



Reportable:	<b>YES</b> / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: **893/2023**  
DATE HEARD: **20 JUNE 2023**  
DATE OF ORDER: **15 SEPTEMBER 2023**

In the matter between:

**BLOCK, JOHN FIKILE**

Applicant

and

**UPINGTON CORRECTIONAL SUPERVISION  
AND PAROLE BOARD**

First Respondent

**HEAD OF CORRECTIONAL SERVICE  
CENTRE-UPINGTON**

Second Respondent

**REGIONAL COMMISSIONER: FREE STATE  
AND NORTHERN CAPE**

Third Respondent

**NATIONAL COMMISSIONER FOR  
CORRECTIONAL SERVICE**

Fourth Respondent

**MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICE**

Fifth Respondent

*Coram:* Nxumalo, J

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**JUDGMENT**

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*Per* **Nxumalo J**

## INTRODUCTION:

1. The applicant in these proceedings is a major male inmate, currently incarcerated at the Upington Correctional Services Centre, here in the Northern Cape Province. On 06 December 2018, he was sentenced by this Court to 15 and 12-years imprisonment on one count of corruption and one count of money laundering; respectively. The sentences were to run concurrently. After lodging an appeal in the Supreme Court of Appeal, in respect of both conviction and sentence, during December 2016, that Court on 21 August 2018, set aside his conviction on the latter count and confirmed the former; in respect of conviction and sentence. Thereafter, the applicant handed himself over at the Kimberley Correctional Services Centre on 27 November 2018, to commence serving his 15-year sentence.
2. The first respondent is the Upington Correctional Supervision and Parole Board in the Province,<sup>1</sup> appointed as such by the responsible Minister, in terms of Section 74 of the **CORRECTIONAL SERVICES ACT** 111 of 1998.<sup>2</sup> The Parole Board is statutorily responsible for the consideration of reports of offenders serving sentences and the determination their parole, within the contemplation of Section 75 of the Act.<sup>3</sup>
3. The second respondent is the Head of the Upington Correctional Centre designated as such by the National Commissioner to manage and control the said Centre. The third respondent is the Regional Commissioner of Correctional Services in the Free State and the Northern Cape provinces. The third respondent is responsible for the coordination of activities, case management administration and committees. The fourth respondent is the National Commissioner of Correctional Services contemplated in Section

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<sup>1</sup> Hereinafter referred to as “*the Parole Board*”

<sup>2</sup> Hereinafter referred to as “*the Act*”

<sup>3</sup> Section 75(1)(a) of the Act, expressly stipulates as follows:

“(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 light of the any other information or argument, may –

(a) Subject to the provision of paragraph (b) and (c) 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.”

3(3) of the Act. The Minister of Justice and Correctional Services, is the fifth respondent.

**THE RELIEFS SOUGHT:**

4. The applicant in the main urgently sought this Court to: (a) review and set aside the first respondent's decision dated 29 September 2020; (b) declare the fourth and/or fifth respondents' decision(s) in relation to his appeal dated 27 February 2023, invalid, unlawful and unconstitutional; (c) declare the fourth and/or fifth respondents' failure to make a decision in respect of his appeal submitted on 27 February 2023, to be in breach of Section 237 of the Constitution; (d) declare that he qualifies for the Covid-19 special remission; (d) direct the respondents to process his application for parole within 30 days.
5. The applicant also sought the Department of Correctional Services to be ordered to pay the costs of this application inclusive of costs of two counsel and any further and/or alternative relief this Court deems fit. The respondents, for their own part, sought this Court to dismiss the motion with costs on a party and party scale.

**THE DELAY:**

6. This motion was urgently lodged on 16 May 2023, seeking same to be heard on a date and time to be determined by the Judge President. In terms of the said notice of motion, the respondents, were required to deliver their answering affidavits, within 10 days after the expiry of the time referred to in rule 53(4) of the Uniform Rules.<sup>4</sup>
7. The respondents thereafter entered appearance on 19 May 2023 and delivered their answering affidavit, which was due on 02 June, only on 14

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<sup>4</sup> Rule 53(5)(b), which expressly requires a presiding officer, chairperson or officer, within 30 days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

June 2023, approximately 7 days out of time and one day shy of the matter being heard on the unopposed roll on 15 June. Consequently, on the latter date, this Court ordered that the matter be removed from the unopposed roll and contemporaneously directed as follows: The respondents were to deliver the impugned record on 20 June 2023; the applicant to file his supplementary affidavit, if any, on 23 June; the respondents were to file further answering affidavits, if any, on 27 June; and the applicant were to reply on or before 30 June 2023.

8. The applicant delivered his replying affidavit 03 July. Thereafter, the matter was set-down for hearing on 24 July 2023, whereat it was postponed, by the Judge President, to 31 July 2023. In the intervening period, the following transpired: The applicant, *vide Mr. R Nelwamondo*, delivered his heads of argument on 14 June 2023;<sup>5</sup> the impugned record was delivered on 21 June. The applicant, thereafter delivered written submissions and amended heads of argument dated 24 and 25 July; respectively *vide Messrs T Ngcukaitobi SC and Nelwamondo*. The respondents, for their own part, *vide Mr L Maponya*, delivered their main and supplementary heads of argument on 21 and 27 July; respectively. Thereafter, the matter was argued on 31 July 2023.
  
9. On the latter date, without taking anything away from whether or not the matter was indeed urgent, this Court reserved judgment and directed the parties to deliver further heads, on issues that arose in session. These were delivered on 04 August. This Court directed so in light of the persuasive decisions, given by the Gauteng Local Division, with regard to some of the issues that arose in these proceedings.<sup>6</sup>

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<sup>5</sup> The said heads are however dated 04 June 2023.

<sup>6</sup> *cf Smith v Minister of Justice and Correctional Services and Others* (21/35658) [2022] ZAGPJHC 60 (11 February 2022). See also Section 20 of the Superior Courts Act 10 of 2013, expressly provides as follows: “Settlement of conflicting decisions in civil cases

*Whenever a decision on a question of law is given by a Court of a Division which is in conflict with a decision on the same question of law given by a Court of any other Division, the Minister may submit such conflicting decisions to the Chief Justice, who must cause the matter to be argued before the Constitutional Court or the Supreme Court of Appeal, as the case may be, in order to determine the said question of law for guidance.”*

## **CONDONATION AND URGENCY:**

10. The respondents sought condonation for the late filing of their answering affidavit. The applicant did not resist. Condonation was granted. As regards urgency, it was contended for the respondents that the matter should not be heard urgently, not only because the urgency is self-created, but also because the applicant has failed to place relevant material facts pertaining to urgency before this Court.
11. The respondent also contended that lodging this application urgently was entirely unnecessary as the applicant had not exhausted certain internal remedies. It is on these bases alone that it was submitted for the respondents that the application should be dismissed, alternatively struck from the roll for lack of urgency. Queerly, the respondents have not specified as to which internal remedies these are.
12. The applicant, for its own part, contended as follows in this regard. That this motion is urgent by its very nature because the applicant is currently incarcerated arbitrarily and unconstitutionally due to the respondents' misinterpretation of the relevant Presidential Proclamation and miscalculation of his minimum detention period. That he unsuccessfully challenged these irrational decisions internally and has exhausted all avenues. That the foregoing notwithstanding, he still remains incarcerated, which constitutes an unlawful denial of his fundamental right to liberty and freedom of movement.
13. He averred that the matter was therefore manifestly urgent. That regard being had to the relief sought, any further delay in hearing this application would not only be prejudicial to him but also render same ineffective. He also maintained that it is so given the fact that he is still incarcerated notwithstanding the fact that he qualifies to be released on parole in terms of the said Proclamation.

