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Parole power play: the correctional services minister's power to revoke parole unilaterally

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Samevatting

PAROOLMAGSPEL: DIE MINISTER VAN KORREKTIEWE DIENSTE SE BEVOEGDHEID OM PAROOL EENSYDIG TE HERROEP

In hierdie artikel ondersoek die outeurs die besluit van Suid-Afrika se minister van korrektiewe dienste, Pieter Groenewald, om die parool van twee misdadigers wat elk tot lewenslange gevangenisstraf gevonnis is, te herroep. Frans du Toit en Theuns Kruger is in 1994 skuldig bevind aan die grusame aanval op Alison Botha. Die besluit om parool toe te staan en later weer te herroep, wat onlangs geneem is, was die eerste in sy soort. In Suid-Afrika, wat tans gebuk gaan onder geweldige hoë statistieke van geslagsgebaseerde geweld, het hierdie debat dus hernieude belangstelling ontketen. Hierdie artikel ondersoek die Suid-Afrikaanse wetlike raamwerk ten aansien van wat presies parool sou beteken, insluitend die ingewikkelde prosedurele aspekte daarvan, asook die diskresionêre bevoegdhede wat aan die minister verleen word in hierdie verband. Die verskillende soorte parool word verduidelik, met inbegrip van die faktore wat in ag geneem word tydens oorweging daarvan, asook die instansies wat verantwoordelik is daarvoor.

'n Vergelykende ontleding met paroolstelsels in Engeland en Nederland dui aan dat beduidende verskille te bespeur is, wat veral betref aspekte soos: prosedurele duidelikheid, deursigtigheid en slagofferbetrokkenheid. Voor die hand liggende tekortkominge het aan die lig gekom.

Kritiek word gelewer op die potensiële misbruik van ministeriële magte in Suid-Afrika. Die daadwerklike invloed wat politieke invloed in paroolbesluite al in die verlede gespeel het, word beklemtoon. Dit wek uiteraard kommer oor die regverdigheid van paroolbesluite in die algemeen en rondom die stelsel as sulks. Met verwysing na judisiële ingrepe word gedemonstreer hoe die howe al in die verlede ministeriële besluite moes hersien het om prosedurele billikheid en grondwetlike rasionaliteit te bereik.

Uiteindelik bevraagteken die skrywers of die minister se eensydige bevoegdheid om soms lukraak parool te herroep toepaslik is, gegewe die moontlike vatbaarheid vir magsmisbruik in die afwesigheid van regterlike oorsig as pertinente vereiste. Daar word aan die hand gedoen dat dit hoog tyd is dat die wetgewer moet ingryp en eens en vir altyd regsekerheid skep oor parool as sodanig. Die huidige toedrag van sake is te moeilik verstaanbaar vir beide die publiek sowel as wetstoepassers en bewerkstellig geensins eenvormigheid nie – vandaar, derhalwe die huidige gebrek in vertroue deur die samelewing jeens parool en alles daarmee saam.

1. Introduction

On 4 February 2025, Groenewald, the newly appointed minister of correctional services, cancelled the parole of Frans du Toit and Theuns Kruger, two offenders serving a life sentence. [1] The minister stated that his main reason for cancelling the parole is the protection and security of the community particularly where violence has been committed against women and children. [2]

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This is the first time in South African history that a minister has exercised this power in terms of the Correctional Services Act 111 of 1998, and it has sparked much debate between legal academics and large media houses. The particular debate is about whether this action falls within the minister's powers, and, if so, whether the minister should even have such a power.

This article will address parole in South Africa in general, provide a comparative analysis of the South African parole system in comparison to other international systems and consider the legality of the actions of the minister of correctional services.

2. Background

On 18 December 1994, Alison Botha was abducted by two men, Frans du Toit and Theuns Kruger, who came to be known as the Ripper Rapists. The two men drove Botha out to the coast of then Port Elizabeth (Gqeberha), [3] stabbed her 30 times in the abdomen, slit her throat to the point where she was almost decapitated, brutally raped her and left her for dead. Alison crawled to the road to flag down any possible passers-by, holding her head to her body and clutching her entrails to her abdomen. [4] Du Toit and Kruger were sentenced to life imprisonment. [5]

On 4 July 2023, Du Toit and Kruger were released on parole after serving 28 years in prison. [6] The two men were released without the authorities consulting Alison Botha. She was not invited by the authorities tasked with deciding on parole to make any submissions for consideration and she was merely informed of such decision via an email that they would first be released on the above date for three months on day parole and thereafter on normal conditional parole. [7] The incident caused public outrage at the time because of the brutality of the crime, and also because of the high rate of gender-based violence in South Africa – so much so that the former minister of police, Cele, referred to it as a "pandemic". [8] According to the media statement released by the department of correctional services on the South African government website, the high rate of gender-based violence against women and children was minister Groenewald's precise reason for revoking Du Toit and Kruger's parole.

