CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 221/21

In the matter between:

JANUSZ JAKUB WALUS	Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
SOUTH AFRICAN COMMUNIST PARTY	Second Respondent
LIMPHO HANI	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
and	
FAMILIES FOR LIFERS NPO	First Intervening Party
TEBOGO MODISE	Second Intervening Party
SOUTH AFRICAN PRISONERS ORGANISATION FOR HUMAN RIGHTS	Third Intervening Party

Neutral citation:	*Walus v Minister of Justice and Correctional Services and Others* [2022] ZACC 39
Coram:	Zondo CJ, Madlanga J, Majiedt J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ

Judgments: Zondo CJ (unanimous)

Heard on: 22 February 2022

Decided on: 21 November 2022

Summary: [Parole] — [life imprisonment sentence] — [rationality] — [sentencing remarks]

[nature and seriousness of the crime] — [Correctional Services Act 111 of 1998] — [Correctional Services Act 8 of 1959]

ORDER

On appeal from the Gauteng Division of the High Court of South Africa, Pretoria

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The decision of the Gauteng Division of the High Court, Pretoria dismissing the applicant's application is set aside and replaced with the following order:

   "(a) The decision of the Minister of Justice and Correctional Services made in March 2020 rejecting the applicant's application for parole is reviewed and set aside.

   (b) The Minister of Justice and Correctional Services is ordered to place the applicant on parole on such terms and conditions as he may deem appropriate and to take all such steps as may need to be taken to ensure that the applicant is released on parole within ten (10) calendar days from the date of this order.

   (c) The Minister of Justice and Correctional Services is ordered to pay the applicant's costs including the costs of two counsel."

4. The Minister of Justice and Correctional Services must pay the applicant's costs in this Court including the costs of two counsel as well as the applicants' costs in the Supreme Court of Appeal in respect of the petition for leave to appeal.

JUDGMENT

ZONDO CJ (Madlanga J, Majiedt J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ concurring):

[1] This is an application brought by Mr Janusz Jakub Walus, the applicant, against, among others, the Minister of Justice and Correctional Services (the first respondent or Minister) for leave to appeal against a judgment and order of the Gauteng Division of the High Court of South Africa, Pretoria (High Court) in terms of which that Court dismissed the applicant's application to have the Minister's decision rejecting his application for parole reviewed and set aside. Subsequently, the High Court dismissed his application for leave to appeal to the Supreme Court of Appeal. He then petitioned the Supreme Court of Appeal for leave to appeal but that Court, too, refused him leave to appeal. The applicant's application to this Court is opposed by the Minister, the South African Communist Party (SACP) and Mrs Limpho Hani who is the widow of the late Mr Thembisile "Chris" Hani about whom I shall say more shortly.

[2] This case is about the placement of prisoners or offenders on parole when they have served a certain period of their term of imprisonment. As will be seen later in this judgment, this Court is called upon to assess the rationality or otherwise of a decision by the Minister in March 2020 to reject the applicant's application for placement on

parole. Since this matter deals with parole, I consider it necessary at this stage of the judgment to refer to and quote section 36 of the Correctional Services Act[1] (CSA).

[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*.[2] 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 reformative 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."[3]

The facts

[4] On 10 April 1993 an assassination occurred in South Africa which shocked the whole country and many people outside of South Africa. It nearly plunged South Africa into a civil war that would have derailed the negotiations aimed at introducing

[1] 111 of 1998.

[2] *Jimmale v S* [2016] ZACC 27; 2016 (2) SACR 691 (CC); 2016 (11) BCLR 1389 (CC).

[3] Id at para 1.

democracy in this country. The person who was assassinated was a highly respected political leader and freedom fighter in South Africa, namely, Mr Hani.

[5] At the time of his assassination, Mr Hani was the Secretary-General of the South African Communist Party and a high-ranking leader of the African National Congress. The applicant is the man who pulled the trigger and shot Mr Hani dead. He and one Mr Clive Derby-Lewis, who has since died, had conspired to assassinate a number of anti-apartheid leaders, including Mr Nelson Mandela, the then President of the African National Congress, who was to become the first President of a democratic South Africa in 1994.

[6] The applicant and Mr Derby-Lewis were charged with, and, subsequently convicted of, the murder of Mr Hani. They were both sentenced to death in 1993. The applicant was also convicted of the illegal possession of a firearm for which he was sentenced to five years' imprisonment. That was the firearm he had used to assassinate Mr Hani. In 2000 their death sentences were commuted to life imprisonment. This was as a consequence of the abolition of the death sentence. The applicant has been in prison for 28 years.

[7] Since 2011 the applicant has applied on several occasions to be placed on parole but all his applications have been declined by the various Ministers responsible for Correctional Services. Various reasons were advanced by the different Ministers for their decisions. The applicant asserts that each time different reasons were found to refuse him parole. Indeed, he says that the goalposts were moved each time he applied to be placed on parole. It is appropriate to refer below to the various applications for parole that the applicant made to successive Ministers responsible for Correctional Services.

[8] In 2011 the applicant applied to be placed on parole. The Parole Board recommended that he be placed on parole. However, the Minister responsible for Correctional Services declined his request. The reason he gave was that the victim's

family and other interested parties had not been given an opportunity to provide either a victim impact statement or a statement of opposition.

[9] On 30 May 2013 the applicant wrote a letter to Mrs Hani in which he apologised. He did not receive any response to that letter. The applicant appeared before the Parole Board in November 2013. Mrs Hani, her daughter and their legal representative attended that hearing and made representations to the Parole Board. During the parole hearing, the applicant again apologised to Mrs Hani. The applicant states that at that hearing Mrs Hani said that she did not accept his apology, but said that, if the applicant wanted to approach her through her legal representative, he was welcome to do so. The applicant states that he respected Mrs Hani's wishes as well as her decision at the time. After the Parole Board hearing, the applicant sent a further letter of apology to Mrs Hani's legal representative to which he received no response. Of course, Mrs Hani was under no obligation to accept the applicant's apology. It is not clear from the record what the Parole Board's decision was on this occasion but the applicant was not placed on parole.

[10] At some stage in the early months of 2015 the applicant attended a further Parole Board hearing. Once again it is not clear what decision the Board took this time. However, on 10 April 2015 the Minister of Justice and Correctional Services at the time considered a further application for parole by the applicant and refused to place him on parole. The reason given by the Minister for his decision was that the nature of the crime and the sentencing remarks of the trial court outweighed all the positive factors which counted in favour of the applicant's placement on parole.[4] He recommended a restorative justice process and that the Department should advise on security threats, if any, that might exist should the applicant be released on parole. The applicant instituted a review application in the High Court to challenge this decision. The matter came before Janse van Nieuwenhuizen J. The High Court rejected the reasons given by the

[4] It appears from the judgment of Janse van Nieuwenhuizen J in *Walus v Minister of Correctional Services and Others* [2016] ZAGPHC 103 (case number 41828/2015 of the Gauteng Division of the High Court handed down on 10 March 2016) that the only reasons the Minister gave in 2015 were the nature of the crime and sentencing remarks and that he may not have said anything about the other factors.

Minister of Correctional Services at the time and concluded that his decision was unreasonable and irrational. Consequently, the High Court set the Minister's decision aside and ordered the Minister to place the applicant on parole.

[11] The Minister took that judgment on appeal to the Supreme Court of Appeal. The Supreme Court of Appeal, through Maya P, set it aside and ordered the Minister to reconsider the applicant's application to be placed on parole. The issue in that appeal was whether the High Court had erred in reviewing and setting aside the decision of the Minister not to place the applicant on parole and to order the applicant's release on parole on the basis that it was irrational and unreasonable. It is remarkable that the Supreme Court of Appeal did not find fault with the judgment of Janse van Nieuwenhuizen J against which the Minister had appealed but it found fault with the Minister's decision. The Supreme Court of Appeal ordered that Mrs Hani's victim impact statement dated 30 October 2013 and the applicant's response thereto should be taken into account by the Minister in reconsidering the applicant's application for parole.