14. It is trite by now that our Courts are cardinally enjoined *vide* Section 39(2) of the Constitution, when interpreting any legislation, and when developing the common law or customary law, to promote the objects of the Bill of Rights. It has been held that a violation of a person's privacy and dignity in such a manner that he or she could not be expected to endure the anxiety and embarrassment of a continued violation, created some degree of urgency which justified a hearing of an application out of turn.<sup>7</sup> By parity of reason, the same applies in this case because it also implicates one of the fundamental rights contained in the Bill of Rights i.e. the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.<sup>8</sup>
15. This Court was therefore constrained to determine the matter to be urgent.

#### **ISSUES FOR DETERMINATION:**

16. It was contended in sum for the applicant that there are essentially three issues that fell for determination, which if decided in his favour, he should be granted the order sought; to *wit*: (a) whether the decision to deny the applicant recognition for meritorious service in terms of Section 80 of the Act, is justified; (b) whether the applicant was placed on a list of offenders who qualified to be released and if so, whether his name subsequently removed arbitrarily; and (c) whether the applicant should have been released under the Covid-19 special dispensation as announced by the President, on 27 April 2020.
17. For reasons which will become clear later, these issues will be determined out of turn.

#### ***Whether the applicant should have been released under the Covid-19 special dispensation as announced by the President, on 27 April 2020:***

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<sup>7</sup> *Prinsloo v RCP Medi LTD T/A Rapport* 2003(4) SA 456 (T) at 462B-F; see also *Majake v Commissioner of Gender Equality and Others* [2010] JOL 24985(GSJ) at para 45

<sup>8</sup> Section 12 (1) (a) of the Constitution

18. It is common cause that the applicant commenced serving his sentence on 27 November 2018. The applicant averred that after serving 1 year and 19 days of his 15-years sentence, the President of the Republic, granted all prisoners a 24-month Special Remission of Sentence. According to the applicant, the import of the foregoing is that as from 17 December 2019, he was no longer serving a 15-year sentence, but 13-years.
19. Whilst the foregoing allegations are admitted, the deponent to the answering affidavit, who is the Head of Legal Services of the Department of Correctional Services for Free State and Northern Cape,<sup>9</sup> swore that he does not know the period the applicant had served, when the said remission of sentence by President came into effect and placed same in issue. Significantly, in paragraphs 20 and 21 of the founding affidavit, the following is stated. That the applicant applied for remission, but his application was turned down due to the respondent's failure to correctly interpret Section 80 of the Act. That he subsequently appealed to the Review Board, which appeal was dismissed and the first respondent's decision was confirmed.
20. As if this injustice was not enough, when the Presidential Proclamation was issued and inmates who would have reached their minimum detention period were to be considered for release, his name, though initially included on the list of those to be considered for release, was subsequently arbitrarily and capriciously excluded with no explanation or reasons given. So averred the applicant.
21. It is common cause that on 27 April 2020, the President announced the authorisation of the placement on parole of certain qualifying sentenced offenders. This was done under Section 84(2)(j) of the Constitution, read together with Section 82(1)(e) of the Act. The purpose of the Proclamation was to address, manage and combat the spread of the Coved-19 virus in all Correctional Centres in the Republic. The qualifying offenders were those low risk sentenced offenders who are or would have been incarcerated on 27 April 2020; and who have or would reach their minimum detention periods

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<sup>9</sup> *“the Department”*

within 60 months, from the date thereof.<sup>10</sup> Of significance is that this Proclamation though signed and sealed by the President on 24 April 2020, was only published on 08 May 2020, in the Government Gazette as Proclamation 19 of 2020.<sup>11</sup>

22. In this regard, the applicant, in sum, contended that to the extent that he would have reached his minimum detention period within the said 5 years, on 26 May 2025, he is a qualifying offender within the contemplation of the said Proclamation. To this extent, he contended that the nub of the respondents' error is the fact that they erroneously relied on the date mentioned in the said Proclamation i.e. 27 April 2020, as the determinative date. That being the case, they reckon that had he reached his minimum detention period on 26 April 2025, he would have qualified to be released, which according to them is not so. He submitted that the respondents' calculation does not conform to the date of the Proclamation as signed by the President i.e. 24 April 2020.
23. The applicant contended therefore that the manner in which the relevant period has been reckoned is *ultra vires*, the Proclamation. It is against this backdrop that, *Mr Ngcukaitobi SC*, argued for the applicant *inter alia* as follows, in sum. That even though the Proclamation was signed on 24 April 2020, it is so that it was only published on 08 May 2020. That 27 April 2020, is concerned only with whether or not an offender was in prison as at that date. That that means two dates are relevant. The first is the date when the Proclamation was published, being 08 May 2020, and the second is when the Proclamation was signed i.e. 24 April. That one or both dates are "*the date hereof*".
24. He submitted that qualifying prisoners within the contemplation of the Proclamation are those who have or would reach their minimum detention periods within a period of 60 months from 08 May 2020 and not 27 April, as contended for the respondents. In this regard, this Court was referred to

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<sup>10</sup> *vide* Proclamation 19 of 2020, Government Gazette number 43298

<sup>11</sup> No. 43298, Vol 659



Section 81 of the Constitution, which regulates the publication of Acts. It provides:

*“A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly **and takes effect when published or on a date determined in terms of the Act.**”*<sup>12</sup>

25. It was submitted for the applicant that if this principle applies to an Act, it also applies to a Proclamation. It was therefore contended for the applicant that it is arbitrary to choose 27 April 2020, as *“the date hereof”* as there was no legal basis for that choice. That 24 April is a more plausible date, since it is the date when the President actually signed the Proclamation. That it is so since the Proclamation could not come into effect, from a date earlier than the date of Proclamation, unless it is expressly stated so, regard being had to the *ratio* in **Pharmaceutical Manufacturers Association of SA: In re - Ex Parte President of South Africa.**<sup>13</sup>
26. That it follows that to the extent that the Proclamation does not name an earlier date for its coming into operation, it must be construed to apply with effect from the date of publication i.e. 08 May 2020. That this interpretation is also consistent with the principle which state that, provisions which implicate liberty and freedom must be construed to promote freedom, not to derogate from it. That that being the case, the simple question was whether the applicant is due to reach a minimum detention period within 60 months of 08 May 2020?
27. That if in terms of the **INTERPRETATION ACT** a *“month”* means *“a calendar month”*<sup>14</sup> that means the applicant qualifies for the special remission of sentence because his minimum detention period is due in May 2025. That it is of no assistance for the respondents to argue that the date falls on 25 May 2025, because the important issue is that it falls during the month of May 2025, as *per* the Proclamation.

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<sup>12</sup> Emphasis supplied

<sup>13</sup> 2000(2) SA 674 (CC)

<sup>14</sup> Act 33 of 1957

28. The applicant's counsel predicated his argument also against Section 16A(2) of the **INTERPRETATION ACT**; to wit:

***“16A. Promulgation and commencement of laws and publication of certain notices when publication of the Gazette impracticable***

(1) ...

(2) *Any law or notice published in accordance with any rules so made, shall be deemed to have been published in the Gazette, and any law so published shall be deemed to have come into operation on the day on which it was first so published as a law, unless some other day is fixed by or under that law for the commencement thereof.*<sup>15</sup>

29. That in the premise, it is clear that the relevant date is the date when the Proclamation is published, because same does not say it commences on a different date than the said date. That in the premise, there is no legally acceptable reason why the applicant remains incarcerated. It is against this backdrop that counsel for applicant submitted that the applicant should have been released.

