IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

In the matter between:

COLIN STANFIELD	Applicant
and	
THE MINISTER OF CORRECTIONAL SERVICES	First Respondent
THE COMMISSIONER OF CORRECTIONAL SERVICES	Second Respondent
P MANS N O	Third Respondent
THE PAROLE BOARD, HELDERSTROOM PRISON	Fourth Respondent

JUDGMENT: 12 SEPTEMBER 2003

VAN ZYL J:

INTRODUCTION

[1] In this matter, after reading the papers submitted and hearing full argument by Mr Gauntlett on behalf of the applicant and Mr Potgieter on behalf of the respondents, I granted an order on 4 August 2003 in terms of which I set aside the decision of the third respondent rejecting the applicant's application to be placed on parole on medical grounds in terms of section 69 of the *Correctional Services Act* 8 of 1959 ("the Act"). In addition I ordered that the applicant be placed on parole forthwith, subject to his remaining under the medical supervision of Dr David Eedes at the Southern Cross Netcare Hospital in Wynberg, and further subject thereto that, on discharge from the hospital, he be placed under the care of his wife, Mrs Sharifa Stanfield, and/or his sister, Ms Joan Stanfield,

and/or Ms Christine Caesar Nkynze, his housekeeper, in his home at 10 Balintore Road, Rondebosch. In regard to the costs of the application, I ordered such costs, including the costs of two counsel, to be borne by the first respondent.

[2] In view of the urgency of the matter and the time constraints making it impossible to give reasons for this order immediately, I undertook to give reasons at a later stage. This did not deter the respondents from filing a notice of appeal on 5 August 2003, the consequence of which was to suspend the operation of the order. The applicant's attorneys responded by filing an application in terms of Rule 49 (11) of the rules of this court. Such application was opposed and fully argued by the same counsel as before. On conclusion of the argument I granted an order, on 8 August 2003, implementing the order of 4 August 2003 forthwith, but subject to a number of further conditions proposed by the respondents and substantially accepted by the applicant's legal representatives.

[3] The respondents requested that reasons be furnished urgently for the order of 4 August 2003 in that this is a matter of some moment, affecting certain important policy considerations relating to the future conduct of similar matters. I would have preferred handing down my reasons immediately, but the nature of the case and the full argument addressed to me by both sides have made it impossible before now. In what follows the reasons for my order are set forth..

CASE FOR THE APPLICANT

[4] The applicant, who is presently forty-eight years old, was convicted of fraud, in the form of tax evasion exceeding two million rand, and was sentenced on 6 March 2001 to six years imprisonment. After exhausting his rights of appeal against the sentence, he commenced serving his sentence on 18 February 2002 in the Helderstroom Prison, Villiersdorp.

[5] On 22 May 2003 he was diagnosed as suffering from incurable and inoperable lung cancer known as a "small cell carcinoma". It was described by Dr Peter Chapman, a respiratory physician or pulmonologist who did the diagnosis, as the worst type of cancer that "grows most rapidly and is not suitable for surgical removal". The CT scan and biopsy done on 26 May 2003 indicated that the cancer was prevalent in the left lung, but had already spread to the right lung. According to Dr Chapman chemotherapy was the only treatment that could be applied at the present time. For this purpose the applicant was referred to Dr Eedes, a radiation oncologist practising at the said hospital.

[6] In his supporting affidavit Dr Eedes opined that it would be appropriate for the applicant to be placed on parole on medical grounds. In this regard he confirmed, in his report dated 30 May 2002, the diagnosis made by Dr Chapman and indicated that the applicant would be treated with "combination chemotherapy (cisplatinum and etoposide)" as an in-patient for three consecutive days every twenty-one days. He would require a minimum of six cycles of treatment over a period of at least five months. During treatment he would suffer from possible side-effects such as nausea, vomiting,

weakness, diarrhoea, hair loss and weight loss. His immune system would be affected by this treatment due to bone marrow suppression with a very high risk of infection and bleeding. It was hence imperative that he not be exposed to conditions that would result in infection, such as would be the case should he be exposed to the public or "crowded conditions". He would in any event require close contact with regular medical care should life-threatening side-effects, emanating from the disease and its treatment, arise. Dr Eedes described the applicant's prognosis as very poor since this was "an especially aggressive malignancy" with an average survival rate of six to eight months with treatment. His chance of surviving for one year was less than 20%, while for two years it was, indeed, less than 10%.

[7] Pursuant to these diagnoses the applicant addressed an urgent application to the second and fourth respondents to be placed on parole on medical grounds in terms of section 69 of the Act. In his supporting affidavit he pointed out that, in addition to the lung cancer recently diagnosed, he also suffered from advanced coronary disease and was at high risk, as appeared from a report dated 24 March 2003 by Dr Elwyn Lloyd, a cardiologist. Dr Lloyd recommended that the applicant be brought closer to adequate medical facilities "as the risk of an acute event occurring is high".

[8] With regard to his personal circumstances the applicant stated, in the said affidavit, that he had a "common law relationship" with his former wife, Mrs Sharifa Stanfield, with whom he was living at the time of his imprisonment. They are the parents

of five childen, aged nineteen, seventeen, fourteen, thirteen and eight years respectively, all of whom, together with Mrs Stanfield, are depressed, uncertain and confused by the prospect of the applicant's dying in prison. This appears from a report dated 17 March 2003 of Ms Joana du Toit, a psychologist who interviewed Mrs Stanfield and the children during the period 18 December 2002 to 21 February 2003, before the latest reports relating to the applicant's advanced coronary disease and terminal cancer were available.