[12] On 26 October 2017 there was another Parole Board hearing. Mrs Hani and certain representatives of the SACP attended that hearing and made representations in support of their opposition to the applicant's application. It appears that the Parole Board made a recommendation to the Minister but the record does not reveal what the recommendation was.

[13] Upon a reconsideration of the applicant's application for parole on 17 November 2017 the Minister responsible for Correctional Services again declined to place the applicant on parole. The reasons given by the Minister at the time can be summarised as follows:

(a) the applicant needed to undergo individual psychotherapy with a psychologist to assist in addressing his political ideologies which the

Minister at the time said had been highlighted as a risk factor in a psychologist's report;

(b) he had noted Mrs Hani's statement that the applicant had not disavowed violence as a means to retaliate against communists;

(c) there were inconsistencies in the applicant's account of the circumstances that led to his decision to commit the offence;

(d) the applicant should participate in individual therapeutic programs with a social worker to enhance his social functioning skills; and

(e) it appeared that over the entire period of his imprisonment, the applicant had not acquired any academic or vocational skills that could enhance his prospects of reintegration into society and the Minister recommended that the Department should assist the applicant to acquire any such appropriate skill.

[14] The applicant also successfully took this decision on review in the High Court. The High Court, through Baqwa J, reviewed the decision, set it aside and remitted the applicant's application for parole to the Minister to consider and decide it afresh. This was in September 2018.

[15] In January 2019 the Minister responsible for Correctional Services at the time reconsidered the applicant's application to be placed on parole following upon Baqwa J's judgment. Once again the applicant's application was refused. His reasons were that there were two conflicting reports of psychologists and this made it difficult for him to take a decision. He directed that the two psychologists should jointly assess the applicant and make a decision and file a joint report on the issues concerning risk and remorse. He also said that the applicant should undergo individual psychotherapy "with the psychologist to assist in addressing challenges which have been highlighted" in a certain paragraph in the report of one Ms Zelda Buitendag. He said that those challenges included "depression and explosive anger episodes".

[16] The applicant also successfully took this decision on review in the High Court. That application was heard by Kollapen J who set the Minister's decision aside. Kollapen J remitted the matter to the Minister for a fresh decision within 60 days of the date of the order. On 16 March 2020 the Minister made a new decision pursuant to Kollapen J's order. Once again the applicant's application was rejected. This is the decision which is the subject of these proceedings.

[17] In a document containing the Minister's decision and his reasons for that decision the Minister said that he had had regard to the "latest profile of the offender (containing all relevant reports, certificates, recommendations, etc.) all submissions made by the offender, Mrs Hani and the SACP as well as previous judgments by the High Court and the Supreme Court of Appeal". In the same document the Minister revealed the factors that he had taken into account that favoured that the applicant be placed on parole. Identifying those factors, he said:

> "From all the above, I took into account positive factors such as:
>
> 1. The behaviour and adjustment of the offender during his incarceration and the clean record he has within the correctional centre;
> 2. The multidisciplinary programs attended by the offender within the correctional centre aimed at his rehabilitation;
> 3. The availability of support systems to the offender and employment prospects in the event of him being placed on parole;
> 4. The fact that the offender is a first offender;
> 5. The reports of the psychologists and social workers;
> 6. The remorse on the part of the offender for the crime of murder committed; and
> 7. The opinions of the psychologists that the risk of the offender re-offending is low."

[18] The Minister stated that, notwithstanding the factors referred to above which supported the applicant's application for parole, there were also "negative factors" that supported the dismissal of the applicant's application. He said that these were "the nature and seriousness of the crime of murder committed by the [applicant] and the

remarks made by the courts at the time of the imposition of sentence". About the nature and seriousness of the crime, the Minister said in the document containing his decision:

> "The crime of murder committed by the offender was the cold-blooded assassination of a prominent political leader, for which careful preparations were made well in advance. The act committed was not only intended, but also had the potential, to bring about a civil war within the Republic at the time;
>
> The offender was convicted of murder with no extenuating circumstances, in respect of which he was sentenced to death and was later commuted to life imprisonment…"

[19] With regard to the sentencing remarks made by the trial court and the Supreme Court of Appeal, the Minister said that he took into account the following remarks:

> "(i). The murder was a deliberate, cold-blooded one… it was preceded by weeks of planning.
>
> (ii). The accused performed an act of assassination on a person who had attained prominence in public affairs in South Africa, whose killing was likely, to the knowledge of the accused, to cause far-fetching, highly emotive reactions with very damaging, serious consequences and extremely harmful effects for the entire society in South Africa.
>
> (iii). The killing was cold-blooded…after the first bullet struck him, the accused came close up and administered the coup de grace from close range.
>
> (iv). This was a cold-blooded assassination of a defenceless victim. The crime of the two appellants was a calculated one. Well in advance of its commission careful preparations were made both for the murder and for the concealment of the identity of its dastardly perpetrators. Their atrocious crime demands the severest punishments which the law permits.
>
> (v). In imposing the death sentence, the trial court stated that it wished 'to send out the message loud and clear to any who contemplate assassination of political leaders as an acceptable option, what view the court takes of such conduct'."

[20] The Minister said in the document containing his decision that he had also taken into account another factor. He said:

> "I have also taken note that in terms of the parole regime applicable at the date the offence was committed, the offender, should it be my decision to approve his placement on parole, will be on parole for a maximum period of three years, less any possible remissions for which he might qualify. *In light of the nature of the crime he committed and in light of the sentence remarks by the trial court and the SCA, it will negate their remarks that the offender's atrocious crime demands the severest punishment which the law permits. I deem these negative factors as outweighing the positive factors mentioned above*.
> *In the premises, and after balancing all the factors, positive and negative, I find that the negative factors outweigh the positive factors and that the placement on parole of this offender is disapproved at this stage*." (Emphasis added.)

The reasons given by the Minister for his decision (in March 2020) not to grant the applicant's application for parole are the same as the reasons that were given by the then Minister of Correctional Services in 2015 for rejecting a recommendation by the Chairperson of the National Council of Correctional Services recommending that the applicant be placed on parole. The reasons given in 2015 by the then Minister of Correctional Services were the nature of the crime and the sentencing remarks of the trial court.[5]

[21] This last factor that the Minister said he took into account is not mentioned among the factors listed in the policy document of the Department as factors that must be taken into account in deciding applications for parole. Here, I am referring to the factor that, if the applicant was granted parole, he would serve a period of two years only on parole because of the parole regime applicable to him and the Presidential amnesties he had received.

[5] This is reflected in the judgment of Janse van Nieuwenhuizen J in *Walus v Minister of Correctional Services and Others* [2016] ZAGPHC 103.

[22] I draw attention to the fact that in the document containing his decisions, the Minister said, among other things, that "in the light of the nature of the crime [the applicant] committed and in the light of the sentence remarks by the trial court and the Supreme Court of Appeal, [to release the applicant on parole] will negate their remarks *that the offender's atrocious crime demands the severest punishment which the law permits*". (Emphasis added). The severest punishment that a prisoner may serve in South Africa is a life imprisonment where he or she is not granted parole. This could happen in a case, for example, where a prisoner is such that he or she does not meet the requirements for parole. In this regard one could think of a prisoner who commits offences while in prison itself or who is always causing trouble in prison and does not show signs of rehabilitation.

[23] The meaning and effect of the statement by the Minister that to release the applicant on parole would negate the sentencing remarks of the trial court and the Supreme Court of Appeal needs to be considered carefully. The Minister understood those remarks to mean that the crime that was committed by the applicant deserved the severest punishment. The South African Concise Oxford Dictionary gives the verb "negate" the meaning: "nullify, make ineffective" or "deny the existence of".[6] Therefore, what the Minister was saying was in effect that, if he released the applicant on parole, that would render the applicant's life imprisonment sentence ineffective or useless. This reflects that, when the Minister considered the applicant's application for parole, he took the attitude that releasing the applicant on parole would render ineffective or useless the "severest punishment" permitted by law that the trial court said he deserved. In the light of the fact that this is what the Minister believed, it is difficult to see how the Minister could ever release the applicant on parole in the future. I say this because, if, in the Minister's view, releasing the applicant on parole in 2020 would have made his life imprisonment sentence ineffective or useless, he would always see releasing the applicant in that light in the future. It, therefore, seems unlikely that the Minister would ever release him on parole in the future.