30. For the respondents, *Mr. LW Maponya*, in this regard referred this Court to **Smith** where the following was held, *per* Strydom J.<sup>16</sup>

” [5] *The condition which was important for the purposes of this matter was that sentenced offenders who have or would have reached their Minimum Detention Period (“MPD”) within a period of 60 months from 27 April 2020 would have qualify (sic) for this placement on parole. In this judgment, this special parole will be referred to as (“the Covid parole”).*

[6] ***For the applicant to have qualified for this parole his DMP should have been calculated to see whether it stretched beyond 26 April 2025. This is***

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<sup>15</sup> Underlining added

<sup>16</sup> *Supra*

*a period of five years after the announcement of the Covid parole which was made on 27 April 2020.*<sup>17</sup>

31. That the reason why the date of the 27 April 2020, was included in the preamble of the Proclamation was to clearly provide the starting point of the calculation of the period referred to in the Proclamation. That it should be noted that the effective date and the date in which the period should be counted from, are two different things.
32. That a contextual interpretation of paragraph 1(a) of the Proclamation to wit: *“Offenders who have or will reach their minimum detention period within a period of 60 months from the date hereof”* reveals that same refers to the date already mentioned in the Proclamation, which is 27 April 2020. Any calculation which is not in line with 27 April 2020, will be in conflict with the judgment in **Smith** which has already held the determining date for calculations of 60 months to be 27 April 2020.
33. That it is clear from **Smith**, who was incarcerated on 06 December 2018, that any applicant who falls beyond the 26 April 2025, does not qualify for Covid-19 parole. Smith’s period of minimum detention period was 30 September 2024, which was found to be falling beyond cut-off date of 26 April 2025.<sup>18</sup> That the foregoing is to some extent similar to the present case because the applicant is also due for parole in May 2025, which falls outside the said deadline of 26 April 2025.
34. It is against this backdrop that it was contended for the respondent that to the extent that the Parole Board has applied the correct method of calculations for Covid-19 parole, this application fell to be dismissed with costs.
35. Section 84(2)(j) of the Constitution, expressly empowers and renders the President responsible for pardoning or relieving offenders and remitting any

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<sup>17</sup> Emphasis supplied

<sup>18</sup> Paragraph 25 of the Judgment

finer, penalties or forfeitures. Section 80(1)(a) of the Act, for its own part, *inter alia* expressly empowers the President, at any time to authorise the placement on correctional supervision or parole of any sentenced offender, subject to such conditions as may be recommended by the Parole Board, under whose jurisdiction such sentenced offender may fall.

36. Executive decisions such as the impugned Proclamation, are therefore not Acts of Parliament, within the contemplation of Section 81 of the Constitution, which expressly regulates the publication of the latter. To the contrary, the said Proclamation is a written executive decision taken in terms of the Constitution and legislation, which has legal consequences, within the contemplation of Section 101(1) of the Constitution.<sup>19</sup>
37. The provisions of the **INTERPRETATION ACT**,<sup>20</sup> applies to every law in force (as defined in the Act)<sup>21</sup> and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.<sup>22</sup>
38. It follows from the foregoing that the right and proper place of departure is not Section 81 of the Constitution, but Section 13 of the **INTERPRETATION ACT**, which is aptly headed "*Commencement of laws.*" It expressly and unambiguously stipulates as follows:

*"(1) The expression "commencement" when used in any law and with reference thereto, means the day on which that law comes or came into operation, and that day shall, subject to the provisions of subsection (2) and unless some other day is fixed by or under the law for the coming into operation*

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<sup>19</sup> Section 101 of the Constitution, expressly stipulates as follows:

"101. (1) A decision by the President must be in writing if it-

(a) Is taken in terms of legislation; or

(b) Has legal consequences."

<sup>20</sup> 33 of 1957

<sup>21</sup> Section 2 of the Interpretation Act defines "law" as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law."

<sup>22</sup> Section 1 of the Interpretation Act

*thereof, be the day when the law was first published in the Gazette as a law.”*<sup>23</sup>

39. It can be deduced from the foregoing that, what “the date hereof” means in the Proclamation is 08 May 2020, being the date on which it was published, and nothing more pretentious. It is so simply because, unless otherwise expressly provided, the date of commencement of a Proclamation, such as the one *in casu*, is not dependent on when it was announced, but on its date of publication. Having commenced on the 08 May 2020; and being that the dispensation remains extant only for 60 months, the next question is: What is the precise effluxion date of same? The answer to this question, is dependent on what the word “month” referred in the said Proclamation means.
40. Whilst “month” is defined in the **INTERPRETATION ACT** as “a calendar month” the latter is not therein defined. The Collins Dictionary defines a calendar month as “a period from one particular date in one month to the same date in the next month” e.g. from 08 May to 08 June. The Concise Oxford English Dictionary, for its own part, defines a month as “each of the 12 named periods into which a year is divided or a period of time between the same dates in successive calendar months.”<sup>24</sup> According to The Chambers Dictionary,<sup>25</sup> “a calendar month” is such a length of time loosely taken as 4 weeks or 30 days.”
41. It is clear from a plain reading of the **INTERPRETATION ACT**’s definition of a moth as a calendar month, that it preferred the meaning of same to assume its usual grammatical meaning. In the premise, it follows that the operation of the Proclamation, having commenced on 08 May 2020, would expire only on 08 May 2025 and not on 26 April, as contended for the respondents.<sup>26</sup>

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<sup>23</sup> Emphasis supplied

<sup>24</sup> 10<sup>th</sup> Ed Revised

<sup>25</sup> 10<sup>th</sup> Ed

<sup>26</sup> *cf Smith*

42. The following can therefore be deduced from the Proclamation, on a proper reading thereof. That the criteria for the claim for placement on parole under same is that an offender would qualify if and only if, such an offender as on 08 May 2020, he/she: (a) is or would have been incarcerated on 27 April 2020; and (b) have or would have reached his/her minimum detention period within the period between 08 May 2020 and 08 May 2025.
43. In the premise, to the extent that the applicant's minimum detention period is 26 May 2025, *sans* any special remission, he clearly falls outside the Covid-19, remission period, by approximately 18 days. Put otherwise, the applicant is not a qualified sentenced offender, in terms of the criteria mentioned in the Proclamation, unless he qualifies for special remission of sentence for highly meritorious service, as contemplated in Section 80 of the Act.

***Whether the decision to deny the applicant recognition for meritorious service in terms of Section 80 of the Act, is justified***

44. Section 80 of the Act expressly and unambiguously stipulates as follows:

***“Special remission of sentence for highly meritorious service-***

*(1) A Correctional Supervision and Parole Board may, on the recommendation of the National Commissioner, grant to a sentenced offender, except to a person serving a life sentence or a sentence in terms of Section 286A of the Criminal Procedure Act, who has acted **highly meritoriously**, special remission of sentence not exceeding two years either unconditionally or subject to such conditions as the Board may determine.”<sup>27</sup>*

45. The following accomplishments are put up by the applicant for determination as highly meritorious, which were attained within 6 months of his imprisonment. These accomplishments are not disputed. He volunteered as a teacher at a school due to a desire to contribute positively to the wellbeing of fellow inmates, as well as to the fact that there was a shortage of teachers

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<sup>27</sup> My emphasis

within the Centre. He also arranged for educative books which are to date still being used by inmates at the Centre. He served as a tutor between 2019 and 2022, whereafter same was interrupted by his studies towards a Diploma in Public Administration with the University of Western Cape. He subsequently attained the said qualification in April 2022.