[9] In a further report by Dr Eedes dated 6 June 2003 and addressed to Mr Matseliso, the acting area manager of the Helderstroom management area, Dr Eedes stated:

> Dr Ron Mallet, the general practitioner of Mr Colin Stansfield, has asked me to draft a letter documenting the minimum requirements for discharge following Mr Stanfield"s chemotherapy for a lung carcinoma.
>
> Mr Stanfield needs to be in an uncrowded environment that is free of infection such as tuberculosis. He also requires easy access to medical care in case of complications, such as lung haemorrhage and infection, from his disease and treatment.

[10] In the meantime Dr S A Frank, the medical officer appointed in terms of section 6 of the Act, requested Prof D F du Toit, a specialist general surgeon of the Tygerberg Hospital and a professor of medicine at the University of Stellenbosch, for a second opinion on the applicant's medical condition. On the basis of the medical reports and case notes of Dr Chapman and Dr Eedes, and with reference to recent medical authority, Prof du Toit stated in his report, dated 11 June 2003, the following:

> 1. Patient is reported to have severe ischaemic heart disease (doctor's case notes).
> 2. Patient has inoperable, histologically proven, small cell carcinoma (SCLC) of the lung invading the mediastinum and in need of chemotherapy.

3. Median survival, even with treatment, is 1 year (ref: Robbins Basic Pathology, 7th edition; Saunders Philadelphia; 2003: pp 504).

Recommendation:

Mr Stanfield should be released on medical grounds on parole as from today.

[11] After having himself interviewed the applicant and Dr Eedes at the hospital, Dr Frank submitted a medical report, dated 12 June 2003, to assistant director L R August, who was designated as the area manager of the Helderstroom management area. In this report he stated as follows:

> Mr Stanfield exhibits, at this time, no overt sign of his disease. He appears, externally, to be in good health. He is, in fact, a good advertisement for the "First World" level of health care which he is receiving. He has two main medical problems:

1. **Ischemic Heart Disease**

He has, radiologically proven, severe ischemic heart disease, for which he is receiving treatment, both medical and surgical. In my opinion, although his disease is severe, it is being well managed and, if this degree of care is maintained, further incarceration should not affect his life expectancy.

In the course of his treatment, a tumour was identified in his chest which was subsequently proven to be a "small cell carcinoma".

2. Lung Cancer

This is a particularly malignant tumor which spreads rapidly and is, in his case, inoperable. Treatment is by chemotherapy with, sometimes, radiotherapy in addition.

The prognosis of this lesion is very poor, being less than 6 months (untreated). This improves to a year on treatment.

Mr Stanfield has already received 2 courses of chemotherapy in a series which stretches over a 6 month period. One unfortunate side effect of this treatment is that he becomes highly susceptible to chest infections, such as tuberculosis. This means that further incarceration carries a very high risk of his developing a chest infection which, in his immune-depressed condition, is likely to dramatically shorten his life.

There is not, to my knowledge, a DCS [Department of Correctional Services] Medical Facility which can adequately care for Mr Stanfield. For this reason I recommend that he be placed on parole (or discharged from prison) with immediate effect.

[12] On 13 June 2003 the fourth respondent conducted an inquiry at the hospital where the applicant had been a patient since being diagnosed with terminal lung cancer on 22 May 2003. The acting chairperson of the fourth respondent, Mr A P Pepler, an assistant director in the Department of Correctional Services (the "Department"), presided over the inquiry. In addition to the aforesaid medical reports, various members of the Department,

who were responsible for religious instruction, social work, discipline and medical assistance at the prison, commented favourably on the application. Mr Pepler, however, recommended that the application be rejected on the following grounds as set forth in annexure A to his report dated 13 June 2003:

> Voorgenoemde verslae is bestudeer en deeglik oorweeg, maar sien ek nie op dié stadium my weg oop om aan te beveel dat Stanfield op die stadium op parool of om mediese redes vrygelaat word nie.

My redes is as volg:

Hy geniet tans goeie gesondheid, op die oog af lyk hy nie siek nie.

Hy help homself deur self te eet, aan te trek en te was.

> # Sy lewensverwagting is tans 6 maande tot 1 jaar en kan daar gekyk word na, of die behandeling waarop hy tans is, enige uitwerking het.

Die gevangene is 'n hoë profiel geval en het hy nog nie eers 1/3 van sy vonnis gedoen nie.

Die strafoogmerke moet tuisgebring word en as 'n voorbeeld vir ander misdadigers dien.

Die minimum vereistes, soos gestel deur Dr. Eedes, kan deur die departement nagekom word en is dit onnodig dat hy op eie koste in 'n hospitaal (privaat) moet bly.

Hy sal heel menswaardig in 'n gevangenis aangehou kan word.

Wat my die ergste van die aansoek ontstel, is dat al die dokters mediese ontslag aanbeveel en bekommerd is oor kieme in die gevangenis, maar nie een praat enigsins van die feit dat Stanfield nog rook nie. Hy sal eers drasties iets moet doen aan sy rookgewoontes.

Ek beveel aan dat die aansoek nie goedgekeur word nie, maar weer herhaal word gedurende Oktober 2003.

[13] On the same day, 13 June 2003, the third respondent accepted Mr Pepler's recommendation and rejected the the applicant's application to be placed on parole on medical grounds. At the request of the applicant's attorneys, the third respondent, on 19 June 2003, furnished written reasons for his decision. Although it contains numerous grammatical and spelling errors, it should, I believe, be quoted in full, in unamended form:

> After having applied my mind properly and taking all the facts into consideration, the following is clear:

Mr. Stanfield is clearly suffering from a recently discovered heart and lung problem.

The lung problem is clearly so serious that all the medical practisioners agree that his life expectancy is between six and twelve months. Succesful treatment can have a influence on this period.