[6] Judy Pearsall *The Concise Oxford Dictionary* (Oxford University Press Inc, New York 1999) Tenth Edition.

In the High Court

[24] The applicant instituted an application in the Gauteng Division of the High Court, Pretoria in terms of which he sought to have the Minister's decision of March 2020 dismissing his application for parole reviewed and set aside. The Minister, Mrs Hani, and the SACP opposed the applicant's application.

[25] In paragraph 73 of his founding affidavit in this Court the applicant said:

> "Out of all these requirements, the Minister only utilised and applied the first two, namely the remarks made by the Court during the imposition of the sentence, and the sentence imposed by the Court, to come to the conclusion that these two requirements should supersede and override all the other requirements. *All other factors and requirements were positive and in my favour*." (Emphasis added.)

The Minister responded to this paragraph in paragraph 20.4 of his answering affidavit. In that paragraph the Minister had this to say which is very important:

> "My decision not to place the applicant on parole was based *on the nature and seriousness of the crime and the remarks made by the trial court and the SCA* in imposing [a] sentence (taking into account also that the applicant will only be required to serve 2 years of his sentence of life incarceration on being placed on parole). *It is so (as stated in paragraph 73 under reply) that the other factors to be taken into account were positive factors in favour of the placement of the applicant on parole*." (Emphasis added.)

[26] A comparison of the above paragraph quoted from the applicant's founding affidavit and this paragraph quoted from the Minister's answering affidavit reveals that the Minister admits the averment made by the applicant that, except for the nature of the crime and its seriousness and the sentencing remarks made by the trial court and the Supreme Court of Appeal, all the other factors which the Minister was required to take into account supported or favoured the applicant's placement on parole.

[27] The approach taken by the High Court when it dealt with applicant's review application was that the Minister had taken into account all the factors he was required to take into account before deciding whether or not the applicant should be placed on parole and he had placed such weight on the various factors as he considered appropriate. The High Court went on to say that how much weight the Minister placed on each of the factors fell within his power and it was not up to it to place upon such factors the weight that it thought should be placed upon them. The High Court also emphasised that the Minister had stated that his decision and the reasons he gave for it did not mean that the applicant would never be released on parole in the future. The High Court dismissed the applicant's application with costs. It also dismissed his petition for leave to appeal to the Supreme Court of Appeal.

Supreme Court of Appeal

[28] The applicant subsequently petitioned the Supreme Court of Appeal for leave to appeal against the decision of the High Court. The Supreme Court of Appeal dismissed his petition on the grounds that the matter had no reasonable prospects of success and there was no other compelling reason why his appeal should be heard.

In this Court

[29] After the Supreme Court of Appeal had dismissed the applicant's petition, he lodged an application in this Court for leave to appeal against the decision of the High Court.

Applications for leave to intervene

[30] Families for Lifers NPO applied for admission as an intervening party in this matter. It is a non-profit organisation which seeks to protect the interests of prisoners who serve life sentences and their families. The Families for Lifers NPO apply to be admitted as an intervening party but a reading of its affidavit reveals that they are dissatisfied with not only the parole system but also, generally speaking, with the manner in which the Minister and other Correctional Services authorities delay in taking

decisions on prisoners' applications for parole. They also complain that the Minister often arbitrarily overrides recommendations made to him by the Parole Board on applications for parole.

[31] Families for Lifers NPO seek a review of the whole parole system. Mr Tebogo Modise also applied for leave to be admitted as an intervening party. His case is the same as that of Families for Lifers NPO and he also seeks the same relief as the Families for Lifers NPO. The applications of Families for Lifers NPO and Mr Modise fall to be dismissed because the issues they raise fall outside of the ambit of the issues in this matter. For example, they want the whole parole system to be reviewed by which I understand them to mean that they want it to be reconsidered in its entirety. That falls outside the role and function of a court. That is a matter that they should take up elsewhere. Accordingly, the applications are dismissed. No orders as to costs are warranted.

[32] The South African Prisoners Organisation for Human Rights (SAPOHR) also applied for leave to intervene in this matter but it, too, raised issues that fall outside the ambit of this matter. It also wanted the whole parole system to be reviewed and complained in general about how the Minister and the Parole Board make their decisions on parole applications. Its application also falls to be dismissed for the same reasons as the applications of Families for Lifers NPO and Mr Modise.

Jurisdiction

[33] The decision of the High Court in respect of which the applicant applies for leave to appeal relates to a review application under the Promotion of Administrative Justice Act[7] (PAJA) – which gives effect to section 33 of the Constitution. This renders this matter a constitutional matter. Accordingly, this Court has jurisdiction.

[7] 3 of 2000.

Leave to appeal

[34] The applicant applies for leave to appeal against the decision of the High Court. This Court grants leave if it is in the interests of justice to do so.[8] Whether or not it is in the interests of justice to grant leave depends upon a consideration of various factors. These include the importance of the matter or the issues raised by the matter,[9] whether, if the Court were to grant leave, the decision of the Court on the merits would affect only the parties or a large section of society and whether the applicant has reasonable prospects of success.[10]

[35] This is an important matter that affects the possible release on parole of someone who is serving a life imprisonment sentence. In my view, the issues that this matter raises, as will be seen below, are issues that do not only affect the applicant but will affect many other prisoners who serve life imprisonment sentences.

[36] This arises because in the present case the applicant is serving a life imprisonment sentence and had been in prison for 26 years when, after a number of earlier unsuccessful attempts, his application for parole was rejected. That raises the question whether, when a prisoner has served so many years of a life sentence and has, by the Minister's own admission, complied with all other requirements for parole, the nature and seriousness of the crime and the sentencing remarks of the trial court can still be used to deny him or her parole. If this Court concludes that the Minister may not use those factors to justify denying an applicant parole when he has served such a long part of his sentence and has complied with all other requirements, there will be many other prisoners who will benefit from that decision. Furthermore, there are reasonable prospects of success. In the circumstances, it is in the interests of justice that leave to appeal be granted.

[8] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[9] *Fraser v Naude* [1998] ZACC 13*;* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 9.

[10] Id at para 7.

The appeal

[37] In considering the applicant's appeal, it is appropriate to refer back to what was said in the first few paragraphs of this judgment. That is that section 36 of the CSA tells us that the objective of the implementation of a sentence of imprisonment is to enable the sentenced prisoner to "lead a socially responsible crime-free life in the future". On the face of it, this seems to suggest that, where, on all the evidence, the risk of a prisoner re-offending, if he or she were released on parole, is low, the relevant authorities should seriously consider releasing such prisoner on parole because the objective of the implementation of a sentence of imprisonment would have been achieved.

[38] The issue in this appeal is whether the High Court was correct in dismissing the applicant's review application in which he sought to have the Minister's decision dismissing his application for parole reviewed and set aside. The appeal is opposed by the Minister, the SACP and Mrs Hani. The applicant attacks the Minister's decision on, among others, the ground that it is irrational, given that the only two factors upon which the Minister relied to support his decision are factors that will never change. In support of their opposition, the Minister, SACP and Mrs Hani rely on the nature of the crime, its seriousness and the sentencing remarks of the trial court and the Supreme Court of Appeal.

[39] The Minister, the SACP and Mrs Hani contend that, when regard is had to these factors in their totality, the Minister's decision not to grant the applicant parole is justified and rational. They point out that by his actions the applicant nearly plunged South Africa into a civil war and he nearly prevented the attainment of democracy. On the other hand, the applicant effectively says: I have been in prison for 28 years. I have behaved very well in prison all these years and I am sorry about what I did. I have apologised to the Hani family and I am not a risk to the community and have complied with all that I have been asked to do to improve my prospects of getting parole but there is nothing I can do about the nature of the crime I committed, its seriousness and the

sentencing remarks of the courts. He contends that the Minister's decision fails the rationality test and should, therefore, be set aside.