46. He also secured a sponsorship of soccer gears and related equipment to the benefit of four soccer teams within the Centre. This, in circumstances that the Department itself could not afford same. He averred that the provision of the foregoing promotes the social responsibility and human development of all sentenced offenders in concert with Section 2(c) of the Act.<sup>28</sup> He further employed an ex-offender at his farm since the latter's release on parole, as result of which the said ex-offender has since not re-offended.
47. The applicant furthermore drew the attention of the Head of the Centre to a discrepancy of a sign at the entrance of the Centre, between the Isi-Xhosa version and its Afrikaans and English counterparts. The difference was that whilst the said sign in the latter two languages unambiguously warned against the unauthorised carrying of dangerous weapons in the Centre, the Isi-Xhosa version, confusingly did not. He is of the view that this state of affairs would not only have exposed the Centre to litigation, but it also negated the safety and security of both inmates and officials. As a result of his intervention, an instruction was issued to remove the defective Isi-Xhosa version, which instruction, in his view resulted in potentially saving the institution from possible lawsuits.
48. Based on the foregoing, on 18 May 2020, the applicant, after being advised by the Case Management Committee so to do, applied to be considered for special remission of sentence. The Head of the Correctional Centre in Upington, one Mr Ndlovu, thereafter prepared a report in which he recorded the deliberations held on 08 June 2020 at the Centre and recommended the

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<sup>28</sup> The said Section expressly proclaims that the purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by promoting the social responsibility and human development of all sentenced offenders

commendation of applicant and consideration for possible remission of his sentence.

49. The foregoing notwithstanding, on 12 June 2020, a decision was made that the said actions did not constitute sufficient grounds to justify remission of sentence, because same did not in themselves, fit within the specified categories of factors that may be taken into account as deserving. The applicant disputed the merits of this decision and continues to do so to date.
50. The Head of the Centre, Mr Ndlovu, thereafter appointed one Mr SL Du Plessis to determine and investigate whether the applicant indeed qualified for special remission. According to the applicant prior to Mr Du Plessis' appointment he and Mr Du Plessis had previously been involved in numerous altercations. According to the applicant, at one point when he protested to Mr Du Plessis regarding the ill-treatment he was subjecting him to, he retorted: "[the applicant] *can even report him to the Minister.*"
51. Mr Du Plessis, *inter alia* reported as follows. That the applicant indeed made the Head of the Centre aware of the fact that there was a translation fault on the notice board at the main gate which Isi-Xhosa version indicated that firearms and cell phones are permitted at the Centre. That the applicant's action was meritorious because he safeguarded the Department against potential litigation and security risks. That, the foregoing notwithstanding, all correctional officers working at the main gate, however, know that no firearms or cell phones are allowed to pass through same and that spelling mistakes on the notice board did not change the policy.
52. That the applicant used his influence and connections at the Premier's office to organise a donation of soccer kits to the value of R13 200.00. That the applicant did indeed assist the school by organising the donations of textbooks to the school. The applicant contended that the fact that Mr Du Plessis stated in his finding that he used his influence and connections at the Premier's office to organise a donation of soccer gear to the value of R13 200.00, is in itself eyebrow-raising because the letter he received from



the Head of the Centre, attached and marked annexure JFB005, only stated that:

*“... Mr Block arranged with the Premier’s office to sponsor Correctional Centre with soccer jerseys and socks, he also arranged for the soccer balls, whistles, soccer pumps and a stop-watch. This equipment is used by offenders every weekend when they play soccer. We could not buy them as we did not have enough funds under SRAC. The soccer kits were used by 4 (four) teams...”*

53. Mr Du Plessis subsequently recommended as follows. The applicant should be commended and encouraged to continue his good behaviour. That though commendable, his actions did not meet the criteria as stipulated in B-Order, Chapter 23, Annexure E, to qualify for special remission of sentence. That the Head of the Centre must guard against accepting donations to the Department, organised by inmates using their influence to obtain them, especially if same is done with the expectation to be considered for remission of sentence. No special remission was therefore recommended.
54. The applicant also averred that the choice of words used by Mr Du Plessis illustrates that he had other ulterior motives and used his powers to prejudice him. That his animosity towards him clouded his ability to arrive at a just, fair and impartial decision at the conclusion of his investigation. That Mr Du Plessis failed to comprehend the seriousness of the defective Isi-Xhosa version of the said notice because it is trite that a notice gives the reader a right to act as directed.
55. The applicant also lamented that it is disturbing that an investigating officer should be ignorant of the fact that when inmates are kept busy with studies and sports activities, they refrain from criminal activities. The applicant further lamented that during the course of his investigations, Mr Du Plessis, *inter alia*: (a) Failed to interview him and members of the case management committee, to properly determine his contributions to the Centre; (c) only determined the value of his contributions from letters he received from the

Head of Correctional Centre; and (d) prejudged his case before he even commenced with the investigations.

56. That the foregoing notwithstanding, on 13 August 2020 the Parole Board made a ruling upholding Mr Du Plessis's recommendations, without having appeared before it for any input, feedback or opportunity to note the impugned decision in writing. According to him, he was only later called to the Head of the Centre for feedback.
57. Aggrieved by the said decision, the applicant subsequently lodged a review application with the Parole Review Board. On 03 February 2021, a decision pertaining to the foregoing was handed down, effectively informing him that his application has been declined.
58. The applicant *inter alia* contended that the specific wording of Section 80 of the Act does not limit the factors that may be taken into account in the definition of "*highly meritorious service.*" The foregoing, notwithstanding the decision of the first respondent, limited itself to an internal document that seems to have been developed as a guide that refers to the factors that may be regarded as deserving for special remission. In the premise, it was submitted that, to the extent the first respondent failed to apply Section 80, it misdirected itself. That the foregoing renders the impugned decision reviewable and susceptible to being set aside.
59. That the fourth respondent also failed to take into account evidence that was expressed by at least three different individuals to confirm that his deeds were worthy of merit. That first, Mr Ndlovu supported his application. Secondly, Ms Qwenya stated that he has assisted the school by providing ten Grade 12 books and ten English books. And thirdly, Mr Mogotsi confirmed that he has assisted in the appointment of Mr Jacobus Jafta at his farm. That the first respondent overlooked the findings of the Investigating Officer that he had assisted the Department because he safeguarded it against potential litigation and security risk entailed in the contradictory Isi-Xhosa version of the notice board.

60. The applicant subsequently appealed to the fourth respondent, *vide* JFB010 dated 27 February 2023. According to the applicant, at the time this application was lodged, the said application had not been decided, nor had the fifth respondent replied to same, *contra* Section 237 of the Constitution. The said Section expressly stipulates that all constitutional obligations must be performed diligently and without delay.
61. The respondents, for their own part, maintained that the respondents correctly interpreted Section 80 of the Act in considering the applicant's application for special remission and the Head of the Centre's recommendation. The decision of the Parole Board was procedurally fair and rational and its actions and recommendations were never taken for any ulterior purpose or motive. Mr Ndlovu's recommendations were non-binding. According to the respondents, the decision of the Parole Board did not warrant referral to the Review Board. They maintained that the Head of the Parole Board applied his mind to the applicant's request for remission of sentence. In the premise, they maintained that the Parole Board did not contravene Section 6 of **PROMOTION OF ADMINISTRATIVE JUSTICE ACT**.<sup>29</sup>
62. That the applicant was supposed to exhaust internal remedies in terms of Section 7 of PAJA. The applicant did not invoke the remedy available to him in terms of the PAIA, nor did he raise any exceptional circumstances why his failure to do so should be condoned. Consequently, the respondent submitted that the application is premature solely for this reason.
63. The respondents submitted further that in arriving at the decision not to grant the applicant special parole dispensation, the respondents are guided by Circular 10 of 2020/21, Branch and Incarceration and Correction Circular, the contents of which contains criteria for eligibility for special parole dispensation. In terms of the said Circular, persons who qualify for the special parole dispensation are only those sentenced offenders who have or

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<sup>29</sup> Act 3 of 2000. Hereinafter referred to as "**PAJA**"

will reach their minimum detention periods within a period of sixty (60) months from 27 April 2020. Consequently, that the applicant should blame himself for not handing himself to the Correctional Centre after the High Court decision in 2016, because had he done so, his minimum detention period would have fallen within the said period.

