



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

CASE NUMBER: 2024/111103

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates **NO**

In the matter between:

JACKY TEMBA MTSHWENI

APPLICANT

AND

NATIONAL COUNCIL FOR CORRECTIONAL SERVICE

1ST RESPONDENT

THE MINISTER OF CORRECTIONAL SERVICE

2ND RESPONDENT

*Disclaimer: This judgment is handed down electronically by uploading it on CaseLines.
The date of the judgment is deemed to be 4 September 2026.*

JUDGMENT

TROMP AJ

Introduction

1. This is an opposed review application against the impugned decision of the respondents to refuse the applicant parole.
2. The applicant is currently serving a life sentence for murder and twenty (20)

years for robbery with aggravating circumstances. He was sentenced on 10 June 2005.

3. At the time of the commission of the crimes in respect of which he is serving the above sentence, the applicant also had a previous conviction of rape. It is common cause that even after the imposition of life imprisonment in respect of the above offences, the applicant was found to have committed disciplinary offences whilst in prison.
4. After becoming eligible to be considered for parole, the first respondent ("the NCCS"), a high-level body comprising, among others, judges, a magistrate, a Director or Deputy Director of Public Prosecutions, and persons with specialised knowledge of the correctional system, considered his placement for parole and decided that he should not be placed on parole at that time. This recommendation was referred to the Minister for final determination in terms of Section 83(2) of the Correctional Services Act.
5. Acting in terms of section 78(2) of the Correctional Services Act of 1998, the Minister upheld the recommendation of the NCCS and made further recommendations to the applicant which will contribute to the likelihood of future placement on parole.
6. It is this decision that the applicant seeks to have reviewed and set aside. The application is opposed on the basis that, *inter alia*, the Minister had taken into account all the factors he was required to take into account before making the impugned decision, and he had placed such weight on the various factors as he considered appropriate.
7. The question therefore is whether in making the impugned decision the Minister

complied with the relevant legal principles in reaching the decision.¹.

Background

8. The applicant was arrested and tried in 2000 on charges of murder and robbery with aggravating circumstances. At the time of the commission of the above offences, the applicant had a previous conviction of rape. On 10 June 2005, the applicant was sentenced to life imprisonment on a charge of murder and twenty (20) years on a charge of robbery with aggravating circumstances.
9. The applicant is currently serving a sentence of life imprisonment at Kgosi Mampuru II Correctional Centre and has accordingly been serving this sentence since 10 June 2005. It is common cause that he has already served the minimum detention period.
10. During his incarceration at the Kgosi Mampuru prison, it is also common cause that the applicant had a history of disciplinary offences.
11. The applicant was first considered for placement on parole in 2023. This application was refused and a further profile was approved. On that occasion, the NCCS recommended to the Minister that the applicant should not be placed on parole and it was further recommended that the applicant should:
 - 11.1 Attend individual psychotherapy to address his criminogenic needs, substance abuse and dishonesty.
 - 11.2 A risk assessment by a non-treating Psychologist should be conducted.
 - 11.3 The Applicant to undergo Moral Regeneration, Relapse Prevention and Resilience Enhancement programs.

¹ *Rustenburg Platinum Mines (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 31. 3 10

- 11.4 The applicant's profile should be submitted to the NCCS again in not less than 12 months.
12. The applicant was considered for placement on parole a second time in December 2024. This application was also refused. On that occasion, the NCCS recommended to the Minister that the applicant should not be placed on parole. It further recommended that:
- 12.1 The applicant undergoes further individual psychotherapy to address his violence propensity, cognitive distortions, criminogenic needs, impulsivity and substance abuse.
- 12.2 A risk assessment by a non-treating Psychologist be conducted indicating the risk level and tools used, if any.
13. The Minister's decision is recorded in a document dated 07 January 2025, it is referred to as the NCCS recommendation form.
14. The decision of the Minister, according to this document, was recorded as follows:
- "Having considered the documentation of the aforesaid offender and the recommendations of the NCCS, further profile is hereby approved".*
15. This decision of the Minister forms the basis of this review application.

Statutory and policy framework

The Correctional Services Act of 1998

16. The Correctional Services Act of 1998 sets out the process through which parole decisions are reached. The 1998 Act repealed the Correctional Services Act of 1959.