The law relating to parole under the 1959 Act and the CSA

[40] In terms of section 136 of the CSA the parole regime applicable to the applicant is one that was provided for in the Correctional Services Act[11] of 1959 (the 1959 Act). In terms of section 65(2) of the 1959 Act the Minister has the power to place on parole any prisoner to whom the parole regime under the 1959 Act applies. Those are prisoners who were sentenced prior to 1 October 2004.

[41] Section 136(1), (2) and (3) of the CSA reads:

> "(1) Any person serving a sentence of incarceration immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters.
>
> (2) When considering the release and placement of a sentenced offender who is serving a determinate sentence of incarceration as contemplated in subsection (1), such sentenced offender must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act 8 of 1959).
>
> (3)(a) Any sentenced offender serving a sentence of life incarceration immediately before the commencement of Chapters IV, VI and VII is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence.
>
> (b) The case of a sentenced offender contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the

[11] 8 of 1959.

Minister regarding the placement of the sentenced offender under day parole or parole.

(c) If the recommendation of the National Council is favourable, the Minister may order that the sentenced offender be placed under day parole or parole, as the case may be."

[42] It will be seen from section 136(3)(a) of the CSA that a prisoner who was serving a life imprisonment sentence immediately before Chapters IV, VI and VII commenced is required to serve a period of 20 years of imprisonment before he or she can be considered for parole. As a result of the judgment in the matter of *Van Wyk*[12] in the Gauteng Division of the High Court the then Minister of Correctional Services issued a policy document which provided that prisoners who had been sentenced before 1 October 2004 would become eligible for consideration for parole after serving a minimum of 13 years and four months. The applicant was one of such prisoners. The applicant completed 13 years and four months of imprisonment in 2007. However, as a result of Presidential amnesties that he received, he obtained certain credits which reduced the minimum period he had to serve before he could be considered for placement on parole by a whole year. The result was that the applicant became eligible to be considered for placement on parole in 2005. That is after serving 12 years and four months' imprisonment.

[43] The policy referred to in section 136(1) of the CSA, which applied to the applicant, is contained in the Parole Board's Manual. Chapter VI(1A)(18) of the Parole Board's Manual relates in part to the function of the parole system and reads as follows:

"(a) The placement of prisoners with a good prognosis *as soon as possible after reaching their consideration dates*, taking the necessary penalisation into account.

(b) The protection of the community takes place by means of prevention, rehabilitation, control and supervision of parolees. Consequently,

[12] *Van Wyk v Minister of Correctional Services* 2012 (1) SACR 159 (GNP).

> parole measures must be aimed at the prevention and help in the community by means of the social re-integration of the parolee by different degrees of supervision and control.
>
> (c) The concept of placement on parole is based on the supposition that it is a just and rational manner of giving prisoners the opportunity to serve the remainder of their sentence from within the community.
>
> Prisoners who are paroled under maximum supervision and who want to settle in areas that cannot be monitored may not be paroled. Alternatively, placement on day parole is considered."[13] (Emphasis added.)

It is to be noted from (a) in this quotation that the Department's policy is 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.

[44] The criteria that must be used to determine whether a prisoner should be placed on parole are provided for in Chapter VI(1A)(19) of the Parole Board Manual. In the introduction in Chapter VI(1A)(19) the following appears in part:

> "(i) The criteria for selection for placement on parole is not meant to be used as the ultimate model. It should rather be seen as a predisposition according to which the Parole Board may serve the interests of the community on the one hand and those of the prisoner on the other hand to the best of their ability and in a responsible manner.
>
> (ii) Thus the primary issue is that it should be attempted to evaluate prisoners *fairly and justly for parole*, to submit well-considered recommendations and to effectuate the highest possible form of professionalism."[14] (Emphasis added).

In this excerpt the policy makes it clear that the evaluation of a prisoner for parole must be done "*fairly and justly*". (Emphasis added.)

[13] Chapter VI(1A)(18) of the Parole Board's Manual.

[14] Chapter VI(1A)(19) of the Parole Board's Manual.

[45] Under "nature of the crime" the Manual reads as follows in paragraph (a):

> "The nature of the crime or crimes for which the prisoner had been found guilty and sentenced for his current imprisonment should be known. A police report (SAP 62) which briefly describes the circumstances surrounding the crimes, as well as any remarks by the person who imposed the sentence, must be available. It is of primary importance that the Parole Board must have a clear image of what the prisoner has done and as far as possible what was the cause of his offence. In the case of drug trade/dagga trade, the Parole Board must know the value and the mass thereof was. In all cases of violence, irrespective of the length of the sentence, the Parole Board must take note of the degree of aggression and the type of weapon used, whether it had been planned or took place in cold blood or impulsively or under the influence of alcohol or drugs. If the crime took place within the context of a group, the prisoner's share in the crime, for example, whether he had used the weapons himself or only executed orders, or was a leader, must be taken into consideration. Furthermore, the age and sex of the victim must also be known because it gives a good insight into the personality of the prisoner."[15]

[46] Chapter IV of the CSA deals with sentenced prisoners. This chapter covers sections 36 to 45. The heading to section 36 reads: "Objective of implementation of sentence of imprisonment." Section 36 of the CSA 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*." (Emphasis added.)

[47] Section 36 seems to me to provide a statutory basis for the proposition that 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. It is important to point out that the Minister accepts

[15] Id at under "nature of the crime".

that the reports including the social worker's report in respect of the applicant are to the effect that the risk of him re-offending if he is released is low. Indeed, his disciplinary record inside prison over more than 25 years supports this. There is no complaint that over so many years the applicant has ever had any incidents of ill-discipline. By all accounts he seems to have been an exemplary prisoner.

[48] Section 37 bears the heading "General principles". Section 37(2) reads:

> "In addition to providing a regime which meets the minimum requirements of this Act, the Department must seek to provide amenities which will *create an environment in which sentenced prisoners will be able to live with dignity and develop the ability to lead a socially responsible and crime-free life*". (Emphasis added.)

The latter part of this provision also reflects the reformative objective of imprisonment under the CSA.

[49] Chapter VII of the CSA deals with: "Release from Correctional Centre and Placement under Correctional Supervision and on Day Parole and Parole". The sections that fall under Chapter VII are sections 73 to 82. The heading to section 73 reads: "Length and form of sentences". Section 73(1) reads:

> "73(1) Subject to the provisions of this Act—
>
> (a) a sentenced prisoner remains in prison for the full period of sentence; and
>
> (b) an offender sentenced to life incarceration remains in a correctional centre for the rest of his or her life."

Section 73(1) of the CSA makes it plain that, subject to the provisions of the CSA, a sentenced prisoner serves the full period of his or her sentence. This means that, unless a prisoner is released from prison in terms of some or other provision of the CSA, he or she must serve a term of life imprisonment if he or she has been sentenced to life

imprisonment or he or she must serve the full determinate term of imprisonment fixed by the court.

[50] Section 73(4) reads:

> "In accordance with the provisions of this Chapter a prisoner may be placed under correctional supervision or on day parole or on parole before the expiration of his or her term of incarceration."

The release of a prisoner on parole is provided for in the CSA. Section 73(4) authorises the placement of a prisoner on parole before the expiry of his or her term of imprisonment.

[51] Section 73(5) reads:

> "(5)(a) A sentenced offender may be placed under correctional supervision, on day parole, parole or medical parole—
>
> (i) on a date determined by the Correctional Supervision and Parole Board; or
>
> (ii) in the case of an offender sentenced to life incarceration, on a date to be determined by the Minister.
>
> (b) Such placement is subject to the provisions of Chapter IV and such offender accepting the conditions for placement."

It is to be noted that section 73(5)(a)(i) envisages a date for the placement of a prisoner on day parole or on parole being a date determined by the Correctional Supervision and Parole Board except in the case of a prisoner who has been sentenced to life imprisonment in which case it is contemplated that the date would be determined by the court.

[52] Insofar as it may be relevant to the placement on parole of a prisoner who had been sentenced to life imprisonment, section 73(6) reads as follows:

"(6)(a) Subject to the provisions of paragraph (b), a sentenced offender serving a determinate sentence or cumulative sentences of more than 24 months may not be placed on day parole or parole until such sentenced offender has served either the stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence, but day parole or parole must be considered whenever a sentenced offender has served 25 years of a sentence or cumulative sentences.