In order to understand why the minister was able to cancel their parole, the parole procedure must be understood.

3. Parole in South Africa

Parole can be considered as a period in which offenders who have served the prescribed minimum detention period of their sentence in a correctional centre and are conditionally released to serve the remainder of their sentence in the community under certain conditions and supervision.

Parole must be differentiated from day parole, medical parole and correctional supervision. Day parole is a form of community correction which precedes parole, assisting the offender to integrate more successfully into society by allowing the

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offender to be released into the community for the day, but such offender is then required to return to the correctional centre after hours. [9] Medical parole occurs when an offender suffers from a highly contagious disease or is terminally ill and upon the recommendation of more than one medical practitioner or a specialist physician, the minister or commissioner or the parole board may approve the release of such offender to allow them to die in a more dignified manner. [10] Correctional supervision is a sentencing option used by the courts and is served within the community. [11] This type of sentence requires an offender to comply with certain conditions and render community service. [12]

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It must be stated from the outset that parole is not a right, it is a privilege. [13] In accordance with section 73(1) of the Correctional Services Act, [14] anyone convicted of an offence must remain imprisoned for their full sentence. Thus, the expectation is that if someone receives a life sentence, they will remain incarcerated for the duration of their life. In particular, that will be the expectation of the victims who survive the violent crimes which result in their offenders being incarcerated for lengthy periods of time.

In addition, a prisoner does not automatically qualify for release on parole after having served a minimum period of their sentence. Therefore, every case has to be determined on its own merits. [15] A prisoner does, however, have a right to be considered for parole after application through the parole procedure as prescribed by the Correctional Services Act and as determined by the relevant authority to grant parole. [16] It is the responsibility of the offender themselves to make the application for parole to the parole board or the minister to be considered for release.

The authors would like the reader to pause and consider at this point whether it is fair for an offender to spend their life in prison waiting for the opportunity to possibly be considered for parole and whether this gives effect to the rights to dignity and equality. It has been suggested that the conditions in South African prisons are such that even death could be considered more humane and dignified than serving a life sentence incarcerated in a South African prison. [17]

After sentencing, when a prisoner arrives at a correctional centre they must be assessed by a case management committee. Case management committees are established in terms of section 52 of the act. [18] This is a multi-disciplinary committee that is established at each correctional centre, [19] and usually consists of custodial staff and specialists who are required to: determine a sentencing plan for each offender; conduct periodical interviews of each offender to determine their progress and amend the plan in accordance with the results of their interviews; and submit a report to the correctional supervision and parole board regarding their offence, their

previous criminal record, their disciplinary record, likelihood of recidivism and the possibility of parole and the conditions to be applied. [20]

The determination of releasing a prisoner on day parole, parole, medical parole or correctional supervision before the expiration of their term of incarceration is made by either the correctional supervision and parole board or the minister of correctional services (if they are sentenced to life imprisonment). [21]

The correctional supervision and parole board is constituted as follows: [22] a chairperson; a vice-chairperson; an official from the department of correctional services; and two members of the community.

The correctional supervision and parole board, after having considered the report on any sentenced offender serving a determinate sentence of more than 24 months, provided to it by the case management committee and having regard to any other relevant information, has the powers to: [23]

i place a sentenced offender under correctional supervision, day parole, parole or medical parole;

ii where the offender has been declared a dangerous criminal in terms of section 286A of the Criminal Procedure Act, [24] make recommendations to the court on granting or placement of such offender under correctional supervision or parole; and

iii where the offender is serving a life sentence, make recommendations to the minister on granting or placing such offender under correctional supervision or parole.

Following the implementation of the Correctional Services Act in 1998, an offender sentenced to life imprisonment must serve 25 years before they can be considered for parole, upon which the application for parole must be referred back to the court of first instance for approval. [25] Alternatively, where the offender has reached the age of 65 and has served at least fifteen years of their sentence, they can be considered for parole. [26]

With respect to life offenders who were sentenced and entered the system before 1998 and having served at least 20 years of their sentence, their application for parole must be referred to the minister of correctional services for consideration. [27] The minister has the power to reject any recommendation of parole received from the correctional supervision and parole board and make recommendations in respect of their treatment, care, development and support; and on recommendation from the correctional supervision and parole board, and the advice of the national council, change the conditions of or withdraw parole from any prisoners. [28] Where the minister refuses or withdraws parole, the decision must be reconsidered by the minister in two years; [29] the same applies to such a decision made by a court or the correctional supervision and parole board.