64. It was also averred for the respondents that whilst the applicant's actions were commendable, same does not meet the criteria as stipulated in Annexure E, to qualify for special remission of sentence. According to the respondents, they were guided by Order 1 of Chapter 25 of the Granting of Amnesty/Special Remission of Sentence, to determine whether the applicant qualifies for special remission of sentence or not. It was submitted for the respondents that the Parole Board, *inter alia* considered the following factors to determine whether the conduct of the applicant constituted highly meritorious conduct, whether he informed the Centre of: (a) an escape; (b) an attack/assault; (c) smuggling of mandrax/dagga; and (d) smuggling of firearms.
65. It is common cause that the applicant is a well-behaved offender. He has never been charged with any misconduct since his incarceration. He has cited his procurement of soccer kits and equipment and books for the Centre;<sup>30</sup> securing a job for an ex-offender at his farm; identifying discrepancies on a warning sign board at the main entrance of the Centre and volunteering as tutor for two years at the Centre. It is so that when his application for special remission was investigated and considered, it was found that whilst his actions were commendable, same does not meet the criteria as stipulated in Order B, Chapter 23, Annexure E, to qualify for special remission.<sup>31</sup>

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<sup>30</sup> Section 18 of the Act, expressly requires the respondents to allow every inmate access to available reading material of his/her choice, unless such material constitutes security risk or is not conducive to his/her rehabilitation. Such reading material may be drawn from a library or in the Centre or may be sent to the inmate from outside the Centre, in a manner prescribed by the regulations

<sup>31</sup> p45, Record

66. The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by enforcing sentences of courts in the manner prescribed by the Act.<sup>32</sup> The Act has thus been promulgated with the object of changing the law governing the correctional system and giving effect to the Bill of Rights and in particular its provisions with regard to inmates.<sup>33</sup> Section 36 of the Act, for its own part, expressly and unambiguously stipulates as follows:

**“36. Objectives of implementation of sentence of incarceration-**

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

67. It is so that there is no definition of the expression “*highly meritoriously*” in the Act. It is, however, not so that there is no list of factors which may be taken into account when a decision is taken as to what actions qualify as “*highly meritorious*” as contended for the applicant. That which is regarded as deserving, is listed in Annexure E: Amnesty/ Special Remission of Sentence.<sup>34</sup> The said annexure is apparently used as a norm by the respondents as a guideline for awarding special remission of sentences for certain actions/behavioural incidents which may be regarded as deserving, together with specific periods in respect of every action/behavioural incident.<sup>35</sup>

68. In **Jimmale and Another**, the following was held:<sup>36</sup>

**“[1] Parole is an acknowledged part of our correctional system. It has proved to be a vital part of reformatory treatment for the paroled person who is**

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<sup>32</sup> Section 2(a) of the Act

<sup>33</sup> Preamble to the Act

<sup>34</sup> Annexure E lists the following criteria for awarding special remission of sentence, variously. Informing about escapes (1-6 months); attacks/assaults (1-18 months); smuggling of dagga/mandrax (1-3 months) and smuggling fire-arms (3-12 months); and developing implements or devices to save the State money, e.g. a machine was broken and the prisoner repaired it which the State was going to pay a lot of money (6 months)

<sup>35</sup> Clause 2.1 (b), Chapter 23: Granting of Amnesty/ Special Remission of Sentence

<sup>36</sup> 2016(2) SACR 691(CC)

*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 and that sentenced prisoners have the right to the benefit of the least severe of the prescribed punishments. As Courts are now clothed with the power to postpone consideration of parole for sentenced offenders, the public interests demand that they have full knowledge of the offender's transgression and personal circumstances, including knowledge of the offender's conditions, when parole is considered. In other words, knowledge and an assessment by Courts of facts relevant to the conduct of the prisoner, after the imposition of sentence, is usually a must.*"<sup>37</sup>

69. Of significance is that Annexure E, in addition to the criteria relied upon by the respondents to disqualify the applicant, also lists "developing/repairing implements or devices to save the State money", as highly meritorious service deserving of a special remission of sentence of 6 months. Of significance also is that Annexure E, expressly acknowledges that whilst it is not always practically possible for the Case Management Committee to ascertain rigid norms for actions/behaviour that may be regarded as deserving, Annexure E merely provides some guidelines as to what may be regarded as deserving. That every action/behavioural incident must be evaluated according to merit.<sup>38</sup>

70. It is so that the only reason for the applicant's disqualification for remission is that, according to the respondents his acts/conduct are not of such a nature that the performance of same actually put him in danger; to wit:

*"If annexure E is studied it is clear that all the actions that are seen as qualifying actions are of such a nature that he/she who performs them actually puts him/herself in danger."*<sup>39</sup>

71. The foregoing contention stands in stark contrast with the following. First, as alluded above, Annexure E itself regards the development/repair of an

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<sup>37</sup> Emphasis supplied

<sup>38</sup> Clause 2.1(a)-(e), Chapter 23: *Granting of Amnesty/Special Remission of Sentence*

<sup>39</sup> p48, Record

implement or device to save State money as deserving of a six (6) months remission. It can hardly be said that the said activity puts the offender concerned in danger. Indeed, whether or not an offender places him/herself in danger in the course of conducting him/herself highly meritoriously, seems to be only one of the factors to be taken into account and not determinative. Second, Annexure E is merely a guideline and nothing more. It follows from the foregoing that the respondents are empowered and required to evaluate every action/behavioural incident according to its merits.<sup>40</sup> This was not done. Nor was Section 80 of the Act read purposively by the respondents.

72. Third, even though not defined by the Act itself, the import of this expression has fortunately already been judicially considered. A brief comparative analysis of relevant case law as to what may amount to “*highly meritorious service*” within the contemplation of Section 80 of the Act, read purposively, is therefore apposite. Significantly, the Court in **Baloyi v Minister of Correctional Services and Others**<sup>41</sup> after reviewing what amounted to “highly meritorious service” seminally remarked as follows:

“[17] *What is common to all these examples is that they consist in ‘services’ rendered to other people or to the institution in which the prisoner is incarcerated. The use of the word ‘service’ is indicative of the type of action or behaviour which the Legislature had in mind: some act of helpfulness to another, some deed towards the benefit of the institution...*”

73. In **Henry v Minister of Correctional Services & Others**<sup>42</sup>, the prisoner was granted special remission for working with other inmates starting a hand-skills project, which contributed towards the rehabilitation of other inmates. Of significance about the **Henry** case is the following. The said prisoner was effectively imprisoned for 17 and quarter years in 1996 for robbery and other related crimes under the erstwhile **CORRECTIONAL SERVICES ACT**.<sup>43</sup> He

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<sup>40</sup> Clause 2.1(a)-(e), Chapter 23: *Granting of Amnesty/Special Remission of Sentence*

<sup>41</sup> (46475/2012) [2012] ZAGPJHC 66 (19 April 2012)

<sup>42</sup> [2006] JOL 18079 (W)

<sup>43</sup> Act 8 of 1959

managed to adjust remarkably well to prison life. He was recruited to teach fellow inmates with effect from 1998. When he arrived at Leeuwkop Medium-C Prison, he continued to teach and evinced a marked improvement in his attitude towards other inmates and warders.

