

“[3] Section 36 reads:

“With due regard to the fact that the deprivation of liberty serves the purposes of punishment, the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future.”

In my view, this provision provides the statutory basis for the proposition that our prison services are correctional services which emphasises that part of the

objectives of imprisonment is the rehabilitation of prisoners. This provision makes it clear that the objective of the implementation of a sentence of imprisonment is to "correct" the offender or prisoner so that, when he or she is released from prison, he or she is unlikely to lead an irresponsible social life but would rather lead a life that is crime-free. That must be a socially responsible and crime-free life outside of prison. In this regard it is appropriate to refer to what this Court said in Jimmale. In that case Nkabinde J said on behalf of a unanimous Court:

"Parole is an acknowledged part of our correctional system. It has proved to be a vital part of reformatory treatment for the paroled person who is treated by moral suasion. This is consistent with the law: that everyone has the right not to be deprived of freedom arbitrarily or without just cause..."

[55] In the case of *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) the Constitutional Court dealt with the issue of rationality as follows:

"[85] It 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. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action".

[56] The purpose of imprisonment is rehabilitation or "correction". The decision to allow a prisoner parole, must be rationally connected to that attainment. If the evidence shows that the prisoner is rehabilitated, parole, if eligible for parole, must be the outcome.

[57] Given that parole is part of our correctional system, and that it serves to promote the right in terms of section 12 of the Constitutional namely that everyone has the right not to be deprived of freedom arbitrarily and without just cause, there is no rationality in the Minister's decision. The overwhelming number of reports tell the Minister that it is time for the applicant to be released. This is premised on the fact that the applicant has submitted himself to all correctional programmes as required and that most of the reports, even the risk assessment report, relied upon by the Minister", demand the release of the applicant on parole.

[58] As such, the decision of the Minister of November 2024 is irrational and must be reviewed and set aside. That brings me to the question of a remedy.

[59] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) the Constitutional Court dealt with what would constitute an exceptional case that would allow the substituting or varying of the administrative action by the court itself. These factors according to the case are:

- a. whether the court would be in as good a position as the administrator to make the decision.
- b. whether the decision was a foregone conclusion.
- c. delay; and
- d. bias or incompetence on the part of the administrator.

[60] In this case, this court has all the reports on the question whether the applicant should be released on parole before it and is therefore in as good a position as the Minister to decide on the recommendations made by the parole board and the NCCS.

[61] The question whether the decision, should the case be remitted, is a foregone conclusion, must also be answered in the affirmative. The Minister, when providing reasons (although not on oath), has indicated that he stands by his view that all positive recommendations ought to be ignored. A resubmitting to the Minister will therefore serve no purpose. He has made his intentions clear.

[62] I shall revert to the issue of delay, because it goes together with the question whether a substitution is just and equitable. The more difficult enquiry is whether there is bias or incompetence on the side of the decision-maker. There is no evidence of any incompetence on the side of the Minister. There exists, however, a clear indication that the Minister is biased in favour of refusing parole.

[63] The reason for this is to be found in the following. In the face of all the evidence that supports a release on parole, the Minister decided to favour his own subjective view, namely, to refuse parole and send the applicant again for reports

he had already undergone. Furthermore, when given the opportunity to explain, the minister refused to go on oath. This is borne out by the fact that he knew of the review and decided not to provide his version.

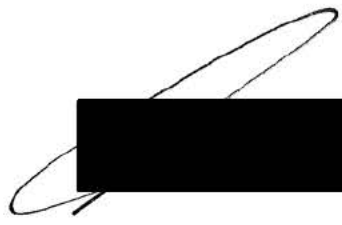
- [64] The only version that this court has, are his reasons not on oath, and which are clearly opposed to the evidence that was before him. This underscores the fact that the Minister has no intention of releasing the applicant ever, which constitutes biasness. This is so, because of his reliance on one single factor not rationally connected to the evidence of the correctional services programmes the applicant underwent having been successful.
- [65] Considering the Walus-case, once it is established that a prisoner has successfully been "corrected", the only logical and rational responsible decision would be to release him. It follows that an unbiased reconsideration is not to be expected.
- [66] Considering the delay that will be caused by remitting the decision to the Minister, it will not be just and equitable to do so. I have dealt hereinabove with the extensive time that has lapsed since the crime was committed and the years of incarceration. The applicant as prisoner is already 61 years old and any further delay cannot be regarded as serving justice. The proper remedy is therefore to substitute the Minister's decision with one that allows the prisoner to be released on parole.
- [67] I also intend to grant a cost order against the respondents on a scale as between attorney and client. I do not easily come to such a decision, but in this case a punitive cost order is appropriate. I have fully hereinbefore dealt with the approach that the respondents have adopted in this litigation. I have indicated that such approach is uncalled for and unbecoming of state functionaries.
- [68] The granting of punitive cost against the three respondents is premised thereon that this court is displeased with the way the state has litigated. In the answering affidavit, unfounded derogatory remarks are directed at the applicant and his legal team. In addition, the decision-maker, the Minister did not see it necessary or worthy to provide his evidence on oath. Yet, he instructed the state attorney to oppose the application. Instead of dealing with the merits of the review, the

state elected to raise several highly technical defences which do not promote the interest of justice.

[69] They have the opposite effect and do nothing but to delay the adjudication of this case, which bearing in mind the rights to freedom which are applicable, should have persuaded the state actors to avoid the approach adopted.

[70] As such, I issue the following order:

- (1) The decision of the Minister of Correctional Services, the second respondent, made in November 2024, rejecting the applicant's application for parole, is reviewed and set aside.
- (2) The Minister of Correctional Services is ordered to place the applicant on parole on such terms as he may deem appropriate and to take all such steps as he may need to take to ensure the applicant is released on parole within 10 (ten) calendar days from the date of this order.
- (3) The respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the applicant's cost of this application on the scale as between attorney and client.




**D VAN DEN BOGERT
ACTING JUDGE
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 22 June 2026.

Appearances

Counsel for the applicant: DB Melaphi
Instructed by: ME Makgopa Attorneys
Ref: Mr Makhubela/M26/2025

Counsel for respondents: PA Mabilo
Instructed by: The State Attorney, Pretoria
Ref: Mr Ngwatle KC

Date of Hearing: 27 and 29 May 2026

Date of Judgment: 22 June 2026