I have also visited the prisoner on 9-06-2003 in the public hospital. It was clear that he is very concerned about his health condition but he appears on the outer very normal, he is at all not bedridden <u>at this stage</u>. Reports by the medical practitioners also state clearly that physically Mr Stanfield appears normal and he is able to can do everything for

himself.

To can take a responsible decission in this regard there is basically two questions, namely:

one, is the life expectancy so short that from a humane point of view it will serve no purpose to keep the person longer in prison. Consistancy in this type of decissions is also very important. In this spesific case the life expectancy is not so short that further imprisonment will not serve a purpose. We as correctional services must also see that the sentence imposed by the court must be served as far as possible.

In the second instance we must answer the question whether the prisoner's health condition is of such a nature, that he is in terms of his physical abilities still able to can do most things for himself as good as any other person. In physical terms he is thus able to can commit a further crime at this stage.

Against this background I do not approve at this stage that Mr Stanfield be released on parole on medical grounds.

It is so that Mr Stanfield's health condition can soon deteriorate rapidly and is it important to make it clear that his situation will be monitored continuously (day to day) and will this decision be reconsidered automatically when the stage arrive that it will

serve no more purpose to keep him further in prison.

[14] The applicant forthwith gave instructions to his attorney to bring the present application to review and set aside the third respondent's decision. Various grounds of review, some of which overlap, were raised with reference to the provisions of section 69 of the Act and the reasons given by the third respondent for his decision. They may be reflected as follows:

1. With reference to the purpose of section 69 of the Act and the purpose for which the decision was taken, there was no rational connection between the information before the third respondent and the reasons articulated by him for such decision.
2. The third respondent misconceived the nature of the discretion conferred upon him in terms of section 69.
3. The decision was taken arbitrarily and capriciously.
4. The third respondent had regard to irrelevant considerations and failed to take account of relevant ones.
5. The decision was taken as a result of unwarranted adherence to a fixed principle.
6. The decision was taken in order to further an improper purpose.
7. The decision was so grossly unreasonable as to warrant the inference that the third respondent had failed properly to apply his mind to the matter.

As will be seen later (para 72 below), these grounds of review may be collectively reflected as a central ground that the decision was so irrational and unreasonable as to warrant the inference that the third respondent had not applied his mind properly to the

facts before him.

[15] Much of the remainder of the applicant's founding affidavit expatiates on the aforesaid grounds of review and contains a substantial amount of argument that will be dealt with later on in this judgment. There is, however, a novel submission contained therein that may be mentioned at this stage. I refer in this regard to the suggested interpretation of section 69 of the Act. Not only is it wholly at odds with that apparently applied by the third respondent, but, it is suggested, with reference to section 39 of the Constitution, Act 108 of 1996, that the said section 69 should also have been interpreted in such a way as to promote the spirit, purport and objects of the Bill of Rights. This means that the applicant was entitled to protection of his inherent dignity (section 10 of the Constitution). This would include the right to die in a dignified and humane way.

[16] A further point raised in the founding affidavit is that Dr Frank himself mentioned that the Department did not have a medical facility that could adequately care for the applicant while being treated for his physical condition.

[17] Appended to the founding affidavit are supporting affidavits of Dr Chapman and Dr Eedes confirming their aforesaid medical diagnoses. Likewise annexed are affidavits of Mrs Sharifa Stanfield, the applicant's wife, Ms Joan Stanfield, his sister and Ms Christine Caesar Nkynze, his housekeeper, demonstrating their willingness and ability to care for him on his discharge from hospital.

[18] The applicant subsequently deposed to a supplementary affidavit, arising from the filing of a copy of the record of the proceedings that had led to the decision that he seeks to have reviewed and set aside. For the sake of completeness he attached a copy of an extract from the medical text book referred to by Prof du Toit in his report of 11 June 2003 (para 10 above). He also attached a medical report dated 3 June 2003 from his general practitioner, Dr Ronald Mallet, the relevant portion of which reads thus:

> It is my considered opinion that my patient will not be in a fit state to commit any crimes should his parole be successful. He has two terminal diseases namely advanced Coronary Artery Disease. He has some borrowed time because of the stents placed in his Coronary Arteries by Dr Elwyn Lloyd. His inoperable cancer of the lung will only be palliated by chemotherapy.

His physical condition is so weakened that he would be physically unable to commit crime. His greatest fear is re-imprisonment as he dearly wants to spend his last months/days with his family.

According to the applicant, the third respondent appears to have ignored this document, which was before him at the time he made his decision. For the record the applicant gave the assurance that he would not commit any crime should he be released on medical grounds.

[19] Of some significance is a medical report, dated 3 June 2003, that forms part of the said record of proceedings and relates to the applicant's medical condition. In this report Dr Frank accepted the applicant's heart disease and lung cancer as proven. His recommendation was that the applicant should be discharged on medical grounds. In the

same report the head of the prison, deputy director N J Grootboom, commented, on 4 June 2003, that he agreed with the recommendation of the doctors and observed that, on release in terms of section 69, the applicant would be placed in the care of his family.

[20] It should be added that Dr Frank, in annexure A to the said report (medical grounds), responded to the question whether the applicant's condition was terminal and, if so, what his life expectancy was, that it was terminal and that his life expectancy was six to eight months. To the next question, namely whether further detention would endanger the applicant's life, he responded that it would, in that there was a risk of infection after radiation or chemotherapy. In answer to the question whether the applicant would, despite his condition, still be able to commit a crime similar to that for which he had been incarcerated or, for that matter, any other crime, Dr Frank indicated that he would be able to. He nevertheless felt that it was necessary or desirable for the applicant to be released into someone's care.