It is not uncommon for ministers repeatedly to deny parole of offenders who are serving out a life sentence. This was the case with respect to Janusz Walus. Walus was the co-accused of Derby-Lewis in the assassination of the anti-apartheid leader, Chris Hani. [30] Walus also received the death penalty which was later commuted to a life sentence in 2000. [31] From 2011 to 2022, Walus made four unsuccessful applications for parole which were all denied by the successive ministers of justice and correctional services who cited the seriousness of the crime and the remarks made during sentencing as the reasons for the denial. [32] Walus brought the application in 2022 to the constitutional court after the minister's denial in March 2020 and after denial of the application by the high court and the supreme court of appeal. [33] Walus attacked the minister's decision on the grounds that it was irrational as the reasons the minister relied upon for the denial would never change and could not progressively be improved by the offender. [34] The constitutional court determined that no matter how serious a crime is for which an offender is sent to jail, the court does not have any power to determine that such an offender should not be considered for parole for a period after serving 25 years in prison. [35] Zondo CJ stated that the correctional services department's policy requires that a prisoner should, as far as reasonably possible, be placed on parole as soon as they become eligible and that Walus become eligible in 2005 which at the time was almost 20 years earlier. [36] The court concluded that the decision of the minister to deny parole was irrational, and set the decision aside. [37] The court ordered that Walus be released on parole within ten days of the judgment on the conditions to be determined by the minister for a period of three years. [38] Walus remained in South Africa to serve his parole period until December 2024, whereafter he was put on a flight back to Poland, his home country. [39]

Offenders who have been declared dangerous criminals and sentenced in terms of section 286A of the Criminal Procedure Act [40] must be referred to the court on the date determined thereby for parole. [41]

Habitual criminals should ordinarily serve a sentence of fifteen years, but can be considered for parole after serving at least seven years of their sentence. [42]

The department of correctional services recognises that it is not in the interests of offenders to serve the full period of their sentence in a correctional centre as this will not promote an effective re-integration into society. [43] It is imperative that each offender's case be considered individually and on its own merits in order to (i) determine whether the offender has been rehabilitated, (ii) does not pose a potential

danger or risk to society by being released, and (iii) is fully aware of the harm their crime caused. [44]

When determining an offender's release on parole the correctional supervision and parole board and the minister will give special consideration to the type of crime committed by the offender, the circumstances surrounding the crime, and the length of the sentence originally prescribed, and balance these considerations against the interests of society. [45] In practice, consideration is usually given to any relevant aggravating and mitigating circumstances at the time of committing the crime, during the time of the trial and even during incarceration. [46] Consideration is also usually given to the victim and/or their families regarding their feelings toward the possible release of an offender.

The process of consideration of release on parole was best explained in *Derby-Lewis v Minister of Correctional Services*. [47] Derby-Lewis was

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convicted of the murder of prominent South African anti-apartheid leader, Hani. [48] Derby-Lewis was originally sentenced to death in 1993 with his co-accused Walus; however, this sentence was changed to a life sentence in 2000. [49] In 2008, Derby-Lewis applied to the Pretoria high court for an order of release on parole and to declare sections 136(1), 136(3)(*a*), 136(3)(*b*) and 136(3)(*c*) of the Correctional Services Act unconstitutional. [50] The sections were challenged on the basis that they subjected him to the provisions of the Correctional Services Act of 1959, [51] that it required him to serve twenty years before being considered for parole (this was later determined to be fifteen years), and that sections 136(3)(*b*) and (*c*) were unconstitutional and discriminatory in that they required his application for parole to be submitted to the national council for correctional services, which would make a recommendation to the minister regarding his placement on parole. [52]

Derby-Lewis had been considered and recommended for parole by the parole board in November 2007 after he had served fifteen years of his life sentence and he was therefore eligible to be released on parole in October 2008. However, Derby-Lewis was not released on parole in October 2008 because the national council for correctional services required the parole board to enquire from the widow of the murdered Hani whether she wished to make any representations regarding Derby-Lewis's release on parole. [53] Before Mrs Hani could make any representations to the parole board, Derby-Lewis brought an application requesting an order that parole be granted on conditions to be determined by the court. [54] The initial application was withdrawn and subsequently replaced by yet another application relating to this judgment, and this application was brought on an urgent basis in December 2008. [55]

In determining the application, the court was required to answer three questions: whether the court was empowered by statute to place an offender on parole; whether the deceased's widow had a right to make recommendations to the parole board; and

whether the court should place the applicant on parole. [56] The court concluded that the court itself was not empowered by the Correctional Services Act to place the applicant on parole. [57] Only the minister was empowered to make such a decision. Further, that even if the court had the authority to grant parole, it lacked sufficient information on the offender's trial, parole board proceedings, correctional centre records and amnesty applications in order to make such a decision. [58] With regard to allowing Mrs Hani to make representations regarding Derby-Lewis' parole, the court concluded that this was an implicit term in the 1998 Act. [59] The court dismissed the application.