(*a*A) Subject to the provisions of paragraph (b), an offender serving a determinate sentence or cumulative sentences of not more than 24 months may not be placed on parole or day parole until such offender has served either the stipulated non-parole period, or if no non-parole period was stipulated, a quarter of the sentence.

(b) A person who has been sentenced to-

(i) periodical incarceration must be detained periodically in a correctional centre as prescribed by regulation;

. . .

(iv) life incarceration may not be placed on day parole or parole until he or she has served at least 25 years of the sentence; or

. . .

(vi) any term of incarceration, excluding persons declared dangerous criminals in terms of section 286A of the Criminal Procedure Act, may be placed on day parole or parole on reaching the age of 65 years provided that he or she has served at least 15 years of such sentence.

[53] The provisions of section 73(6)(a) apply to a prisoner who has been sentenced to a determinate sentence. It is to the effect that, once such a prisoner has served 25 years, it is obligatory that he or she be considered for parole. Section 73(6)(b)(iv) relates to a prisoner who has been sentenced to life imprisonment. It deals with two categories of prisoners who have been sentenced to life imprisonment. It provides that a prisoner sentenced to life imprisonment may not be placed on parole before he or she completes 25 years of imprisonment subject to one exception. That exception is where a prisoner

who has been sentenced to life imprisonment reaches the age of 65 before completing 25 years of imprisonment but having completed 15 years of imprisonment. It provides that in such a case a prisoner may be placed on parole even though he or she may not have completed 25 years of imprisonment, provided that he or she has completed at least 15 years of imprisonment.

[54] Section 75 of the CSA deals with the powers, functions and duties of Correctional Supervision and Parole Boards. Only section 75(1) is important for purposes of this judgment. It reads:

> "(1) A Correctional Supervision and Parole Board, having considered the report on any sentenced offender serving a determinate sentence of more than 24 months submitted to it by the Case Management Committee in terms of section 42 and in the light of any other information or argument, may
>
> (a) subject to the provisions of paragraphs (b) and (c) and subsection (1A) place a sentenced offender under correctional supervision or day parole or grant parole or medical parole and, subject to the provisions of section 52, set the conditions of community corrections imposed on the sentenced offender;
>
> (b) in the case of any sentenced offender having been declared a dangerous criminal in terms of section 286A of the Criminal Procedure Act, make recommendations to the court on the granting or the placement under correctional supervision, day parole, parole or medical parole and on the period for and, subject to the provisions of section 52, the conditions of community corrections imposed on the sentenced offender; and
>
> (c) in respect of any sentenced offender serving a sentence of life incarceration, make recommendations to the Minister on granting of day parole, parole or medical parole, and, subject to the provisions of section 52, the conditions of community corrections to be imposed on such an offender."

[55] It is clear that in respect of prisoners sentenced to life imprisonment the power of the Correctional Supervision and Parole Board is to make recommendations to the Minister on the granting of parole. That is provided for in section 75(1)(c). That provision must be read with section 78. Section 78(1) to (4) reads:

> "(1) Having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations in the case of a prisoner sentenced to life imprisonment, the court may, subject to the provisions of section 73(6) (b)(iv), grant parole or day parole or prescribe the conditions of community corrections in terms of section 52.
>
> (2) If the court refuses to grant parole or day parole in terms of subsection (1), it may make recommendations in respect of treatment, development and support of the prisoner which may contribute to improving the likelihood of future placement on parole or day parole.
>
> (3) Where a Correctional Supervision and Parole Board acting in terms of section 73 recommends, in the case of a person sentenced to life imprisonment, that parole or day parole be withdrawn or that the conditions of community corrections imposed on such a person be amended, the court must consider and make a decision upon the recommendation.
>
> (4) Where the court refuses or withdraws parole or day parole the matter must be reconsidered by the court within two years."

[56] It is quite clear that under the CSA a court has the power to grant parole to prisoners who are sentenced to life imprisonment.

Factors taken into consideration

[57] In his answering affidavit the Minister set out the factors which he said needed to be taken into account in determining whether an offender should be placed on parole. The factors are contained in Chapter VI(1A)(19) of the Correctional Services B-Order, under the heading "Criteria for Parole Selection" which is the "Parole Board Manual". The Minister listed the following as the factors that require to be taken into account in considering an application for parole:

"7.1 Chapter VI(1A)(19) of the Correctional Services B-Order, under the heading 'Criteria for Parole Selection' (commonly referred to as the 'Parole Board Manual'), provides that the factors mentioned are to be taken into account in the consideration of an offender for placement on parole.

7.1.1 In terms of Chapter VI(1A)(19)(b) of the B-Order, under the heading 'Nature of the crime', the nature of the crime committed by the offender, the remarks made by the court at the time of the imposition of the sentence, and whether the crimes took place in cold blood or impulsively are taken into account when considering an offender for placement on parole;

7.1.2 In terms of Chapter VI(1A)(19)(c) of the B-Order, under the heading 'Crime and background history', the criminal history of the offender is to be taken into account when considering an offender for placement on parole (including whether he or she is a first offender);

7.1.3 In terms of Chapter VI(1A)(19)(d) of the B-Order, under the heading 'Behaviour and reaction to treatment', the behaviour and adjustment of the offender during his or her incarceration, together with the programmes attended by the offender within the correctional centre aimed at his or her rehabilitation, are to be taken into account when considering placement on parole;

7.1.4 In terms of Chapter VI(1A)(19)(e) of the B-Order, under the heading 'Medical, psychological and psychiatric considerations', regard is to be had to psychological reports in considering an offender for placement on parole;

7.1.5 In terms of Chapter VI(1A)(19)(f) of the B-Order, under the heading 'Domestic circumstances and employment opportunities after placement', regard is to be had to whether an offender will have a fixed residence, whether he or she will be capable of obtaining employment and the availability of support systems in the event of his or her being placed on parole;

7.1.6 In terms of Chapter VI(1A)(19)(h) of the B-Order, under the heading 'Selection for placement on parole', the interest of the community not

> to be exposed to increased danger is to be taken into account in considering an offender for placement on parole."[16]

[58] In paragraph 7.2 of his answering affidavit the Minister stated that in terms of the policy of the Department on parole, in deciding whether an offender should be placed on parole, the following factors are required to be taken into account:

> "7.2 In terms of the policy document of the Department of Correctional Services pertaining to placement on parole ("the policy document"), in deciding whether an offender should be placed on parole account is to be taken of:
>
> 7.2.1 the remarks made by the court in imposing sentence;
> 7.2.2 the nature and seriousness of the crime and the consequence thereof;
> 7.2.3 the behaviour and adjustment of the offender during his or her incarceration;
> 7.2.4 the programmes attended by the offender within the correctional centre aimed at his or her rehabilitation;
> 7.2.5 the availability of support systems to the offender in the event of his or her being placed on parole;
> 7.2.6 whether the offender has a fixed address which can be monitored on his or her being placed on parole;
> 7.2.7 the offender's scholastic or technical achievements during his or her incarceration;
> 7.2.8 the risk of recidivism in the event of the offender being placed on parole."

[59] In paragraph 7.4 of his answering affidavit the Minister pointed out that in terms of section 63(1) of the 1959 Act – which applies to the applicant in regard to parole by virtue of section 136(1) of the CSA – the decision-maker "is enjoined to have regard to the nature of the offence and any remarks made by the court in question at the time of the imposition of sentence" for purposes of the decision whether or not to place an offender on parole.

[16] Chapter VI(1A)(19) of the Correctional Services B-Order.

Rationality

[60] The applicant has attacked the Minister's decision not to place him on parole on many grounds in support of his contention that that decision should be reviewed and set aside. One of these was that the decision was irrational because there was no connection between the Minister's exercise of power given to him in this regard and the purpose for which that power was conferred. Counsel for the Minister as well as counsel for the SACP and Mrs Hani submitted that the Minister's decision was rational and served the purpose of the power conferred on the Minister. If I conclude that the Minister's decision was irrational, that will be a sufficient ground justifying that the Minister's decision be reviewed and set aside. Indeed, that will make it unnecessary to deal with other grounds of review upon which the applicant relied in support of his appeal.