17. The 1998 Act proceeds from the premise that a prisoner has no right to be released on parole. He, however, has a right to be considered for parole.²
18. In the matter of *Mazingane and Others v Minister of Correctional Services and Others*,³ the Court consolidated over nine review applications brought by prisoners serving life sentences. The Court dismissed these applications and emphasised in para 73 that:
- “The sentenced offender thus has a right to be considered for parole but not a right to be placed on parole”*
19. The provisions of section 42(1) of the Act establishes the Case Management Committee. The first step in the process is conducted by the Case Management Committee and this committee is responsible for, *inter alia*, interviewing and assessing longer-term offenders at regular intervals to the Correctional Supervision and Parole Boards regarding the possible placement of offenders on parole, and the conditions of such placement.⁴
20. In circumstances where the Case Management Committee recommends the possible placement of offenders on parole, the process then escalates to the Correctional Supervision and Parole Boards. The Correctional Supervision and Parole Boards are established under the provisions of section 74 of the Act.
21. One of the functions of the Parole Boards is to consider reports submitted by the Case Management Committee, and to make recommendations to the Minister on the granting of parole to an offender serving a life sentence. In circumstances where the Parole Board recommends the possible placement of offenders on parole, the process then escalates to the National Council, which

² Section 73 of the Correctional Services Act 111 of 1998

³ (2024/00411 ; 2024/00414 ; 2024/00353 ; 2024/00360 ; 037664/2022) [2024] ZAGPJHC 1092 (28 October 2024)

⁴ Section 42(2)(d)(vii) of the Act

is established under section 83 of the Act.

22. The Act requires that recommendations must be overseen by the National Council, which is established under section 83 of the Act. After considering a recommendation by a CSPB, together with the relevant record of proceedings, the National Council may recommend to the Minister that parole be granted to an offender serving a life sentence.
23. If the Minister does not approve the recommendation of the National Council, and decides to refuse parole, he may, in terms of section 78(2):
“...make recommendations in respect of treatment, care, development and support of the sentenced offender which may contribute to improving the likelihood of future placement on parole or day parole”.
24. The Act further provides that in circumstances where the Minister refuses parole, the matter must be reconsidered by the Minister, on advice of the National Council, within two years.⁵
25. In essence, as is clear from the Act, with respect to life offenders, the Minister has the power to reject any recommendation of parole received from the correctional supervision and parole board and make recommendations in respect of their treatment, care, development and support.

The Guidelines/policy applicable to the consideration of the applicant's parole

26. Taking into consideration the date on which the applicant was convicted and sentenced, it is important to also make reference to the guidelines/policy applicable to the consideration of the applicant's parole. The applicant's

⁵ Section 78(4) of the Act

eligibility for placement on parole is regulated in terms of the transitional provisions of section 136 of the 1998 Act. The guidelines contained in Chapter VI of the Correctional Services B-Order, commonly referred to as the Parole Board Manual, particularly the 'Criteria for Parole Selection' set out in Chapter VI (1A) thereof.

27. Simply put, the 1995 Parole Board Manual is applicable. The provisions of the Parole Board Manual applicable when considering placement of offenders on parole are, *inter alia*, the following:

27.1 Any remarks made by the court during the imposition of sentence.

27.2 The sentence imposed by the court.

27.3 Placement policy, community interests and public interests.

27.4 Crime prognosis as it manifests in physical/psychological abilities to commit crime again.

27.5 Behaviour and adjustment in the prison.

27.6 The degree to which a prisoner participates in the multi-disciplinary program and benefits from it; custodial and privilege classification.

27.7 Achievements that were obtained in prison (scholastic, academic, technical and so forth).

27.8 The crime pattern of a prisoner (present and previous) and the threat that imposes to community after release.

27.9 The degree which a prisoner has shown that opportunities granted to him/her were utilized, for example with regard to suspended sentences, postponed sentences and previous placements.

27.10 The probability of recidivism viewed against the background of criminal history, crime rate, time lapse since previous placements/release, the

number of previous convictions; and

27.11 Previous non-compliance with conditions of parole provisions.

The applicant's grounds for review

28. The applicant contends in essence that the Minister's decision is reviewable on the following two grounds:

28.1 It was procedurally unfair; and

28.2 that the Minister's decision is irrational and unreasonable.

Procedural unfairness as a ground of review

29. The applicant bases this ground for review on the assertion that he was not afforded the opportunity to make any representation before the decision was taken.

30. This ground of review appears to be premised on a number of misconceptions. The first misconception is that the applicant is entitled to make representations to the NCCS. The second misconception is that the applicant is entitled to make representations to the Minister.

31. As set out in the legal framework alluded to above, the statutory scheme requires the NCCS to oversee the recommendations of the correctional supervision and parole board (CSPBS).⁶ The 1998 Act does not envisage the making of representations by life offenders to the NCCS. Similarly, the Minister considers the placement of the life offenders on parole by reviewing the profile

⁶ Section 83 of the 1998 Act

of the offender (from the CMC and the CSPB).