Once a decision has been made to grant parole, certain conditions are imposed in terms of section 52. [60] Section 52 outlines a number of conditions which can be imposed on an offender. These include the following: placement under house detention; to seek employment; to pay damages to the victim/s; to take part in support or treatment programmes; to participate in mediation; to be restricted to one or more magisterial districts; to refrain from committing a criminal offence; to report to certain police stations or probation officers; and to refrain from visiting certain places or making contact with certain persons. [61] An important condition which is almost always mandatory in community corrections is community service, in order to restore justice and to restore the balance between the offender and their community. [62]

A supervision committee is required to oversee and review the measures and conditions of an offender on parole on regular intervals until the expiration of the offender's sentence. [63]

Where an offender on parole fails to comply with their parole conditions, the national commissioner can, depending on the nature and seriousness of the contravention, reprimand the offender, instruct them to appear before the correctional supervision and parole board, or issue a warrant for their arrest. [64] In terms of section 75(6), where the correctional supervision and parole board or the minister decides to cancel parole for any offender, the matter must be reconsidered by the correctional supervision and parole board or the minister within two years. [65] The cancellation of parole of a life serving offender (before 1998) can be done only by the minister in terms of subsection 6 if the decision to grant parole was made by a minister. [66] Where the offender does not have a valid explanation for non-compliance with any conditions or duty, their parole is likely to be revoked and they will be required to serve the remainder of their sentence in a correctional centre.

The correctional supervision and parole board usually makes the final decision regarding whether to revoke parole or not. However, it can be referred to the correctional supervision and parole review board for reconsideration by either the minister, the national commissioner or an inspecting judge. [67] A review board

comprises members of the national council and consists of: [68] a judge as chairperson; a director or deputy director of public prosecutions; a member of the department of correctional services; a person with special knowledge of the correctional system; and two representatives of the public.

The review board will make a decision based upon the record submitted to them in terms of section 75(8)(*b*), [69] or any such evidence that the minister or national commissioner may wish to place before the review board. [70] The review board will either confirm the decision or make its own decision and make any other order it deems necessary. [71] Reasons for their decision must be provided by the review board to the minister, the national commissioner, the correctional supervision and parole board and the offender. [72] It is important to note that the offender does not have access to the review board.

It is apparent from the above explanation that parole as a whole is quite a confusing concept and also a confusing procedure, with different timelines for different types of offenders. Notably in the *Derby-Lewis* case, it was stated by Van der Merwe J that the implementation of the parole laws

> "has led to uncertainty and confusion in the minds of prisoners, Correctional Services officials and even lawyers. . .I am of the view that urgent and real attempts should be made by all role-players to bring harmony and consistency in legislation concerning the Department of Correctional Services, and in particular the handling of parole." [73]

In addition, the regulations to the Correctional Services Act 111 of 1998 fully describe only the procedures of medical parole.

4. Comparative analysis

For the purpose of the comparative analysis the authors have chosen two countries to compare to the South African parole system – the English legal system, as the South African procedural law system is almost a direct reflection of that of the English system, and the Dutch legal system, as South Africa's legal principles and procedure stem from much of it.

4.1 The United Kingdom

The parole system of the United Kingdom is controlled by the ministry of justice and headed by the Lord Chancellor and secretary of state of justice. The parole board is created by the Criminal Justice Act. [74] Parole is referred to as "release on licence" in English law.

The parole board members are comprised as follows: [75] a person who holds or held a judicial office; a registered psychiatrist; a person who (in the opinion of the secretary of state) has knowledge and experience of the supervision or aftercare of discharged prisoners; a person who (in the opinion of the secretary of state) has a knowledge of the causes of delinquency or the treatment of offenders; and a person

who (in the opinion of the secretary of state) has experience of law enforcement in the United Kingdom.

In accordance with section 239, the duty of the parole board is to advise the secretary of state with respect to any matter that the secretary himself has referred to them regarding early release (parole) or recall of prisoners. [76] When considering any matter, the parole board must take into consideration any documents provided to it by the secretary, any other oral or written information obtained by the board, and any report of any interview held by a parole board member with the offender (if so required). [77]

The secretary of state can make any rules with respect to the proceedings of the board regarding how many members deal with cases or

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which cases must be dealt with in a prescribed time. [78] Further, the secretary can give directions to the board as to what should be considered in discharging any functions in terms of the act, and, when giving such directions, the secretary must consider the need to protect the public from serious dangerous offenders, and the desirability of preventing recidivism and ensuring rehabilitation. [79]

In terms of section 244, when a fixed-term prisoner has served the requisite custodial period of imprisonment, the secretary of state must release him on licence. [80]