[61] In attacking the Minister's decision as irrational, the applicant relied on, amongst others, the fact that the nature and seriousness of the crime of which he was convicted and the sentencing remarks of the High Court and the Supreme Court of Appeal will never change in the future. The Minister did not dispute this nor could he. The applicant then went on to submit in his founding affidavit in the High Court that, because these two matters on which the Minister relied to justify denying him parole will never change in the future, the Minister will never release him on parole which, therefore, meant that he would serve a full life sentence of imprisonment.

[62] In *Pharmaceutical Manufacturers*[17] this Court said about the standard of rationality:

> "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

[17] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

> 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."[18]

[63] This Court went on to point out: "The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry".[19]

[64] Indeed, this Court said later in the same case: "What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner".[20]

[65] Finally, this Court went on to say about rationality:

> "Rationality in this sense is a minimum threshold requirement applicable to the exercise of 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. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately."[21]

[66] In paragraph 13 of his answering affidavit the Minister set out the factors which he said he took into account in deciding the applicant's application for parole. Earlier on I referred to the factors that the Minister said in his decision document he took into account in deciding the applicant's application for parole. That was based on what appears in his decision document. Here, I am now referring to the factors that the

[18] Id at para 85.

[19] Id at para 86.

[20] Id at para 89.

[21] Id at para 90.

Minister said in his answering affidavit he took into account in deciding the applicant's application for parole. Most of the factors he mentioned in his decision document he also mentioned in his affidavit. However, there are two features in respect of which there is a difference in what he said in his decision document and what he said in his affidavit that may need to be highlighted. For that reason, I propose to reflect here what he said in his affidavit in this regard. The Minister said:

> "13.1 For purposes of my decision dated 16 March 2020, I took into account as positive factors in favour of his placement on parole:
>
> 13.1.1 the commendable behaviour and adjustment of the Applicant during his incarceration (as attested by his clean disciplinary record within the correctional centre);
>
> 13.1.2 the multidisciplinary programmes completed by the Applicant within the correctional centre aimed at his rehabilitation;
>
> 13.1.3 the availability of support systems to the Applicant and his favourable employment prospects in the event of his being placed on parole;
>
> 13.1.4 the fact that the Applicant is a first offender;
>
> 13.1.5 the remorse on the part of the Applicant for the crime;
>
> 13.1.6 the risk of the Applicant re-offending being low."

I note that in paragraph 13.1.1 of his answering affidavit, the Minister describes the applicant's behaviour in prison as "commendable". That description is not reflected in his decision document. I believe that it is important. I also note that in paragraph 13 the Minister does not refer to taking into account the reports of psychologists and social workers which he says in his decision document he took into account.

[67] The Minister then went on to say in the next paragraph, namely, paragraph 13.2 of his answering affidavit:

> "13.2 Notwithstanding the positive factors in favour of his placement on parole, I was in the light of paragraph 7.1.1, paragraphs 7.2.1 – 7.2.2 and paragraphs 7.4 – 7.5 above enjoined to have due regard to the nature and seriousness of

the crime of murder committed by the Applicant, and the remarks made by the court at the time of the imposition of the sentence."

Paragraphs 7.1.1, 7.2.1 – 7.2.2 and 7.4 – 7.5 referred to in this paragraphs read:

"7.1.1 In terms of Chapter VI(1A)(19)(b) of the B-Order, under the heading 'Nature of the crime', the nature of the crime committed by the offender, the remarks made by the court at the time of the imposition of the sentence, and whether the crimes took place in cold blood or impulsively are taken into account when considering an offender for placement on parole.

. . .

7.2.1 the remarks made by the court in imposing sentence;

7.2.2 the nature and seriousness of the crime and the consequence thereof;

. . .

7.4 In terms of the provisions of section 63(1) of Act 8 of 1959 (which finds application to the placement of the Applicant on parole by virtue of section 136(1) of Act 111 of 1998), the decision-maker is enjoined to have regard *"to the nature of the offence and any remarks made by the court in question at the time of the imposition of sentence"* for purposes of the decision whether or not to place an offender on parole.

7.5 The Full Court of the North Gauteng High Court, Pretoria in the matter of *Derby-Lewis v Minister of Justice and Correctional Services and Others* stressed the importance of the nature of the crime and the remarks made by the court at the time of the imposition of the sentence when considering an offender for placement on parole in stating that "*the judgement of the trial court, not only on the merits, but also on the sentence, is of utmost importance for a proper decision on the placement of the applicant on parole*". (Emphasis added.)

[68] What emerges from this paragraph is that the Minister considered himself enjoined to have regard to the nature and seriousness of the crime as well as the sentencing remarks of the Court.

[69] The Minister then referred to the crime of murder of which the applicant was convicted. He said: "The crime of murder committed by the applicant involved the cold-blooded assassination of a prominent political leader, for which careful preparations were made in advance. The applicant was convicted of murder with no extenuating circumstances."

[70] The Minister relied on the following remarks of the trial court:

> "13.4 In imposing the sentence of death, the trial court stated as follows:
>
> 13.4.1 '*The accused performed an act of assassination on a person who had attained prominence in public affairs in South Africa, whose killing was likely, to the knowledge of the accused, to cause far-reaching, highly emotive reactions, with very damaging, serious consequences and extremely harmful effects for the entire society in South Africa*';
>
> 13.4.2 '*The accused had ample opportunity for reflection and reconsideration, but carried on regardless*';
>
> 13.4.3 '*The act was not performed impulsively and spontaneously in immediate reaction to a specific event*';
>
> 13.4.4 '*The assassination was planned over a period of many weeks, with close attention to detail*';
>
> 13.4.5 '*The killing was cold-blooded, with deliberate intent. After the deceased fell, when the first bullet struck him, the accused came close up and administered the coup de grâce from close range*';
>
> 13.4.6 '*The murder was a deliberate, cold-blooded one. …it was preceded by weeks of planning*';
>
> 13.4.7 'The trial court wished "*to send out the message loud and clear to any who contemplates assassination of political leaders as an acceptable option, what view the court takes of such conduct'*." (Emphasis added.)

[71] The Minister also referred to the remarks made by the Supreme Court of Appeal in its judgment when it dealt with the applicant's appeal on sentence. He quoted the following passages from the judgment of the Supreme Court of Appeal:

"13.5.1 Few crimes can be regarded by a court as more atrocious, or as being more calculated to arouse the revulsion of decent members of society, than the sort of murder of which the appellants were duly convicted. The trial court ultimately concluded that in the case of each appellant the death sentence was the only proper penalty. So far from being assailed by any doubts in the matter, I entirely agree with that conclusion. I would therefore confirm the death sentences.

13.5.2 I have already mentioned that I am disposed to confirm both the death sentences. However, for the reasons set forth in this court's judgment in *S v Makwanyane en 'n Ander* 1994 (3) SA 868(A) at 873C-D it is appropriate that the further consideration of the appeals against the death sentences by this court be deferred until the Constitutional Court shall have ruled upon the constitutionality of the death sentence in a case such as the present."[22]

[72] It will have been seen from the above what types of remarks of the trial court and the Supreme Court of Appeal the Minister took into account in deciding not to place the applicant on parole. The courts' remarks he took into account relate to the seriousness of the offence that the applicant had committed or to the fact that the offence was well-planned and was committed in cold blood. The question that arises is: are these the types of remarks made by a trial court at the time of imposing a sentence that the Department's policy contemplates should be taken into account? In my view, they are not and the Minister misconceived the remarks to which the policy refers. The sentencing remarks to which the policy document refers can only be remarks about the minimum period of imprisonment that a convicted person or offender should serve before he or she can be considered for parole. Sometimes Judges and Magistrates make remarks to such effect when they impose a sentence of imprisonment. If the reference to the sentencing remarks of the Court referred to in the Department's policy document is understood to be a reference to such remarks, the requirement in the policy document makes sense.

[22] *S v Walus* [1994] ZASCA 189; 2000 JDR 0761 at 44 and 47.