74. In 2001 he teamed up with six other inmates and out of their own pockets started a very successful hand-skills project. For this rewarding effort, they were each recognised by the Head of Prison and each granted a 3-month special remission for meritorious service to the Department towards the rehabilitation of other inmates. He continued being involved in other prison activities and spent a lot of time and effort on teaching as well as his studies.
75. It is also trite now that when interpreting any legislation and when developing the common law or customary law, it is now incumbent on every Court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights.<sup>44</sup> In **Minister of Police and Another v Du Plessis**, at paragraph [15], Navsa ADP, writing for the Court, emphasised the sanctity of the right to liberty as follows:<sup>45</sup>

*“Our new constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which have always even in the dark days of apartheid been judicially valued, and to ensure that excesses of the past would not recur. **The right of liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values human dignity, the advancement of human rights and freedom. Put simply, we as society place a premium on the right of liberty.**”*<sup>46</sup>

76. It is so that in **Makate v Vodacom**, the Constitutional Court accentuated that the import of Section 39(2) is that Courts are *“bound to read a legislative provision through the prism of the Constitution”*.<sup>47</sup> This Court therefore accepted that since the freedom and security of the person is implicated in

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<sup>44</sup> Section 39(2) of the Constitution

<sup>45</sup> 2014 (1) SACR 217 (SCA)

<sup>46</sup> Emphasis supplied

<sup>47</sup> **Makate v Vodacom (Pty) Ltd** [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at para 87



these proceedings, it is incumbent on this Court to construe the relevant law to promote the spirit, purport and objects of the Bill of Rights.

77. It is so that if a provision is reasonably capable of two interpretations, Section 39(2) requires the adoption of the interpretation that “*better*” promotes the spirit, purport and objects of the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional. Section 39(2), however, is not a licence to ignore the text of legislation. The legislation must be “*reasonably capable*” of bearing the assigned interpretation.<sup>48</sup>
78. It is also so that if a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, our Courts are required to adopt the interpretation that would render the provision compatible with the Constitution. In **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others**, the Constitutional Court enjoined judicial officers to prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the Section.<sup>49</sup>
79. As Sachs J put it in **South African Police Service v Public Servants Association**, Section 39(2) “*require[s] that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution.*” This is because Section 39(2) specifically, and the Constitution as a whole, embraces a new approach to interpretation of law. It requires Courts to “*prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees*”.<sup>50</sup>

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<sup>48</sup> **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another** 2009 (1) SA 337 (CC at paras 46, 84 and 107

<sup>49</sup> 2001 (1) SA 545 (CC) at paras 22-23

<sup>50</sup> **South African Police Service v Public Servants Association** [2006] ZACC 18; 2007 (3) SA 521 (CC) at para 20

80. The Constitutional Court has also cautioned that whether or not the legislation implicates constitutional rights, our Courts have eschewed the approach of “*blinkered peering at an isolated provision in a statute*” to determine its meaning. As Ngcobo J (as he then was) explained in **Bato Star Fishing v Minister of Environmental Affairs and Tourism and Others**:<sup>51</sup>

*“The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.”*

81. The following can be deduced from the foregoing overview with regard to what our Courts have considered to be “*highly meritoriously*” action within the contemplation of Section 80(1) of the Act. First, that the expression “*highly meritorious service*” clearly connotes “*services*” rendered to other people or to the institution in which the prisoner is incarcerated. Second, the use of the word “*service*” is indicative of the type of action or behaviour which the Legislature had in mind; to *wit*: some act of helpfulness to another, some deed towards the benefit of the institution.
82. It can also be deduced from the foregoing that for a conduct of an offender to amount to “*highly meritorious service*” as contemplated in Section 80 of the Act, such conduct or deed need not be perilous to the offender, to qualify as such.
83. In **Elrich v Minister of Correctional Services**<sup>52</sup> where the Head of a prison had misinterpreted his power as to the segregation of categories of prisoners, it was held that he erred materially in believing that he had no discretion when in fact he did have such, the error was material in that it resulted in him not applying his mind properly. By parity of reason, this Court determines that the respondents erred materially in believing they severally had no discretion, when in fact they did. This error is reviewable,

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<sup>51</sup> 2004 (4) SA 490 (CC)

<sup>52</sup> 2009 (2) SA 373 at para 40

because the respondents were blinkered by an enquiry into whether or not the applicant's actions placed his life in danger.<sup>53</sup> The common denominator in these acts is also the fact that all amount to acts of helpfulness to another or amount to some deed towards the benefit of the institution. This would include the employment of Mr Jacobus Jafta at his farm, if the former was still on parole.

84. In **Pharmaceutical Manufacturers Ass of SA and Another: In re Ex parte President of RSA and Others**,<sup>54</sup> the Constitutional Court seminally said the following 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 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."*

85. The question whether the impugned decision is rationally related to the purpose for which the power was given calls for an objective enquiry because what the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. It should be so since the Constitutional Court said:

*"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*

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<sup>53</sup> *Elrlich (supra)*

<sup>54</sup> 2000 (2) SA 674

*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.*"<sup>55</sup>

86. Section 36 of the Constitution expressly stipulates that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. Except as provided in Section 36(1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.
87. Literally nothing in Section 80 of the Act, connotes that actions that are seen as qualifying actions are of such a nature that he/she who performs them actually puts him/herself in danger.<sup>56</sup> It is so since the grammatical and ordinary sense of the expression "*highly meritoriously*" means a "*deserving reward or praise to a high degree.*"<sup>57</sup> The specific wording of the Section therefore cannot be read to limit the factors that may be taken into account in the definition of "*highly meritorious service.*"
88. The foregoing, notwithstanding the decision of the first respondent, rigidly limited itself to Annexure E, which is an internal document that seems to have been developed merely as a guide that refers to the factors that may be regarded as deserving for special remission. Whilst it is accepted that in our law that guidelines can be "*of enormous assistance in ensuring consistency and predictability in the application of policy, especially when the decision is a complex one requiring the weighing and balancing of many different factors.*"<sup>58</sup>

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<sup>55</sup> My emphasis

<sup>56</sup> p48, Record

<sup>57</sup> Concise Oxford English Dictionary, Revised 10<sup>th</sup> Ed

<sup>58</sup> **BP Southern Africa v MEC** at 155A-B

89. It is trite in our law that in accordance with the duty to exercise authority, administrators may not act in ways that effectively prevent their discretionary powers from being exercised in the manner envisaged by the empowering provision. The fact that Annexure E itself regards the development of implements or devices to save the State money as a conduct which may be regarded as deserving, belies the respondents' contention that all the actions that are seen as qualifying actions should be of such a nature that he/she who performs them, actually puts him/herself in danger.
90. In **Kemp NO v Van Wyk** the Supreme Court of Appeal held that an administrator was entitled to evaluate an application in light of the directorate's existing policy "*provided that he was always independently satisfied that the policy was appropriate to the particular case and did consider it to be a rule to which he was bound; conditions which were satisfied in that case*".<sup>59</sup> That Court said the following at paragraph 1:
- “[1] *A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but generally there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this Court in Britten v Pope 1916 AD 150 and remain applicable today.*”<sup>60</sup>
91. In **Johannesburg Town Council v Norman Anstey & Co**, a local authority's decision not to grant a tearoom licence was found to have been

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<sup>59</sup> 2005 (6) 519 (SCA)

<sup>60</sup> My emphasis

dictated by the general application of its rule and thus failed to treat the application on its own merits. Similarly, in **Moreletta Sentrum v Die Drankraad**, a liquor board's decision was set aside on the grounds that the administrator's mistake was to apply the policy as a hard-and-fast rule in circumstances that justified a departure from the policy and allowed itself to be blinded by same. The germane question herein is thus whether the respondents' strong headed reliance on Annexure E severally, precluded them from properly exercising the powers bestowed them in terms of the empowering provision. The answer is indubitably in the affirmative.