Further, the release of certain violent and/or sexual offenders is determined by section 244ZA and requires that the secretary of state must release the offender provided he has served the requisite custodial period. [81] A release on licence in terms of this section applies to the following offences only: manslaughter, soliciting murder, wound with intent to do grievous bodily harm, ancillary offences, inchoate offences in relation to murder, and a sexual offence for which a sentence of life imprisonment could have been imposed. [82]

In terms of section 244ZB, in the case of a high-risk offender who is eligible or who will become eligible for release on licence and where the secretary of state is of the opinion, upon reasonable grounds, that the prisoner would pose a significant risk to members of the public or serious harm due to the commission of any serious offences, the secretary can refer the prisoner's case to the parole board. [83] The secretary should inform the prisoner that the matter is being referred to the parole board explaining the effect of the notice, the reasonable grounds of the secretary's opinion, and the prisoner's right to make representations. [84] The prisoner may make representations to the secretary of state about the referral at any time after receiving notification of such and before the parole board disposed of the matter. However, the secretary is not required to delay the referral to give the prisoner such opportunity. [85]

Further, the secretary of state may at any time release a fixed-term prisoner on licence if the secretary is satisfied that exceptional circumstances exist to justify such release on compassionate grounds. [86]

After release has been decided upon, the fixed-term prisoners will be released on licence which shall remain in force until the expiration of the prisoner's sentence provided any revocation has not occurred. [87] When released on licence, much like in South Africa, conditions are imposed on the prisoner. The conditions of an offender released on licence must include the standard conditions, electronic monitoring, curfew conditions, and any other condition authorised by legislation and/or any such conditions prescribed by the secretary of state. [88] The secretary of state cannot cancel or vary any such condition included in a licence unless the board directs him/her to do so. [89] The secretary of state must consider the following purposes when exercising his/her powers to prescribe conditions: the protection of the public, the prevention of recidivism and the success of re-integration of a prisoner into society. [90]

The prisoner has a duty to comply with the prescribed licence conditions when released for the period as specified in the licence. [91] However, if the prisoner's licence relates to a sentence of imprisonment passed by a service court and the person is residing outside the British isles, then the prisoner must comply only as far as it is practicably possible where they reside. [92]

The secretary of state may revoke the licence of any prisoner and recall them to prison. [93] The prisoner so recalled may make representations in writing in respect of the recall, and upon return to prison must be informed of the reasons for recall and their right to make representations. [94] After consideration of the prisoner's representations, the secretary of state may cancel the revocation if satisfied that the prisoner has not broken any conditions of their licence, release the prisoner as if the recall had not happened or detain the prisoner pursuant to the expiration of their sentence. [95] Section 255A provides for a further release even after revocation and recall of a prisoner's licence provided they are over the age of eighteen, their sentence is less than twelve months, their licence was not recalled for a charge of a serious offence and they are not a high-risk offender. [96]

In 2018, the secretary of state of justice instituted a review of the law surrounding parole in England sparked by the release on parole of an offender, John Worboys. [97] Worboys was sentenced to an indefinite period in 2009 for drugging and sexually assaulting female passengers of his cab in the period between 2002 and 2008. [98] Worboys was convicted of nineteen counts involving twelve victims but was believed to be linked to 102 allegations. [99] The parole board approved Worboys' release in January 2018 after he had served his minimum of eight years when two of his victims brought an application opposing his release. [100] This is what led to the

review of the parole laws. Prior to the review, the provisions ruling the parole board included a blanket ban on the publication of any information relating to the decisions they made and the reasons for their decisions. [101] The parole board would release reasons for the decisions and certain of the licence conditions to victims only if they had signed up for the Victim Contact Scheme but it was never a full disclosure of either the conditions or the reasons for the decision. [102] In order to improve the public's confidence in the parole system there was a concerted effort to move to an era of greater transparency to the public regarding the parole board's decisions and making accessible information on how the parole board works. [103] The result of the review amended the parole board rules to provide for extended transparency. Forthwith, a summary will be provided of the decisions that were taken by the parole board for the release or non-release of an offender to the victim who is signed up for the Victim Contact Scheme and who wants the information. This is the case unless exceptional circumstances prevent the disclosure. The summary must also be made available to other parties who request it, provided that the parole board's chair believes it is justified. [104]

It is important to note that the English law is vastly more developed in this regard than the South African law. The Criminal Justice Act 2003 [105] fully describes the parole procedure for each type of offender and the minimum sentence required to be served before consideration for parole will take place. Further, it must be noted that the act in respect of the release of prisoners on licence states in almost all sections that the secretary of state has a duty to release the prisoner who has completed the required custodial period. [106] It suggests that, in contrast with South Africa, parole is a right for prisoners and that once prisoners have reached their minimum custodial period, the secretary of state and the parole board must automatically *mero motu* consider them for release on a licence. In South Africa, a prisoner must apply for parole after serving the minimum prescribed period of incarceration for the applicable type of crime, whereafter the correctional supervision and parole board and/or the minister will consider the application and make a decision.