[21] Another interesting document contained in the record of proceedings is a so-called "assessment of a realistic date for release" ("berekening van 'n realistiese uitplasingsdatum") signed by Mr Pepler. From this it appears that the applicant will have served one third of his sentence by 17 February 2004. If a six month remission ("vergoeding") should be accorded him as a first offender, a realistic date for his release would be 17 August 2003, a date which has already passed at the time of my writing this judgment. The applicant pointed out that this was in marked contrast with Mr Pepler's recommendation of 13 June 2003 (para 12 above) that a new application could be

considered during October 2003.

[22] These facts and circumstances demonstrated conclusively, the applicant suggested, that his release on parole on medical grounds was justified and that the third respondent's decision was "inexplicable and irrational" and indicative of his failure to apply his mind.

CASE FOR THE RESPONDENTS

[23] In his opposing affidavit the third respondent, described as a director in the Department stationed at the said prison, stated that he occupied the position of area manager of correctional services in the Helderstroom management area. The prison fell within his jurisdiction and was under his management. It would hence appear that he was delegated in his official capacity by the second respondent to deal with the applicant's application for parole on medical grounds.

[24] At the outset the third respondent explained, with reference to the relevant statutory provisions, the procedure regarding the consideration of a prisoner's release on parole. He emphasised the wide discretion of the second respondent to place a prisoner on parole on medical grounds, after consideration of the report and recommendations of the fourth respondent and of the recommendation of the medical officer, in cases where, as provided in section 69(b) of the Act, it was "expedient on the grounds of his physical condition". Guidelines in this regard were set out in section VI(5)(e) of the standing

correctional order "B". One of these guidelines was that an injudicious placement or release on parole may foil the penal objectives of the sentencing authority. Another was that, in all cases where there was no doubt as to the terminal nature of the illness and where the life expectancy was short, it was advisable that placement or release on parole for medical reasons be effected on a conditional basis.

[25] The said standing order was supplemented by a circular, dated 21 December 2001 from the provincial commissioner, Western Cape, to all area managers, regarding placement or release on parole on medical grounds. In this circular an area manager, with minimum rank of director, was identified as a delegated official who could decide matters concerning parole on medical grounds. Paragraph 3 of the circular required that, in dealing with an application for release or placement on parole on medical grounds, certain "administration aspects" were of importance and should be followed at all times. This included, in sub-paragraph 3(e), that the decision-making authority "must be satisfied that the prisoner is terminally ill". According to the third respondent this confirmed the requirement "that the condition of the prisoner must be terminal, i.e. death must be imminent".

[26] Regarding the discretion of the second respondent or his duly delegated official to place a prisoner on parole on medical grounds, the third respondent stated that he was required to consider the report and recommendations of the fourth respondent and also the recommendation of the medical officer. The ultimate authority and responsibility for taking this decision, however, vested solely in the second respondent or his duly

delegated official, who was enjoined to exercise this power within the confines of the applicable statutory provisions.

[27] The third respondent gave the assurance that, in assessing the application, he had considered all the available and relevant information, including that contained in the review record. In this regard he referred to documentation supporting an earlier application by the applicant for parole. The third respondent had refused such application and directed that a further report and recommendation be prepared by the fourth respondent on 15 August 2003.

[28] With reference to Dr Frank's report dated 12 June 2003 (para 11 above), the third respondent emphasised the words "to my knowledge" and "[f]or this reason I recommend" as indicating that Dr Frank had recommended that the applicant be placed on parole because, to his knowledge, the Department had no medical facility that could care for him adequately. In this regard the third respondent stated that, in view of the fact that there was no indication that the applicant was "in the final phase of terminal illness", the question of appropriate medical facilities for use during his continued incarceration was particularly pertinent. Although, in his view, the medical evidence on the applicant's life expectancy was "varied and incongruent", the third respondent assumed in his favour that his life expectancy was six to twelve months, which "could improve with successful medical treatment".

[29] This assumption appears to have been negated, or at least substantially watered down, by the rationale underlying the third respondent's decision not to grant the applicant parole on medical grounds, as appears from paragraph 16 of his opposing affidavit. It reads:

> Apart from the fact that on all accounts including my own observations, Applicant is physically still far from being bedridden, it becomes apparent even if one takes the statistics provided by the medical reports on face value that his demise is not imminent. In fact, Dr Frank regards Applicant as still being able to commit crime. One should add that Dr. Mallet’s contrary view concerning Applicant’s physical condition, is patently against the weight of the evidence and obviously exaggerated.

[30] This reasoning brought the third respondent back to the question of appropriate medical facilities ensconced in one or the other of the Department’s prisons. In this regard he referred to an investigation conducted by assistant director August, head of health care (medical/nursing) services in the Helderstroom management area. In paragraph 2 of his report dated 7 June 2003, Mr August adverted to the medication prescribed for the applicant by his doctor and certified that, as long as the applicant remained in prison while on such medication, the prison nursing staff would administer it for as long as he could provide it at his own cost.

[31] As for the further conditions stipulated by Dr Eedes, Mr August had investigated the situation at a number of prison hospitals and had been told by Sister Matshibane, the head of nursing services at the Drakenstein prison hospital, that she herself would first

have to establish the applicant's current condition in order to decide whether such hospital could accommodate him. If she was satified with his health status, she would discuss his possible admission to the hospital with the head of the Drakenstein prison.

[32] According to a handwritten note at the end of his report, Mr August intimated that Sister Matshibane had communicated with him by telephone on 8 June 2003 and had informed him that the head of the Drakenstein prison was not in favour of admitting the applicant to that prison. The reason was that the prison would have the responsibility of transporting him to hospital for treatment every three weeks and of providing guards at the hospital for as long as he remained there. Sister Matshibane was, however, satisfied that her hospital would be able to comply with the requirements laid down by Dr Eedes. In the meantime Sister Hintsho of the Pollsmoor Medium B prison, who had initially expressed the view that no prison hospital in the province could meet with such requirements, had, on reconsideration, concluded that her hospital could indeed accommodate the applicant.