32. The Act does not envisage the making of representations by life offenders to the Minister
33. In the matter of *Booyesen v Minister of Justice and Correctional Services and Others* (33188/2022) [2024] ZAGPPHC 205 (8 March 2024), Retief J found that the reliance on section 3 of PAJA stood to fail on the above basis.
34. This ground for review therefore cannot succeed.

Unreasonableness as a ground for review

35. The applicant bases this ground for review on the contention that the Minister placed more weight on the negative factors than the positive factors when he considered the applicant for parole. It is the applicant's argument that there is overwhelming evidence in support of him being released on parole, and that the Minister acted unreasonably in denying him parole.
36. The applicant attacks the Minister's reliance on certain reports from his profile, and/or non-reliance on the reports which seem to favour his release on parole.
37. In determining whether an administrative action is unreasonable I first turn to the provisions of section 6(2)(h) of the Promotion of Administrative Justice Act which provides that administrative action will be reviewable if the relevant exercise of power is so unreasonable that no reasonable person could have so exercised the power.
38. In the matter of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*⁷ the Constitutional court held that section 6(2)(h) does not introduce

⁷ 2012 (1) SACR 103 (CC) (2010 (12) BCLR 1233; [2010] ZACC 17).

an exaggerated version of unreasonableness into our administrative law, and that the standard envisaged under this section is simply that of unreasonableness.

39. In paragraph 45 of the *Batho Star* judgment, the court further laid down a framework to guide courts in determining whether a decision is unreasonable. This involves considering various factors, including the following:

39.1 The nature of the decision;

39.2 The identity and expertise of the decision-maker;

39.3 The range of factors relevant to the decision;

39.4 The reasons given for it;

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

40. In circumstances where the decision-maker, such as the Minister in the present application, is given a discretion that is dependent on a consideration of a range of competing factors, the approach to be adopted by Courts is as follows:⁸

"...the decision maker must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances".

41. In the matter of *Barnard v Minister of Justice, Constitutional Development and Correctional Services and another* [2015] 4 All SA 648 (GP) para 84, the court held that in the context of review applications to set aside the refusal of parole, it is clear from the principles and guidelines set out in the parole policy and

⁸ Batho Star Judgment at para 49.

parole manual that in making a parole determination in any particular case in which an offender is serving a life sentence, the Minister is required to give consideration to a complex matrix of factors.

42. These factors address competing interests: the individual interests of the offender in securing his or her release from imprisonment on parole at an appropriate time, against the interests of the community in being protected from offenders who have been given the maximum sentence by virtue of the nature and seriousness of their crimes.
43. The Minister must ensure that while each individual offender is dealt with in a fair and just manner in the parole process, the individual interests of the offender do not override the importance of the retention of public confidence in, and ultimately the legitimacy of, the criminal justice and parole systems.
44. The question in the applicant's case is therefore whether the Minister applied the criteria in the Parole Manual properly when he made the impugned decision.
45. In the matter of *Barnard v Minister of Justice, Constitutional Development and Correctional Services and another* [2015] 4 All SA 648 (GP), the Minister successfully defended a review application brought by an offender in circumstances where the NCCS recommended the placement of the offender on parole. The Honourable Judge Keightley AJ accepted the Minister's reasons for refusing to release the offender on parole, and held that:

"It is clear from the reasons cited by the Minister that he considered both positive and negative factors in deciding not to approve the National Council's recommendation that the Mr Barnard be placed on parole. My task in reviewing the Minister's decision for reasonableness is not to determine whether he was correct in concluding that the negative factors outweighed the positive. The

question is whether the Minister achieved a reasonable equilibrium between these factors in the circumstances”.

46. In the recent matter of *Booyesen v Minister of Justice and Correctional Services and Others* (33188/2022) [2024] ZAGPPHC 205 (8 March 2024), the Minister also successfully defended a review application brought by an offender in circumstances where the NCCS recommended the placement of the offender on parole. The Honourable Judge Retief accepted the Minister’s reasons for refusing to release the offender on parole. The court specifically accepted the Minister’s argument that in refusing parole, he applied all the criteria including considering the interest of the community and in doing so, struck a reasonable equilibrium, resulting in the interests of the community outweighing the remaining considerations.
47. In the applicant’s case, the Minister applied the criteria in Chapter VI(1A)(19) of the B-Order under the heading ‘Criteria for Parole Selection’ (Parole Board Manual), section 63(1) of Act 8 of 1959 enjoining the Minister to consider the nature of the offence,⁹ the Policy document of the Department of Correctional Services, he therefore considered, *inter alia*, psychologist reports; the recommendations of the NCCS, the CMC report and Parole Board report.
48. He applied positive factors in favour of the placement on parole, and the negative factors that militate against the granting of parole.
49. From the record, it is clear that the applicant’s profile that served before the Minister and which was considered by the Minister in reaching his decision, led the Minister to come to the conclusion that the identified conditions had not yet been adequately addressed.