The transparency aspect of the parole board's decisions appears to be leaps and bounds ahead of the South African law. This ensures that there is an easily accessible system through which to engage with the ministry of justice. In addition to this, there is a concerted attempt by the government of the United Kingdom to ensure that the general public is able to understand the procedure of parole and the rules of the parole board.

4.2 The Netherlands

Parole or conditional release is explicated in the Criminal Code, in particular articles 15a-i. [107] A convicted offender sentenced to imprisonment of more than one year but not exceeding two years shall be conditionally released after serving at least one year and when one third of the remaining term has been served. [108] A convicted offender

sentenced to a determinate sentence longer than two years shall be conditionally released when they have served two thirds of the sentence. [109]

Offenders who are conditionally released in terms of articles 15(1) and (2) are subject to general conditions as well as special conditions. In terms of article 15a(1) the general conditions applicable are as follows: [110] the offender does not commit an offence before expiration of the probation period; and the convicted offender, insofar as special conditions are applicable to the conditional release co-operates with fingerprinting for identification or by providing an identity document, and co-operates with the probation service supervision.

While the general conditions for the release are applicable to all offenders, special conditions may be imposed. [111] The special conditions may include: [112] a prohibition on contacting any specific persons or organisations; a prohibition on being at or in the surroundings of a specific

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location; an obligation to be present at specific times at a specific location; a prohibition on the use of drugs and alcohol and to co-operate with blood and urine testing; and any other condition pertaining to the convicted offender's conduct.

It is the obligation of the public prosecution services to decide on whether special conditions should be imposed on an offender, [113] and they can supplement, revoke or amend any special conditions provided they promptly inform the offender of the amendment. [114] The public prosecution service has the duty of ensuring the offender's compliance with the conditions and can appoint a probation service designated by governmental decree to supervise the offender's compliance. [115] These probation services will inform the public prosecution service about the offender's ability to comply with their conditions through progress reports. [116] The public prosecution service will also determine the length of the conditional release period, but it cannot be longer than the remainder of the sentence. [117]

Interestingly, an obligation to carry out community service cannot be imposed as a special condition to conditional release, as community service is an independent penalty. [118]

In terms of article 15d, conditional release may be postponed or denied in cases where: [119] the convicted offender was admitted by reason of mental disease or defect to an institution for treatment; an offender seriously misbehaves after the commencement of the custodial sentence; an offender attempts to flee imprisonment; the setting of conditions will not reduce the risk of recidivism in a serious criminal or the criminal refuses to comply with the conditions; and the custodial sentence which is being enforced is based on a judgment of conviction by a foreign court.

Where the minister of justice is of the opinion that there is a cause to postpone or deny conditional release for a period of time, the minister must submit a written application requesting the postponement or denial. This must be made to the district

court which is the court of first instance. [120] This application must be made 30 days before conditional release. The district court can grant the application, reject the application or make any recommendations regarding the special conditions of the offender. [121] Further, the decision of the court must contain reasons and be announced in open court and promptly reported to the offender. [122] The decision of the court is not open to appeal. Conditional release can consecutively be postponed and even thereafter be denied. [123]

If an offender fails to comply with any of the conditions applicable to their release, it can be revoked fully or partially. [124] If there are reasons to suspect that the behaviour of the offender, who is conditionally released, will lead to the revocation of the conditional release, the public prosecution service may order his arrest. [125] If the minister of justice is of the opinion that the offender, conditionally released, has failed to comply with the conditions of the release, he can request the public prosecution service to submit an application to revoke either in totality or partially the release of the offender. [126] Similarly, if the public prosecution service is of the opinion that the offender has failed to comply with the conditions of the release, they must submit a written application to revoke the release to the district court. [127] Similarly to the process in article 15f, the district court must make a reasoned order in an open court which is reported to the offender and cannot be appealed. [128]

By way of comparison, the Dutch law surrounding parole is concise and easily understandable. Like the English law, the Dutch law implies that the offender is automatically eligible for parole once they have served the minimum custodial period dependent on the duration of their sentence. It is the responsibility of the minister of justice and/or the public prosecution service to oppose the conditional release of an offender at least 30 days prior to the offender's release and such opposition must be reasoned. Interestingly, the Dutch Criminal Code makes no mention of any inclusion of the victim in the parole system or decision-making considerations.

It is apparent from the above discussion that the South African law on parole has not developed as fully as that of either The Netherlands or the United Kingdom.