92. Section 6(2)(h) and (i) of PAJA, expressly empower this Court to judicially review an administrative action if the exercise of the power or the performance of the function authorised by an empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or the action is otherwise unconstitutional or unlawful or the action is otherwise unconstitutional or unlawful.
93. The impugned decision was therefore not based on accurate findings of fact or correct application of the law. That being so, no rational basis existed for the respondents' conclusions because the impugned decision cannot be said to be rationally connected to the information the respondents, as required by Section 6(2)(f)(ii)(cc) of PAJA.<sup>61</sup> In the premise, to the extent that the first respondent failed to apply Section 80 of the Act, this Court is of the considered opinion that it misdirected itself, erred materially on a point of law.
94. It follows from the foregoing that the respondents' decision to disregard the applicant's listed conduct for special remission of sentence for highly meritorious service is not only materially influenced by an error of law, but was taken because of irrelevant considerations that were taken into account and/or irrelevant considerations that were considered.

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<sup>61</sup> *Chairman of the State Tender Board v Digital Voice Processing; Chairman of the State Tender Board v Sneller Digital and Another* 2012 (2) SA 16(SCA) at para 40

95. It is against this backdrop that this Court came to the ineluctable determination that the respondents' decision to disqualify the applicant for consideration for special remission of sentence, solely on the basis that none of his actions come near to being regarded as highly meritorious, was materially influenced by an error of law. It follows that the decision to deny the applicant recognition for meritorious service in terms of Section 80 of the Act, is unjustified.
96. It is trite that an action is reviewable and may be set aside if the action is materially influenced by an error of law or the action itself is not rationally connected to the reasons given for it by the administrator; or the action is otherwise unconstitutional and unlawful. In the result, same falls to be judicially reviewed and set aside.
97. It is so that in terms of Section 42(3) of the Act, a sentenced offender must be informed of the contents of the reports submitted by the Case Management Committee to the Parole Board or the National Commissioner and be afforded the opportunity to submit written representations to the Parole Board or National Commissioner, as the case may be. A mere reading of the said Section reveals that it is a mandatory and a material procedural requirement or condition prescribed by the empowering provision.
98. This Court is satisfied that the applicant has exhausted all available internal remedies provided for in the Act. It was therefore not necessary for the applicant to invoke any provision of PAIA in order for him to access what the respondents are statutorily obliged to afford him. This, notwithstanding, nowhere in the answering affidavit is it evinced that the applicant was afforded the opportunity to submit any written representations to the Parole Board or National Commissioner, as the case may be, nor is there any evidence before this Court that the applicant ever took any note in writing regarding the final decision conveyed to him.

99. All that the respondents content themselves in paragraph 25 of the answering affidavit with, is a bare unsubstantiated denial. It follows that the applicant's averments that he was not afforded any opportunity to make written representations or that he was not called to appear before the Case Management Committee for feedback, but was only called to the office of the Head of the Centre for feedback, stand undisputed. In the premise, this Court finds that the impugned decision was arrived at in a procedurally unfair manner.
100. It is common cause that Mr Ndlovu, the Head of the Centre, appointed Mr Du Plessis to investigate and determine whether the applicant qualify for special remission. The applicant averred that, to the extent that the Centre was well aware of the animosity between himself and Mr Du Plessis, he should never have been appointed as such. Alternatively, he should have recused himself to maintain fairness and impartiality during the investigation.
101. The respondents, for their own part, averred that Mr Du Plessis was not or suspected of being biased and his investigation was procedurally fair. That Mr Ndlovu would not have appointed Mr Du Plessis if he was aware that there was any rift or animosity extant between the latter and the applicant. Even though the averment of the alleged animosity is somewhat lacking in specificity, the respondents' bare denial, without more, is not sufficient to generate a genuine or real dispute of fact. Mr Du Plessis himself could have delivered a supplementary of confirmatory affidavit in this regard. He did not do so.
102. Whilst it has been well said that in motion proceedings this Court must take "*a robust, common sense approach*" to disputes on motion and not to hesitate to decide an issue on affidavit merely because it may be difficult to do so.<sup>62</sup> It is also so that this approach must be adopted with caution and that this Court should not be tempted to settle disputes of fact solely on probabilities emerging from the affidavits. Given this Court's determination,

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<sup>62</sup> *Soffiantini (supra)*



it is deemed unnecessary to decide this issue. This Court therefore did not do so.

103. Section 6(g) and (i) render an administrative action judicially reviewable if the action concerned consists of failure to take a decision or the action is otherwise unconstitutional or unlawful. Section 237 of the Constitution expressly requires all constitutional obligation to be performed diligently and without delay. The applicant also prayed that the failure of the Minister and/or the National Commission to make a decision in relation to his appeal dated 27 February 2023 be declared invalid, unlawful and unconstitutional.
104. The respondents strenuously disputed the foregoing and in amplification of the denial maintained that on 22 May 2023, the National Commissioner furnished the applicant with a response that he does not qualify for special remission parole annexed to the papers and marked "SF3." A relief can only be granted where there is a continued infringement of an applicant's rights. After a decision has been taken, whether positive or negative, it is no longer possible to review and have declared unlawful the failure to take the decision.
105. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which is extant, if the Court is to avoid giving advisory opinions on abstract propositions of law.<sup>63</sup> There is also certainly no basis for relief to be granted on a footing wholly different from the grounds set out in the application.<sup>64</sup> That being so, this Court determines that the right to that relief has fallen away because the decision has been taken.
106. The applicant alleged that his name was originally on the list of offenders but was thereafter removed, despite the fact that he was informed by one Mr Louis September, that he had to provide his address for confirmation. To this extent, the applicant attached an email annexure from one Mr Jaco Mathee (CMA-Disposal Supervisor of the Department) addressed to one

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<sup>63</sup> *National Coalition for Gay and Lesbians v Minister of Home Affairs and Others* 2000(2) SA 1 (CC) para 19

<sup>64</sup> *Thusi v Minister of Home Affairs and 71 Others* 2011(2) SA 475 at para 31

Louis September, headed: “CSPB case for early release; HCC Cases for early release...” with the said list attached.

107. That the applicant has not been given any written reasons for this. His speculation is that it is possible, that this was due to some nefarious political interference. The respondents deny these allegations and maintain that the applicant was not eligible for special dispensation parole by virtue of him not meeting certain requirements in Circular 13 of 2019/20, read together with the Sections 80 of the Act.
108. In response to the foregoing, the respondents simply averred that it is not known whether these allegations are true or not and therefore same was put in issue.<sup>65</sup> This is queer, to say the least. It is because an affidavit is not a pleading. Public officials must comply with the obligations mentioned in Section 195 of the Constitution, which include a high standard of professional ethics.<sup>66</sup> The respondents cannot content themselves with bare or unsubstantiated denials<sup>67</sup> in an answering affidavit unless, of course, there is no other way open to them and nothing more can be expected of them.<sup>68</sup>
109. Whilst the competency to grant special remission of sentence to a prisoner serving a determinative sentence is within the discretion of the first respondent, such a discretion cannot be exercised arbitrarily or capriciously. The prisoner who is adversely affected by same must take note in writing regarding the final decision conveyed to him/her.<sup>69</sup> The applicant’s averment that he was not afforded this opportunity is not seriously disputed.
110. In **Minister of Justice and Correctional Services v Walus**, the Supreme Court of Appeal at paragraph 15 to 17 held as follows:

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<sup>65</sup> Para 18, p94, AA

<sup>66</sup> **Public Protector v South African Reserve Bank** 2019 (9) BCLR 1113 (CC)

<sup>67</sup> **Room Hire v Jeppe Street Mansions** 1949(3) SA 1155(T) at 1163 and 1165