[33] The third respondent thereupon stated that, although the hospital section of the Helderstroom prison in fact also met the conditions set by Dr Eedes, it could not provide twenty-four hour surveillance as did the Drakenstein prison hospital, which could cater for the applicant's needs and meet the requirements set by both Dr Eedes and Dr Frank. The reservations expressed by the head of the Drakenstein prison were understandable, but could not prevent the applicant from being accommodated there. In this regard the

third respondent averred that he had consulted with the office of the provincial commissioner and with the area manager under whom the Drakenstein prison fell. Both officials agreed with him that the applicant could and should forthwith be accommodated at such prison. There was, in addition, a private medical facility near the prison where the applicant could receive his prescribed treatment, should he so choose. In any event, the third respondent opined, it was abundantly clear that the applicant could receive the same treatment in the medical facility of Drakenstein prison as he was presently receiving. In addition nothing precluded the doctors currently treating him from continuing to do so at the prison hospital.

[34] A further consideration prompting the third respondent to refuse the application for parole on medical grounds was the fact that the applicant had committed a serious crime in respect of which a sentence of six years imprisonment had been imposed. Should he be released at this stage he would have served less than one third of such sentence. Inasmuch as medical treatment in the form of chemotherapy would not, according to the doctors, be an exercise in futility, his premature release might well have a negative effect on other prisoners who had been diagnosed with terminal illnesses, particularly HIV/AIDS. Like the applicant their physical condition was, at least temporarily, such that they could continue living a normal life and could, indeed, revert to committing crimes. It was, in fact, “not inconceivable that such convicted criminals who now know that they are suffering from a terminal illness would be even less inhibited from committing further crimes should they be released prematurely”. This

would self-evidently have a “deleterious effect on the objectives of punishment and on the interests of the administration of justice and of the community at large. “This”, the third respondent stated, “would certainly not be expedient but would rather frustrate the objectives of Section 69 of the Act”.

[35] The applicant’s premature release “in his present relatively good physical condition” would, in the third respondent’s view, make it impossible not to afford the same indulgence to a large number of other prisoners diagnosed with terminal illness but who were “enjoying a comparable physical state” and were likewise “neither bedridden nor in the final phase of terminal illness”. Such prisoners were, indeed, “anxiously awaiting the outcome” of the applicant’s matter.

[36] These considerations, the third respondent averred, “also underlie” his summary of reasons for refusing the application, read together with his decision dated 13 June 2003, as it appears from the review record. In addition he had visited the applicant personally in order to acquaint himself with his “physical and mental condition”. This was to enable him to consider the application “carefully, fairly and in a balanced way”. Having done so, he had come to the conclusion “that it was not expedient, as envisaged in Section 69 of the Act, that the Applicant be placed on parole at this stage”. In this regard he had applied his mind “objectively and honestly” to the matter and come to an “independent decision”. Should the applicant’s condition “deteriorate dramatically”, however, an “automatic reconsideration of the matter” would be justified. He would hence be monitored continuously on a day to day basis. The third respondent had

consequently not accepted the fourth respondent's recommendation that the applicant's parole be reconsidered on 1 October 2003.

[37] In response to the applicant's founding affidavit the third respondent professed that he was aware throughout that he should consider not only the applicant's physical condition and the issue of expediency, but also his right to dignity in line with a humane approach. This prompted him to say (in paragraph 41.5 of his affidavit):

> My considered view was that it is not expedient in the circumstances to place the Applicant on parole, when he has not even served one-third of his sentence and his life expectancy is not so short that it would serve no purpose to continue his incarceration. Moreover, his physical condition is such that he is still a fully functional individual whose release, in that condition, could raise serious questions about the administration of justice and the concomitant obligation to combat crime. It would also spark numbers of similar demands for release from similarly placed prisoners.

[38] On the question of expediency he stated (in paragraph 41.7) that it was "definitely not expedient to release a prisoner, who is physically able to continue committing crime, prematurely". In this regard he appears to have distinguished between the applicant's "medical" and "physical" condition on the basis that the latter relates to his external appearance as opposed to his internal condition. This accords with his interpretation of the concept "physical" as it occurs in section 69 of the Act.

[39] Regarding the exercise of his discretion the third respondent stated (in paragraph 42) that he "approached the matter on the basis that for so long as the physical condition

of a prisoner justifies it, consideration should be given to ensuring that as much as possible of the sentence is served. This clearly coincides with the purpose of Section 69". Even accepting that the applicant's life expectancy was between six and twelve months, the third respondent was of the view that it could not be said that he was "in the final phase of terminal illness" and that his life expectancy was so short as to justify parole on grounds of expediency. It was not expedient to release on parole a person in the applicant's "physical condition" and with his life expectancy, at a time when he could still commit crime. This would, according to the third respondent, "be inimical to the purpose of Section 69". He hence denied that his decision was arbitrary or capricious.

[40] A supporting affidavit was filed by Mr Pepler, who presided over the fourth respondent when it recommended that the application be rejected (para 12 above). Mr August (para 30 above) was a member of the fourth respondent at the time. According to Mr Pepler the decision to hold a parole hearing at the hospital where the applicant was a patient was actuated entirely by a concern for his best interests. After careful consideration of the matter, including the written and oral submissions of the applicant's counsel and attorney, the fourth respondent unanimously recommended that he not be released on parole on medical grounds. It did, however, recommend that he be considered and re-assessed for possible placement on parole on 1 October 2003.