5. Review of ministerial power

It is not uncommon for the decisions of the office of the minister of correctional services serving at the time to shock the public. However, in most cases people are shocked when parole is used by the minister for the purpose of a political ploy and that is why the public often perceives parole in this manner. In the last 30 years, parole laws have frequently been used to advance political agendas.

A prominent, on-going and recent example of the misuse of parole with regard to political ploys is the case of Schabir Shaik. Shaik was convicted in 2006 by the Durban high court of fraud and corruption in that Shaik and his companies had made several payments above the value of R1 million to Jacob Zuma between 1995 and 2002, when Zuma held several influential positions, including being deputy

president of South Africa. [129] The payments were made in an attempt for Zuma to exercise his political influence to benefit Shaik and his business interests. [130] The court sentenced Shaik to fifteen years' imprisonment and made a confiscation order in terms of the Prevention of Organised Crime Act, [131] requiring Shaik and his companies to pay the state over R34 million for benefits that he received. These were deemed to be proceeds of crime. [132] Shaik attempted to appeal this order on the grounds that the proceeds did not flow from the crime; however, the constitutional court upheld the decision made in the Durban high court. [133] In 2009, after serving just three years of his sentence, Shaik was released on medical parole after spending most of the three years in the Inkosi Albert Luthuli Central Hospital, where he was being treated for chronic hypertension and depression. [134] As stated above, the purpose of medical parole is to release a prisoner who is in the final stages of a disease or terminal illness and to allow such prisoner to die in a dignified manner at home. Such a diagnosis must be confirmed by at least two medical practitioners and/or a specialist. Shaik was diagnosed with an alleged terminal illness after three doctors confirmed that Shaik was clinically depressed, had suffered a stroke and would die from severe hypertension. [135] However, after his release on medical parole, Shaik was seen driving around in his BMW, shopping, dining out and playing golf, and appearing very much alive despite the diagnosis of a terminal illness by the medical experts. [136] Shaik's parole (and his period of imprisonment) ended in 2021; however, he is still alive in 2025 and according to *The Citizen*, in 2024 Shaik began campaigning for Zuma's new party uMkhonto weSizwe (MK) in the national elections. [137] It is matters like these that leave the authors and the South African public to question the authenticity and accuracy of the South African parole system, the ability of the correctional services parole board to make decisions uninfluenced by political parties and the minister of correctional services to grant parole without favour or prejudice.

Cabinet ministers, unlike judges, are accountable to parliament for the exercise of their powers and performance of their functions. [138] Further, they are not necessarily required to perform these functions without fear, favour or prejudice. However, where the actions of a minister affect the rights of any person, their actions can be reviewed by a competent court. This is done through the application of administrative law governed by the Promotion of Access to Justice Act. [139]

Administrative action is defined in terms of the act as

> "any decision taken, or any failure to take a decision, by –
>
> a) An organ or state, when –
>
> i Exercising a power in terms of the Constitution or a provincial constitution; or
>
> ii Exercising a public power or performing a public function in terms of any legislation; or

> b) A natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect." [140]

A decision of an administrative nature is "a decision relating to – a) Making, suspending, revoking or refusing to make an order, award or determination . . .". [141]

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It is apparent that the decision made by minister Groenewald was an administrative action, as he was performing a public function in his position as minister of correctional services in terms of an empowering provision, namely section 75(6) of the Correctional Services Act. [142] The decision was to revoke an order made by a previous minister of correctional services to grant two life sentence serving prisoners parole and this decision directly adversely affected two persons' rights.

In terms of section 3 of Act 3 of 2000, [143] any action which adversely affect the rights or legitimate expectations of any person must be procedurally fair and whether the procedure of the administrative action was fair depends on the facts of each case. Sections 3(2)(*b*) and 3(3) list the ways in which to give effect to an administratively fair procedure, particularly with regard to notifying the person whose rights will be affected and providing them with an opportunity to make representations. [144] However, in terms of section 4(a) a minister can depart from these requirements if it is reasonable and justifiable to do so. [145] In order to determine if such departure is reasonable and justifiable, the following factors must be taken into account: the objects of the empowering provision; the nature and purpose of the administrative action; the likely effect of the administrative action; the urgency of taking the administrative action; and the need to promote an efficient administration and good governance. [146]

Section 6 of Act 3 of 2000 provides that anyone can institute proceedings in a court for judicial review of administrative action particularly where the administrator who took the decisions:

i) Was not authorised by an empowering provision;

ii) Acted under a delegation of power which was not authorised by the empowering provision;

iii) Was biased or reasonably suspected thereof;

iv) The action was procedurally unfair;

v) The action was materially influenced by an error of law;

vi) The action taken was:

  a) For a reason not authorised by the empowering provision;

  b) For an ulterior purpose of motive;

  c) Because irrelevant considerations were taken into account;

  d) Because of the unauthorised influence of another person or body;

  e) The result of a decision was made in bad faith; or

  f) The result of a decision was made arbitrarily. [147]