<sup>68</sup> **Whitman v Headfour** 2008(3) SA 371 (SCA) at 375G

<sup>69</sup> Para 2.2, Chapter 23: *Granting of Amnesty/Special Remission of Sentence*

“[15] Our Courts have, under common law, also been under caution to guard against the possible blurring of the distinction between procedure and merit for the same reason, articulated as follows:

*‘Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.’*<sup>70</sup>

[16] Summed up, the principles are the following. The inevitability of a certain outcome is not a factor to be considered in determining the validity of the decision. Therefore, neither party may argue that the consideration of the victim impact statement by the minister would make no difference. The proper approach is rather to establish, factually, and not through the lens of the final outcome, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. In this exercise the materiality of any deviance from the legal requirements must be taken into account, where appropriate, by linking the question of compliance to the purpose of the provision before concluding that a review ground under PAJA has been established. **So, if the process leading to the decision was compromised, it cannot be known with certainty what the administrator would have finally decided had the procedural requirements been properly observed.**”<sup>71</sup>

111. It has been well stated that it is through fair processes that fair decisions are generally reached.<sup>72</sup> In the absence of any explanation from the respondents, especially Messrs Louis September and Jacob Matthee, both of whom it is assumed are still in the employ of the respondents or alive, this Court is constrained to find, for the purposes of this application, that the removal of the applicants from the list of cases for early release was not only procedurally unfair, but arbitrary and capricious.

<sup>70</sup> Wade *Administrative Law* 6 ed (Oxford University Press, New York 1988) at 533-4

<sup>71</sup> Emphasis supplied

<sup>72</sup> NUM v Lebanon Gold Mining Co (1994) 15 ILJ 585 (LAC) at 586.

112. In **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others**, the pioneering decision which the Constitutional Court as the crow flies, relied on the principle of legality and held thus:<sup>73</sup>

*“[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses the principle of legality – is generally understood to be a fundamental principle of constitutional law.”*<sup>74</sup>

*It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they exercise no power and perform no function beyond that conferred upon them by law...”*<sup>75</sup>

113. In **All Pay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & Others**. There the Apex Court, dealing with questions of procedural fairness and lawfulness in a procurement matter, said:<sup>76</sup>

*“[23] To the extent that the judgment of the Supreme Court of Appeal may be interpreted as suggesting that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in a given matter, that misapprehension must be dispelled. So too the notion that, even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.*

*[24] This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome;*

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<sup>73</sup> 1998 (12) BCLR 1458 (CC)

<sup>74</sup> para 56, *supra*

<sup>75</sup> para 56, *supra*

<sup>76</sup> 2014 (1) SA 604 (CC) at para 23-25

*the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. **If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.***<sup>77</sup>

[25] *Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy.*<sup>78</sup>

114. With regard to whether or not the matter should be remitted, the following was submitted on behalf of the applicant. That there is no reason to remit the issue. That it is so because this Court can very well calculate the relevant period on its own. That it has been shown how the period ought to have been calculated lawfully in a manner which complies with the Constitution. That once the period is correctly calculated, there is no basis to refer the matter back to the Department.
115. That this case is exceptional considering the following factors: (a) the applicant remains in prison beyond the date he should have lawfully remained; (b) the evidence has shown selective targeting and bias affection towards the applicant; (c) the evidence has shown arbitrariness on the part of the respondents who released certain unqualified inmates; and (d) the record has shown falsification by the respondents' deponent of the evidence under oath in an attempt to mislead the Court.

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<sup>77</sup> My emphasis

<sup>78</sup> Ditto

116. That there are no grounds advanced why this Court is not in as good a position as the Department to take the decision as to how many months should be taken off the applicant's sentence. Whilst a period between three (3) and six (6) months was suggested as the appropriate bench mark, it was submitted three (3) months would be just and equitable. In the premise, it was submitted for the applicant that the correct approach is to make a determination of the applicant's period of remission.

117. This Court has given the foregoing serious and very serious and careful consideration. The considerations which may come to play when the question facing the Court is how to deal with the consequences of setting aside a decision to refuse parole were set out in **Walus** by the Chief Justice; thus:

*“[87] In **Trencon** 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, 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.***

*[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.'* (Footnotes omitted)

[89] ***One of the exceptions recognised in Trencon is where the decision is a foregone conclusion. 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 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.'***<sup>79</sup>

118. Masipa J in the **Henry** case, instead of remitting the matter to the relevant authorities for reconsideration, declared him suitable for placement on parole as appeared on the recommendation made by the chairperson of the CMC. This decision was based on *inter alia* the finding that; (a) the end result was in any event a foregone conclusion and it would have merely been a waste of time to order the tribunal or functionary to reconsider the matter; (b) much time had already unjustifiably been lost by an applicant to whom time was in the circumstances valuable; (c) the further delay by reference back was significant in the context; and (d) the tribunal or functionary had exhibited bias or incompetence to such a degree that it would have been unfair to require the applicant to submit to the same jurisdiction again.

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<sup>79</sup> Emphasis supplied

## **CONCLUSION:**

119. This Court did not find that the respondents exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again. Whilst the impugned decisions were procedurally unfair, same was in the main, genuinely but materially influenced by an error of law and the *ratio* in **Smith (supra)**. This Court is therefore of the considered opinion that this is not one of those cases where this Court would be justified in substituting its own decision for that of impugned administrative body.
120. Clause 2.1(f) of Chapter 23: Granting of Amnesty/ Special Remission of Sentence expressly stipulates that a recommendation for the granting of special remission of sentence is also justified when a Court motivates or recommends, under certain circumstances, the special remission of sentence considered. Clause 2.1(g)(*ibid*), for its own part stipulates that when correspondence in the above regard is received, it must be submitted via the Area Manager to the Provincial Commissioner, together with a recommendation to the Correctional Supervision and Parole Board for decision, within a period of twenty-one (21) days. This Court will order accordingly.
121. There is no reason why the applicant should be out of pocket with regard to costs because he is substantially successful. The costs therefore must follow the event.

## **ORDER:**

122. In the premise, the following Order is granted:

**(a) THIS COURT HEREBY DISPENSES WITH AND CONDONES THE APPLICANT'S NON-COMPLIANCE WITH THE FORMS AND**



**SERVICE PROVIDED FOR IN THE UNIFORM RULES OF COURT AND THE MATTER IS ENROLLED AND HEARD URGENTLY.**

- (b) THE RESPONDENTS' LATE FILING OF THE ANSWERING AFFIDAVIT IS HEREBY CONDONED.**
- (c) THE DECISION OF THE UPINGTON CORRECTIONAL SUPERVISION AND PAROLE BOARD DATED 29 SEPTEMBER 2020 IS HEREBY REVIEWED AND SET ASIDE.**
- (d) THE DECISION OF THE NATIONAL COMMISSIONER DATED 22 MAY 2023 IS HEREBY REVIEWED AND SET ASIDE.**
- (e) THE APPLICANT'S APPLICATION FOR SPECIAL REMISSION OF SENTENCE FOR HIGHLY MERITORIOUS SERVICE IS HEREBY REMITTED TO THE UPINGTON CORRECTIONAL SUPERVISION AND PAROLE BOARD FOR A DECISION WITHIN A PERIOD OF TWENTY-ONE (21) DAYS OF THE DATE HEREOF.**
- (f) THE DEPARTMENT IS HEREBY DIRECTED TO PAY THE COSTS OF THIS APPLICATION, INCLUDING THE COSTS OF TWO COUNSEL.**

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**JUDGE APS NXUMALO**  
HIGH COURT OF SOUTH AFRICA  
NORTHERN CAPE DIVISION  
KIMBERLEY

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Edited:	<b><u>YES</u></b>
Revised:	<b><u>YES</u></b>
Checked:	<b><u>YES</u></b>