⁹ *Derby-Lewis v Minister of Correctional Services and Others* 2009 (6) SA 205 (GNP).

50. In essence, the Minister applied all the criteria including considering the interest of the community and/or the state, and in doing so, struck a reasonable equilibrium, resulting in the interests of the community/justice outweighing the remaining considerations. The impugned decision is therefore rational and reasonable in the circumstances.
51. The court is not tasked in this review application to determine whether the Minister was correct in concluding that the negative factors outweighed the positive. The question is whether the Minister achieved a reasonable equilibrium between these factors in the circumstances. I am not satisfied that the applicant has made out a proper case that the Minister acted unreasonably taking into consideration all the information available to him in considering the applicant's profile.

Irrationality as a ground for review

52. Save for stating that it is irrational to be denied parole because of his past and nature of the crime, the applicant did not go further in his affidavits in making out a specific case as to why he contends that the Minister had acted irrationally in deciding to refuse him parole.
53. The applicant contends that the negative factors militating against his release on parole are things that will never change, or have nothing to do with the applicant's risk of reoffending, therefore it cannot be rational for the Minister to refuse his release on parole.
54. The Minister concurred with the NCCS's observations and recommendations after reviewing the reports of various professionals, particularly the risk factors

evident in the psychologists' report which forms part of the applicants profile.

55. According to the psychologists' report, the following factors raise the applicant's level of risk for re-offending:

"63.1 Violent crime: The index crime was violent. The accused had already planned to commit the crime and shot the victim in the head.

63.2. Previous violence: research conducted by Monahan (1981) argues that "if there is one finding that overshadows all others in the area of prediction, it is that the probability of future crimes increases with each prior criminal act". The Applicant revealed that there had been an escalation of crimes since the age of 15.

63.3. Substance use problems: substance use is associated with an increased risk for general violence. The Applicant started using substances at the age of 15 and his use reportedly increased with time. The Applicant also reported that he had been drinking days before they committed the index offence.

63.4. Criminal associates: This risk factor pertains to the presence of criminal associates when committing a crime and/or most important associations were criminal before or during the crime. It is on record that the Applicant has three accomplices for the index offence. He also indicated that one of them is in the same correctional facility as him.

63.5. Impulsivity: the Applicant indicated that he had planned to commit robbery but not murder; therefore, the fact that they shot the victim all because they suspected him of having a gun suggests that they were impulsive which makes it a risk.

63.6. Prior supervision failure: this item is concerned with serious supervision

failures while the individual was on parole, probation, or under the auspices of some correctional or mental health agency or institution. The Applicant has been found guilty twice, this is further backed by the available documents.”

56. In essence, the psychological assessment of the Applicant raises areas of uncertainty regarding his risk of re-offending. These factors cannot be equated to the factors that will never change. Negative factors such as, *inter alia*, substance abuse, prior supervision failures, impulsivity are issues that increase the risk of reoffending, and which can be dealt with before the placement of the applicant on parole.
57. It is also common cause that at the time of the commission of the offences of murder and robbery with aggravating circumstances, the applicant had already been found guilty of rape and/or was on parole and/or serving a suspended sentence at the time.
58. The fact that the Minister requires the applicant to undergo certain programme(s) to increase the future likelihood of his release on parole is neither irrational nor unreasonable. In this regard Tokota AJ in the matter of *Van Gund v Minister of Correctional Services and Others* 2009 (2) SACR 522 (GNP) at para 15, correctly in my view, held that:

“The fact that the applicant has undergone this anger-management programme is no bar to the Board deciding that he should do it again if it did not achieve the desired effect. It is up to the applicant to obey the authorities or stay longer in prison. The choice is his. This Court would be inundated with urgent applications for the release of prisoners on parole if it were to easily usurp this power of the Parole Board. Courts ought to adopt a “hands off” attitude to

matters reserved for other arms of government, and only intervene when circumstances warrant such intervention.”