[73] The remarks contemplated in the Department's policy are the types of remarks this Court had in mind in *Jimmale* when it referred to the court's "power to postpone consideration of parole for sentenced offenders".[23] In fact, in *Jimmale* this Court said:

> "The issue for determination in this application for leave to appeal relates to the power of a trial court to grant a non-parole order – that is – an order by the trial court that the person sentenced should not be considered for parole before a stated portion of the sentence has been served."[24]

In my view, when the Department's policy document refers to the sentencing remarks of the trial court, it refers to the remarks of the sentencing court that reflect the minimum period of imprisonment that the court would have said should be served by the offender before he or she could be considered for parole.

[74] The courts obtained the power to impose a non-parole portion of a sentence of imprisonment from section 276B(1)(a) of the Criminal Procedure Act.[25] That provision reads:

> "(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may, as part of the sentence, fix a period during which the person shall not be placed on parole.
>
> (b) Such period shall be referred to as the non-parole period, and may not exceed two-thirds of the term of imprisonment imposed or 25 years, whichever is the shorter."

[75] It is to be noted that section 276(B)(1)(b) limits the length of the period during which a court may prevent the Correctional Services authorities from considering a prisoner for parole. It may not say that a prisoner may not be considered for parole for his or her entire period of imprisonment. Its power is limited to a maximum period of

[23] *Jimmale* above n 2 at para 1.

[24] Id at para 2.

[25] 51 of 1977.

two-thirds of the term of imprisonment to be served by the accused or to 25 years whichever is shorter. Therefore, no matter how serious the crime is for which a person is sent to jail, the court has no power to say that he or she should not be considered for parole for a period after the expiry of 25 years of imprisonment.

[76] If, however, the reference to remarks in the Department's policy is understood to be a reference to the types of remarks to which the Minister referred and relied upon, namely, remarks about the seriousness of the offence, that would not make sense because the policy document does mention the seriousness of the offence as a factor to be taken into account. Since the authors of the Department's policy document dealt with the seriousness of the crime elsewhere in the document, they could not have intended the reference to the trial court's sentencing remarks to be a reference to remarks that relate to the seriousness of the crime.

[77] In the present case neither the trial court nor the Supreme Court of Appeal made the types of sentencing remarks that are contemplated by the Department's policy. That is understandable because the sentence that the trial court imposed on the applicant did not contemplate his return to society. He was sentenced to death. Therefore, the Court had no reason to make remarks about the length of the period of imprisonment that the applicant had to serve before he could be considered for parole. Accordingly, in this case there are no sentencing remarks of the type contemplated in the Department's policy that the Minister was entitled to take into account. This means that the factors recognised in the policy of the Department as factors that should be taken into account that, according to the Minister, did not support the release of the applicant on parole were only the nature of the crime and the seriousness thereof.

[78] The Minister also made the following important admission in paragraph 16.1 of his answering affidavit:

> "It is admitted that the factors mentioned in Chapter VI (1A) (19) of the Correctional Services B-Order (the so-called Parole Board Manual) referred to in paragraphs 7.1.3 to 7.1.6 above were positive factors in favour of the placement of the applicant on

> parole. So, too, the factors mentioned in the policy document referred to in paragraphs 7.2.3 – 7.2.8 above. For purposes of my decision, I had due regard to such factors in favour of the placement of the applicant on parole."

[79] The reference in this paragraph to the factors in paragraphs 7.1.3 to 7.1.6 is a reference to six of the eight factors that Chapter VI (1A) (19) of the Correctional Services B-Order under the heading "Criteria for Parole Selection" provides are to be taken into account in deciding whether or not an offender should be granted parole.

[80] In his answering affidavit, all the Minister said was in effect that it was not his position that the applicant would never be released on parole. He never explained how he could release the applicant on parole in the future when the reasons that prevented him from releasing the applicant on parole in 2020 would still be present and would not have changed. What the Minister says in effect is that in 2020 he was prevented by the nature and seriousness of the crime and the trial court's and Supreme Court of Appeal's sentencing remarks from releasing the applicant on parole but some time in the future he could release him on parole despite the fact that the nature of the crime, its seriousness and the court's sentencing remarks would not have changed. Earlier I pointed out that the Department's policy requires that, as far as possible, a prisoner should be placed on parole as soon as possible after he or she has reached the date when he or she can be considered for parole. In this regard we must remember that the applicant's date when he became eligible to be considered for placement on parole was in 2005. That is seventeen years ago. That is close to 20 years ago. Furthermore, I also highlighted earlier that the Department's policy makes it clear that a prisoner must be evaluated fairly and justly for placement on parole.

[81] The question that immediately arises then is this: if, in the future, the Minister can or will release the applicant on parole on the same facts as those which prevailed in 2020 when he denied him parole, does that mean that he will have reached two different and mutually exclusive conclusions on the same facts? If he could reach the conclusion to release the applicant on parole on these facts in the future, why is it that he did not

release him in 2020 on the same facts. If the Minister were to release the applicant on parole on the same facts in the future, how will he justify his two conflicting conclusions on the same facts? The Minister did not explain any of this in his answering affidavit. His failure to explain this renders his decision to deny the applicant parole inexplicable. If it is inexplicable, it follows like night follows day that it is irrational. There is no connection between the exercise by the Minister of his power and the purpose for which the legislation conferred that power on him. If there is no connection between the Minister's exercise of the power and the purpose of the power conferred upon him, his decision is irrational.

[82] One can put what I have said in the preceding paragraph in a different way. That is that, if more than 26 years after the applicant was sentenced for the crime he committed, it was appropriate for the Minister not to release the applicant on parole in 2020 because of the nature of the crime, the seriousness thereof and the Court's sentencing remarks, why would it be appropriate for the Minister to release him one or two or three or five years thereafter? These three factors are immutable. They will not change one or two or three or five years later. This the Minister has not explained, notwithstanding the fact that it cried out for an explanation because the applicant clearly put it in issue. Therefore, this Court must vitiate the Minister's decision. If it were not to do so, it would in effect be giving its approval to the proposition that in future it would be appropriate for the Minister to deny the applicant parole even when he may have served 30 or 35 or even 40 years of imprisonment. That, simply on the basis of the nature of the crime, the seriousness thereof and the trial court's and Supreme Court of Appeal's sentencing remarks despite the fact that the applicant has complied with all other requirements for him to be placed on parole which the Minister concedes. The Minister's decision is not rationally connected to the purpose of the power conferred upon him. His decision is, therefore, irrational and it falls to be reviewed and set aside.

Remedy

[83] Having concluded that the Minister's decision is irrational and falls to be reviewed and set aside, the next question is whether this Court should remit the matter

to the Minister to consider the applicant's application for parole afresh in the light of this judgment or whether this Court should order the Minister to place the applicant on parole on such terms as may be appropriate in all of the circumstances.

[84] Ordinarily, this Court would remit the matter to the Minister and direct that he considers the applicant's application for parole afresh and make a decision on whether or not the applicant should be placed on parole. That route enables the court to allow the functionary in whom the power to make a certain decision vests to make the decision whether or not the applicant should be released on parole. However, it is not our law that a court will not under any circumstances either make the decision itself that was supposed to have been made by the functionary concerned or that it can never order such a functionary to make a particular decision. The courts in this country appreciated this even before the advent of democracy.

[85] In *Traube*[26] Goldstone J concluded that the decision of the Administrator of Transvaal or the hospital authorities involved in that case not to appoint the applicant, Dr Traube, as a senior house officer fell to be reviewed and set aside. The High Court then had to consider whether to remit the matter to the relevant functionary to decide her application for appointment as a senior house officer or to make that decision itself. The High Court concluded, after referring to *Agricultural Supply Association*,[27] that it was permissible for the Court to make the decision itself where the decision was a foregone conclusion.[28] In that case Goldstone J said:

> "In my opinion the question which must determine which of these two courses I should follow is primarily whether the result of a further reference back is a foregone conclusion. Put in another way, I must consider whether on all the facts of this case it will be reasonable for an unbiased, intelligent person to refuse to appoint the applicant to the position sought by her because she is not suitable for that appointment."[29]

[26] *Traube v Administrator, Transvaal* 1989 (2) SA 396 (T).