[41] With reference to the document relating to an "assessment of a realistic date of release" as being 17 August 2003 (para 21 above), Mr Pepler explained that it was

completed prior to the parole hearing as a guide for administrative purposes. In the applicant's case it was based on the wrong assumption that he was a first offender, in which event his parole could be expedited by six months. During the parole hearing, however, it was established that he in fact had a number of previous convictions, the first of which dated back to 1972 and the last to1989. In any event the recommendation was not binding on the second respondent.

[42] Mr August likewise deposed to a supporting affidavit opposing the relief sought by the applicant. He stated that the applicant had consistently preferred to make use of his own medical practitioners and facilities rather than avail himself of the medical facilities available at the prison. He confirmed that the applicant could be accommodated immediately in the hospital section at the Drakenstein hospital, where he would be accorded twenty-four hour medical observation in conditions that met the requirements set down by Dr Eedes in his report. His circumstances would be "humane and adequate" and would "effectively eliminate the risk of infection". In any event there was a private medical facility close to the Drakenstein prison where he could obtain "the best medical treatment". This would obviate his having to travel all the way to Cape Town for treatment that his private medical practitioners could just as conveniently give him at such prison or in the said medical facility.

[43] It may be convenient to refer at this stage to a supporting affidavit of Ms Annelize Malan, a deputy director in the Department, in which she stated that she had ascertained,

and could confirm, that there were indeed "facilities" at the Drakenstein prison where the applicant could be accommodated in accordance with the needs specified by Dr Eedes. She pointed out further that the Panorama hospital, which was situated "within a reasonable distance" from such prison, had similar specialist medical facilities as those offered by the hospital where the applicant is presently being treated. The applicant could receive "certain of his treatment" at the Panorama hospital should his doctors so advise and should it be expedient to treat him there.

[44] I return to Mr August's affidavit in which he stated that he had personally observed that the applicant's "physical condition" had always been good and that he had always been "completely self-sufficient". He could "by no stretch of the imagination be described as bedridden". He had in fact exercised in the prison and had even assisted with the polishing of floors.

[45] In his affidavit dated 10 July 2003 Dr Frank, the designated medical officer at the Helderstroom prison, stated that he had initially indicated the applicant's life expectancy of six to eight months on the basis of the information available to him at the time he compiled his report of 3 June 2003 (para 19-20 above). In his later report, dated 12 June 2003 (para 11 above), he followed the more favourable view expressed by Prof du Toit in his report (para 10 above), namely that the applicant's life expectancy could increase to one year with treatment. In the present affidavit, however, he pointed out that "statistically ... survival of up to 5 years is not excluded".

[46] According to Dr Frank's observations of the applicant's physical condition during a visit to him on 12 June 2003 at the hospital, the applicant appeared to be asymptomatic. He had no complaints and was experiencing no pain or other discomfort such as shortness of breath. He was able to conduct a coherent conversation and did not appear to have lost any weight.

[47] Regarding his recommendation that the applicant be placed on parole with immediate effect, Dr Frank explained that this had been prompted entirely by his impression at the time that the medical facilities of the Department could not comply with the conditions stipulated by Dr Eedes for the applicant's discharge from hospital after the application of chemotherapy. He now realised, however, from the third respondent's affidavit, that the necessary facilities indeed exist and that the applicant could be "more than adequately" accommodated at the hospital facilities of the Drakenstein prison. His previous recommendation for immediate placement could hence "obviously" not stand.

[48] The head of the Helderstroom prison, deputy director Grootboom, pointed out in his affidavit that his concurrence with the recommendations of the various doctors (para 19 above), supporting the applicant's placement with his immediate family, was based on the medical documentation made available to him. He was in no position to question their views and recommendations. Placing the prisoner with his immediate family was a "standard arrangement" from which there would be deviated only if there were a specific

recommendation that the prisoner should be placed in an institution. When discussing this with the applicant during a visit to him on 18 June 2003, the applicant had indicated that he would prefer to remain in the Helderstroom prison rather than be transferred to the Drakenstein prison.

THE APPLICANT'S REPLY

[49] Much of the applicant's replying affidavit contains argumentative matter that does not bear repeating at this stage. I shall refer only to what I regard as relevant factual matters.

[50] At the outset the applicant pointed out that two of the grounds relied on by the third respondent for his decision to reject the application for parole on medical grounds appeared for the first time from his opposing affidavit. He referred in this regard, firstly, to the third respondent's averment that granting the application would have a negative effect on penal administration in South Africa and, secondly, to his averment that the Drakenstein and Helderstroom prisons had the necessary facilities to meet his (the applicant's) needs. These averments were not included in the reasons put forward by the third respondent for his decision. Nor was it suggested that the reasons furnished by him were only in summary form and could later be supplemented. Indeed, when Mr Conradie from the Department met with him on 18 June 2003 to inform him of the third respondent's decision, he was apprised only of the content of the written reasons received the next day, on 19 June 2003. It was incomprehensible that he should omit to mention

two further reasons so strongly relied on in his said affidavit.

[51] Regarding the alleged negative effects on penal administration of his release on parole, the applicant pointed out that no details were furnished by the third respondent of the large number of prisoners diagnosed with HIV/ADS and other terminal illnesses who were waiting expectantly for the outcome of the present application. From the annual report of the Office of the Inspecting Judge, Judicial Inspectorate of Prisons (1 April 2002 – 31 March 2003), it would appear that only a tiny proportion of prisoners (88 out of an average population of 179 398) was released during 2002 on medical grounds. This had prompted Inspecting Judge J J Fagan to suggest that more use should be made of the provisions relating to the release of terminally ill prisoners.