In *Anderson v Minister of Justice and Correctional Services* the court reviewed a decision made by the minister regarding the parole of an offender. [148] Anderson was convicted of murder and was serving a life sentence at Kgosi Mampuru II Correctional Centre. [149] Anderson launched a review application against the minister of correctional services and the national council of correctional services for their refusal to release Anderson on parole. [150] At the time of the hearing in 2024, Anderson had served 24 years of his sentence and had applied twice for release on parole and on both occasions he was provided with a refusal to grant parole and recommendations by the national council of correctional services to undergo individual psychotherapy to address criminogenic needs and to have a risk assessment completed by a psychologist. [151] Anderson approached the high court to set aside this decision.

The court determined that the action taken by the minister was an exercise of public power which must be exercised both lawfully and rationally. [152] If the public power is not exercised in such a manner, it must be set aside. The court determined that there existed no internal remedies to be exhausted within the parole process and that Anderson had a right in terms of Act 3 of 2000 or legality review to seek review of the minister's decision. [153] Upon consideration of the documents provided to the court, it became apparent that only one professional report, being that of a clinical psychologist, weighed adversely against Anderson and that all other reports supported the position of him being granted parole. [154] The court confirmed that the question to be answered in this instance was whether the decision made by the minister was rationally and objectively related to the purpose of the power. [155] The court determined that it appeared from the documents that the minister had considered only the adverse report of the clinical psychologist and recommendations of the national council of correctional services when making his decision to deny parole and further the minister failed to provide any reasonable explanation for the exercise of his powers in this manner. [156] The court found the minister's exercise of power irrational and the minister was ordered to place Anderson on parole within fourteen calendar days of the judgment. [157] Importantly in the judgment, Moshoana J stated that the power provided to the minister in terms of section 136(3)(*c*) of the Correctional Services Act [158] was of a discretionary nature and it was not for the minister to rubberstamp a decision or recommendation provided by the national council of correctional services and further that a decision made in such a manner would most certainly lack rationality. [159]

6. Was minister Groenewald correct?

It has been sixteen years since Van der Merwe J described the nature of the parole laws in South Africa as very confusing and stressed the need for the laws to be made simpler and easier to understand. However, no such change has taken place and the laws regarding parole remain confusing for prisoners, judges, legal practitioners and the general public alike.

Du Toit and Kruger fall into the group of life serving offenders who entered the system prior to the implementation of the 1998 Correctional Services Act and as such their parole considerations are still determined by the 1959 Act. However, this is only for the consideration of granting parole and not for revoking it.

Section 75(9) of the Correctional Services Act states: "The Minister may cancel correctional supervision, day parole or parole as referred to in subsection (6) only if the decision to grant correctional supervision, day parole or parole was taken by the Minister."

It is apparent from a simple reading of the above section that there is no procedural requirement for the minister to provide any formal reasoning to the offenders or to the public for revoking parole. The only requirement is that the granting of parole must have been made by a minister. The section also does not require that an offender out on parole must have contravened their conditions for the minister to make such a decision. Further, the power provided in terms of section 75(9) is a discretionary power where the minister is required to exercise his discretion rationally when executing this power and to ensure that such execution aligns with the purpose of the provision.

The authors are of the belief that the purpose of the above section was to allow a minister to revoke parole where the minister is of the belief that the decision to grant parole was wrongfully made – irrespective of whether it was decided upon by the current or by any preceding minister. Alternatively, where a minister believes that their own decision to grant parole was incorrect, the power to revisit the decision applies.

The Alison Botha case was widely publicised and caused outrage both nationally and internationally due to the sheer brutality of the rape and attempted murder of Alison Botha. Furthermore, the release of Du Toit and Kruger on parole received much criticism from the South African public for this very reason and because Alison Botha herself was not consulted on the matter. The authors of this article are of the belief that minister Groenewald made the decision on this very basis particularly due to the current rate of violent crimes against women and children and because, procedurally, the decision was made incorrectly when the previous minister failed to allow Ms Botha an opportunity to make representations to him on the matter. It would, however, not be surprising if Du Toit and Kruger took the matter on review.

While the authors accept that the decision may have been made rationally and is procedurally fair, they are left to wonder whether such a

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power should exist for ministers considering how the concept of parole (or rather the granting and/or declining of parole) may easily be abused to push political agendas. Lastly, the authors are of the opinion that the only rational way to revoke parole in this manner is at least to provide the offenders with sound reasons for unilaterally revoking their parole, particularly after they have served over 20 years of their life sentence and are eligible to be considered for parole. The legislature is called upon once and for all to intervene, and to set clear and unambiguous fixed principles in order to bring legal certainty to the current maze of our parole system.

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