[27] *Agricultural Supply Association (Pty) Ltd v Minister of Agriculture* 1970 (4) SA 65 (T).

[28] Id at 72A-D. See *Traube* above n 26 at 408A-E.

[29] *Traube* id at 408E-G.

The Court ultimately made an order directing the relevant functionaries to take all steps necessary to cause Dr Traube to be appointed to the position of a senior house officer at Baragwanath Hospital, Soweto.

[86] After the advent of democracy, this continued to be the position. It is important to emphasise that courts only substitute their decisions for those of government functionaries in exceptional cases. It is not something the courts do lightly nor should they. Section 8 of PAJA deals with remedies in judicial review proceedings. In so far as it may be relevant, section 8 reads:

> "8(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
>
> (a) directing the administrator—
>
> (i) to give reasons; or
>
> (ii) *to act in the manner the court or tribunal requires*;
>
> (b) prohibiting the administrator from acting in a particular manner;
>
> (c) *setting aside the administrative action and*—
>
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
>
> (ii) in exceptional cases—
>
> (aa) *substituting or varying the administrative action or correcting a defect resulting from the administrative action; or*
>
> (bb) directing the administrator or any other party to the proceedings to pay compensation." (Emphasis added.)

[87] In *Trencon*[30] this Court dealt extensively with the circumstances in which it would be justified for a court not to remit a matter to the relevant functionary but,

[30] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

instead, to itself make the decision that the law vests in the functionary. It is not necessary for purposes of this judgment to deal with all those exceptions. It should suffice to refer only to one or two. Khampepe J, writing for a unanimous Court in *Trencon*, said:

> "Pursuant to administrative review under section 6 of PAJA and once administrative action is set aside, section 8(1) affords courts a wide discretion to grant 'any order that is just and equitable'. In exceptional circumstances, section 8(1)(c)(ii)(aa) affords a court the discretion to make a substitution order.
>
> Section 8(1)(c)(ii)(aa) must be read in the context of section 8(1). Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution."[31]

[88] This Court also said in that case:

> "In *Livestock*, the Court percipiently held that—
>
> > 'the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.'"[32] (Footnotes omitted.)

[89] One of the exceptions recognised in *Trencon* is where the decision is a foregone conclusion.[33] This Court went on to say:

> "To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors

[31] Id at para 34–35.

[32] Id at para 37.

[33] Id at para 38.

must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. *The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties*. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

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 would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision. In other instances, some matters may concern decisions that are judicial in nature; in those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision.

Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. 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'. Indubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion. However, in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion."[34] (Emphasis added.)

[90] A period of more than 15 years has lapsed since the applicant became eligible for consideration to be placed on parole. It was in 2005 that the applicant became

[34] Id at paras 47-49.

eligible to be considered for placement on parole. The Minister accepts that the applicant has shown remorse for the crime he committed. The evidence reveals that during his imprisonment all these years since 1993 the applicant has had no negative disciplinary record in prison. The Minister accepts that the applicant's risk of re-offending if he were to be placed on parole is low. The applicant has apologised to Mrs Hani and her family more than once. The applicant cannot do anything about the nature of the crime he committed, its seriousness nor can he do anything about the sentencing remarks that the trial court had made about him and the crime of which he was convicted. With regard to the factors the Minister took into account against the applicant the fact that, if the applicant were placed on parole, he would serve only a period of two years of his life sentence, should not have been taken into account. This is because that is a benefit that the law has given to the prisoners falling in the same category as the applicant and he is entitled to benefit from that law. In this regard it must be remembered that section 9(1) of the Constitution declares that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law.":

[91] In my view, this Court is in as good a position as the Minister to determine whether the applicant should be released on parole.

[92] The other factor that should be taken into account in deciding whether to remit the matter to the Minister or to order the Minister to place the applicant on parole is the history of this matter. That history reveals that not only has the applicant served 28 years of imprisonment of his life imprisonment sentence but he has also complied with all that the various Ministers of Correctional Services and the Parole Board have required him to do in order to improve his prospects of being granted parole.

[93] For over a decade the applicant made numerous applications for parole and various Ministers responsible for Correctional Services rejected his applications for one reason or another. On a number of occasions the applicant applied to the High Court to challenge the various Ministers' decisions denying him parole and he succeeded in all of them except the one that is the subject of this judgment. Even in this one as will have

been seen above, he should have succeeded. In all those applications, except one, the Court remitted the matter to the Minister responsible for Correctional Services to consider the applicant's application for parole afresh and each time the various Ministers reached the same conclusion as they had reached before, namely, to reject his application for parole. The one occasion when the High Court did not remit the matter is referred to in the next paragraph.

[94] The history of the applicant's applications for parole reveals that, as far back as 2011, the Parole Board recommended that the applicant be released on parole but the then Minister responsible for Correctional Services rejected the recommendation. That history also reveals that in the one court application, in which the Court did not remit the matter, the Court ordered the Minister to release the applicant on parole. On that occasion the Minister appealed that judgment to the Supreme Court of Appeal. The outcome of the Minister's appeal was that the Minister had erred in deciding the applicant's application for parole without considering the statement of the Hani family. When the Minister reconsidered the applicant's application for parole, as ordered by the Supreme Court of Appeal, he once again reached the same conclusion as before, namely to reject the applicant's application for parole.

[95] In the present case the Minister has considered all the factors that should be considered in deciding whether to place a prisoner on parole and concluded that, except for two, they all supported the conclusion that the applicant should be released on parole. The two factors that the Minister considered to count against the applicant are the ones discussed above which I have concluded can no longer stand in the way of the release of the applicant. I have reached this conclusion against the background that the applicant served more than 25 years of his sentence of life imprisonment during which he has kept a clean disciplinary record and has complied with every requirement that he has been told by the prison authorities he should comply with in order to improve his prospects of placement on parole. In the circumstances I am of the view that it is just and equitable that this Court should order the Minister to place the applicant on parole.

[96] In considering whether or not the applicant should be released on parole, I have been mindful of the fact that, in assassinating Mr Hani, the applicant sought to derail the attainment of democracy in this country and nearly plunged South Africa into a civil war. However, I have also borne in mind that, when the fathers and mothers of our constitutional democracy drafted our Constitution and included in it the Bill of Rights, they did not draft a Bill of Rights that would confer fundamental rights only on those who fought for democracy and not on those who had supported apartheid or who were opposed to the introduction of democracy in this country. They drafted a Bill of Rights that conferred fundamental rights on everyone including those who had supported apartheid with all their hearts. Indeed, they drafted a Bill of Rights which conferred fundamental rights even upon visitors to our country so that, upon entry into our country, they begin to enjoy the benefits and protections of our Bill of Rights. That is why the preamble to our Constitution reads in part:

> "We, the people of South Africa,
>
> …
>
> Believe that South Africa belongs to all who live in it, united in our diversity.
>
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –
>
> > Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> >
> > Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> >
> > Improve the quality of life of all citizens and free the potential of each person; and
> >
> > Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

[97] Furthermore, most of the sections in our Bill of Rights start with the phrase "Everyone has a right…" That is because the fundamental rights conferred in those sections are conferred on everyone.[35]

[98] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The decision of the Gauteng Division of the High Court, Pretoria dismissing the applicant's application is set aside and replaced with the following:

   "(a) The decision of the Minister of Justice and Correctional Services made in March 2020 rejecting the applicant's application for parole is reviewed and set aside.

   (b) The Minister of Justice and Correctional Services is ordered to place the applicant on parole on such terms and conditions as he may deem appropriate and to take all such steps as may need to be taken to ensure that the applicant is released on parole within ten (10) calendar days from the date of this order.

   (c) The Minister of Justice and Correctional Services is ordered to pay the applicant's costs including the costs of two counsel."

4. The Minister of Justice and Correctional Services must pay the applicant's costs in this Court including the costs of two counsel as well as the applicants' costs in the Supreme Court of Appeal in respect of the petition for leave to appeal.

[35] This is not to say that all the fundamental rights in our Bill of Rights are conferred on everyone because some are conferred only on the citizens and others on other categories of people.

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