[52] On the adequacy of medical facilities in the elderstroom and Drakenstein prisons, the applicant denied that the nursing staff at either prison would be able to administer the specialist treatment required by him. In addition it would not suffice that he be kept in a single cell in the hospital section of either prison since that would not ensure an infection free environment as required by Dr Eedes and Prof du Toit. Neither prison provided access to medical care in the case of complications arising from his disease, such as lung haemorrhage and infection on the one hand, or the side-effects of chemotherapy on the other.

[53] Mr Pepler's "wrong assumption" that the applicant was a first offender, in which

event a realistic date for placement on parole would be 17 August 2003 (para 41 above), was rejected by the applicant on the basis that his last conviction was more than fourteen years earlier. In any event his condition negated any tendency to commit further crimes.

[54] Mr August's affidavit, according to the applicant, made it clear that Helderstroom prison was excluded as a possible place of rehabilitation in that it did not provide twenty-four hour medical surveillance. For the rest he knew of no private medical facility in close proximity to the Drakenstein prison which would make it unnecessary to travel to Wynberg for treatment.

[55] Turning to Dr Frank's affidavit (para 11 and 47 above) the applicant pointed out that it was at odds with his report of 12 June 2003, in which he recommended the applicant's immediate release on parole. Having been a medical officer of the Department in the Boland area over a lengthy period of time (eighteen to twenty years), Dr Frank must have known, the applicant submitted, that there was no prison in the area of his jurisdiction that was adequately equipped to care for cases such as that of the applicant.

[56] In a supporting affidavit in reply, Prof du Toit confirmed the recommendations made by him in his report of 11 June 2003 (para 10 above) and rejected the suggestion that he should have physically examined the applicant. Inasmuch as the histology was conclusive of an advanced stage of small cell carcinoma, such examination would have served no purpose. The cancer had not only spread to both lungs, but had already

attacked the thoracic cavity. The applicant would ultimately die of respiratory failure.

[57] Prof du Toit made it clear that the applicant was indeed in the final phase of terminal illness, in that the small cell lung carcinoma was an aggressive cancer that spread with great rapidity and had a propensity to invade the liver, adrenals, brain, bones and, ultimately, every organ in the body. He emphasised that, even with radiotherapy or chemotherapy, which was purely palliative, the median survival rate was one year only and could not be described as "varied and incongruent" (para 28 above). This condition was irreversible and incurable and could not be improved with successful medical treatment (para 28 above). It could not be compared with tuberculosis or HIV/AIDS, where the life expectancy with treatment could be fifteen to twenty-five years.

[58] On the observations as to the applicant's outward appearance, Prof du Toit pointed out that, initially, he might look well. As the effects of chemotherapy and radiotherapy manifested themselves, however, he would become chronically ill and proceed from being ambulant to requiring rest two or three times a day. After a session of palliative treatment he might, generally, feel better, but this condition would be temporary and would soon alternate with chronic illness severely affecting his physical, emotional and intellectual abilities. It was inevitable that he would become bedridden, predictably within months. He would in time lose weight, feel ill, suffer from shortness of breath, develop water on the lungs, risk haemorrhage from the bronchus and become cathetic. These symptoms, which would inevitably manifest themselves in the not-so-distant

future, were painful and hard to bear "in the immediate term" and were not eliminated by treatment.

[59] It was exceptionally difficult, Prof du Toit averred, to predict the precise moment when a particular patient would become bedridden as a result of the cumulative effect of his symptoms, because each patient responded differently to treatment. It was incontrovertible, however, that a person with such symptoms would not be able to overcome such symptoms and would inevitably succumb to respiratory failure as the ultimate effect of his cancer.

[60] It followed from the aforegoing, Prof du Toit opined, that the applicant's outward appearance belied the terminal stage of his illness and could not, on medical grounds, constitute a basis for denying him parole.

[61] On the question of whether or not the Department had medical facilities at one or more of its prisons sufficient to meet the applicant's needs, Prof du Toit emphasised that the applicant's medical condition required considerable medical skill and expertise to be properly monitored and treated. Treatment could be administered only by a clinician skilled in such treatment, namely a specialist having greater skills than the average oncologist. The nature of the chemotherapy to be administered required constant medical surveillance and twenty-four hour monitoring by a specialist such as Dr Eedes, both during and after chemotherapy. To Prof du Toit's knowledge there was no prison in the

country equipped to administer such treatment. Nor was the level of medical care required by him available in any prison.

[62] For these reasons Prof du Toit was of the view that the third respondent did not understand, from a medical point of view, the content and significance of the relevant medical reports placed before him. There was hence no basis for the refusal of the applicant's application to be placed on parole on medical grounds. Prof du Toit accordingly confirmed his recommendation that the applicant be placed on parole with immediate effect.

[63] One Gideon Morris, a director in the Judicial Inspectorate of Prisons, deposed to an affidavit confirming the content of the annual report of the Judicial Inspectorate (para 51 above) and pointing out that, as a result of overcrowded prisons, the mortality rate amongst prisoners had increased by 600% over the past seven years. He expressed surprise at the claim that the Drakenstein prison could provide an uncrowded environment free of infection as well as twenty-four hour medical surveillance to a person suffering from lung cancer. In most cases the prison hospital was a large communal cell with no specialist facilities and housing persons suffering from various diseases, such as tuberculosis, HIV/AIDS or pneumonia. In his experience medical personnel were not physically present after hours and the prisoners themselves sounded an alarm and summoned medical personnel should a fellow-prisoner fall seriously ill.