59. In applying the equilibrium principle, the Minister concluded that the negative factors outweigh the positive factors, hence his refusal to place the applicant on parole.¹⁰
60. The applicant heavily relies on the following caselaw in support of his application:
- a. *Walus v Minister of Justice and Correctional Services and Others*¹¹ ;
 - b. *Anderson v Minister of Justice and Correctional Services and Another*¹²;
 - c. *Van Der Hever v Minister of Correctional Services and Another* ¹³
61. All three these matters do not assist the applicant and are distinguishable from the applicant's case.
62. In the matter of *Walus v Minister of Justice and Correctional Services* and another, the Minister's decision to not recommend parole was based on the nature and severity of the crime, as well as the sentencing remarks of the trial and Supreme Court of Appeal. These factors were incapable of being changed as they were restricted to the past and remained static in time. Additionally, the applicant exhibited a low risk of recidivism. The Court noted that the application of the same factors that were immutable to all future decisions would yield an inexplicable reason not to recommend parole, which is in stark contrast to the empowering provision. This outcome would result in an unjust and unfair

¹⁰ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at para 49.

¹¹ CCT 221/21 [2022] ZACC 39:2023 (2) BCLR 224 (CC); 2023 (1) SACR 447 (CC) (21 November 2022).

¹² (022949/2024) [2024] ZAGPPHC 1355 (23 December 2024).

¹³ (14495/2017) [2018] ZAGPPHC 867 (8 November 2018)

justification.

63. In the present case, the factors, while constant, differ from those considered by the Court and the Minister in the *Walus* matter. This is because, in the present matter, the constant factors refer to possible events that may occur after the applicant is released on parole, future events that may trigger the applicant's risk of relapse, affecting both the applicant and the community.
64. In the matter of *Anderson v Minister of Justice and Correctional Services and Another*, unlike in the present matter, there was no explanation given by the Minister at all as to why the applicant in that case was not placed on parole.
65. The Anderson case was decided on the basis that there was no opposition by the Minister. The Court was therefore not in a position to decide if the Minister's decision complied with the relevant statutory prescripts.
66. In the matter of *Van Der Hever v Minister of Correctional Services and Another* both the parties agreed that pending the review application by the offender an independent psychologist would be appointed to assess and to report to the court on his findings.
67. The court found that the respondents took no cognisance and gave no consideration to the report and conclusion of the independent psychologist and that the Parole Board refused to consider representations of the applicant's attorney.
68. In the present case, the Minister has emphasised multiple times that he took cognisance of the positive factors in favour of the applicant's release. However, in applying the equilibrium principle, he concluded that the negative factors outweigh the positive factors, hence his refusal to place the applicant on parole.
69. In my view, the applicant has failed to make out a case that the Minister's

decision is tainted by procedural unfairness and therefore does not fall to be reviewed on grounds of irrationality (in terms of section 6(2)(f)(ii) of PAJA), or on grounds of unreasonableness of the decision (in terms of section 6(2)(h) of PAJA).

Substitution of the decision by the Minister.

70. The applicant requests this court to substitute the decision by the Minister with its own and to order that the applicant be released on parole,
71. In the matter of *Derby-Lewis v Minister of Correctional Services and Others* 2009 (2) SACR 522 (GNP), it was held that courts have no statutory powers to substitute the respondent's decision with its own and place the applicant on parole.
72. The applicant has failed to make out a case of exceptional circumstances as envisaged in section 8(1)(c)(ii) of PAJA. In the matter of *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) at para 28, the SCA held as follows regarding the meaning of 'exceptional circumstances' in the context of section 8(1)(c)(ii) of PAJA:

"The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon determination that a case is 'exceptional': s 8(1)(c)(ii) of the PAJA. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon the consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary".

Conclusion

73. The applicant has failed to show that the impugned decision is susceptible to be reviewed under PAJA and the application is accordingly dismissed with costs.



TROMP AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 4 FEBRUARY 2026

DATE OF JUDGMENT: 4 SEPTEMBER 2026

APPEARANCES:

ATTORNEYS FOR THE APPLICANT:

M.E Makgopa Attorneys
Tel: 071 209 3448
Email: admin@makgopaattorneys.co.za
Mr Matsobane Elias Makgopa

COUNSEL FOR THE APPLICANT

Advocate B Malinga
Tel : 076 425 1113
Email : busisiwe@advmlalinga.com

FOR THE RESPONDENTS:

The State Attorney: Pretoria
Tel : 012 309 1677
Email : KKgaphola@justice.org.za

COUNSEL FOR THE RESPONDENTS:

ADV R A RAMUHALA
Duma Nokwe Group
Chambers, Sandton