[64] Ms N E Ndinisa, an "independent prison visitor" appointed in terms of section 92 of the Act, has been visiting the Drakenstein Prison hospital regularly since March 2002. According to her the prison did not have facilities to treat and care for terminally ill patients like the applicant, and did not provide twenty-four hour medical surveillance. On the contrary, she rarely saw a doctor on the premises and patients who became ill overnight would invariably have to wait till the next morning for day-duty nursing staff to make the necessary arrangements for them to see a doctor or to visit an outside hospital.

[65] Dr Eedes confirmed that the applicant was in the final phase of a fatal illness. His outward appearance belied his condition, which would not improve with medical treatment. Dr Eedes likewise confirmed that there were no adequate facilities within the Department to meet the applicant's medical requirements. He associated himself with Professor du Toit's opinion and with his reasons for such opinion.

ARGUMENT ON BEHALF OF THE APPLICANT

[66] In his argument on behalf of the applicant, Mr Gauntlett submitted that the reasons tendered by the third respondent to justify his refusal of the applicant's application for parole on medical grounds did not bear scrutiny in that they were in conflict with the overwhelming medical evidence that the applicant was in the final stage of a fatal illness. The applicant's outward appearance gave no indication of his true physical condition, while section 69 of the Act did not require him to be bedridden or in such a state of health that death should be considered imminent, thereby rendering him

unable to commit any crime.

[67] The inadequacy of these reasons, as later supplemented with reference to the penal consequences of releasing the applicant at this stage and the suitability of the medical facilities in various prison hospitals, gave rise to a number of grounds of review dealt with by Mr Gauntlett under various headings. The traditional common law grounds of review were preceded by a discussion of the standard of review set forth in section 33(1) of the Constitution and providing that all persons have the right to lawful, reasonable and procedurally fair administrative action.

[68] Similarly a person's fundamental right to dignity, as envisaged in section 10 of the Constitution, should, according to Mr Gauntlett, be considered in rendering a decision in terms of section 69 of the Act. A prisoner's right to protection of his dignity should include his right to die with dignity.

[69] Section 69, Mr Gauntlett submitted, gave the second respondent a discretion to place a prisoner on parole on medical grounds on the recommendation of the medical officer, should it be "expedient on the grounds of his physical condition". In this regard Mr Gauntlett argued that the third respondent had, in the face of a number of contrary specialist medical opinion, formed his own "medical" opinion that the applicant's life expectancy could not be regarded as "so short that further imprisonment would not serve a purpose", while it could not be said that he was "in the final phase of terminal illness" of such a nature that he would, apparently, be unable to commit a similar, or any other,

crime.

[70] Furthermore, Mr Gauntlett argued, the third respondent had not applied his mind to whether or not the applicant's release on parole on medical grounds was "expedient" in the sense of its being advantageous, appropriate or suitable under the circumstances. Section 69 did not impose any burden on the prisoner to prove an inablity to commit crime or to constitute a threat to public safety. Nor did it require him to prove that death was imminent.

[71] The length of time already served by the prisoner applying for release on parole on medical grounds was, Mr Gauntlett suggested, totally irrelevant, since section 69 authorised placement on parole at any time. The fact that the applicant had served less than one third of his sentence should not have been taken into account as a relevant consideration in assessing whether or not his release on parole on medical grounds was expedient.

[72] During the course of argument by Mr Gauntlett, the various grounds of review raised in the founding affidavit (para 14 above) centred around one main ground, namely that the decision taken by the third respondent was objectively so irrational and unreasonable that the inference was justified that he had failed to apply his mind to the matter. This was linked with the perception that he had misconceived the nature of his discretion in terms of section 69 of the Act and had displayed an unwarranted adherence

to a fixed principle or policy of the Department. In the process he had taken irrelevant considerations into account while ignoring relevant ones, thereby creating the impression that his ultimate decision was arbitrary and capricious.

ARGUMENT ON BEHALF OF THE RESPONDENTS

[73] In his argument on behalf of the respondents Mr Potgieter dwelt initially on the relevant procedures emanating from the Act and on the powers of the second respondent in respect thereof. He emphasised that section 69 of the Act should be read with standing correctional order "B" of the Department (para 24 above) and the circular supplementing such standing order (para 25 above). Mr Potgieter suggested in this regard that terminal illness in fact meant that death should be imminent.

[74] In regard to the grounds of review raised against the decision to refuse the applicant's application for parole on medical grounds, Mr Potgieter submitted that the third respondent had come to his decision in a rational, balanced and fair manner. He had given serious and due consideration, and applied his mind, to all relevant factors, including the applicant's medical condition as reflected in the various medical reports and opinions. There was no question that he had acted beyond the scope of the Act in exercising his wide discretion, nor could it be said that he had acted improperly or in bad faith. Inasmuch as his decision was "rationally related to the purpose for which the power was given" this court should not interfere with it.

[75] With reference to the fundamental right to dignity contained in section 10 of the

Constitution, Mr Potgieter accepted that every sentenced prisoner was entitled to be detained in conditions consistent with human dignity and to be provided with adequate medical treatment. In the present matter there was no suggestion that the applicant had been deprived of these rights. On the contrary, he had been given every latitude to be treated by medical practitioners of his own choice in a hospital of his own choice.

[76] In exercising his discretion in terms of section 69(b) of the Act, the second respondent or his delegate (*in casu* the third respondent) was required to give specific consideration to the elements of expediency and the physical condition of the prisoner. In considering expediency he should take all relevant factors into account, including the interests of penal administration. The same applied to the consideration of the physical condition of the prisoner. In this regard, Mr Potgieter appears to have distinguished between externally determinable "physical condition" and internally diagnosed "medical condition". The former was purely factual and could be established by mere observation of the prisoner's outward appearance. The latter could not be determined by factual observation, but required medical examination and testing. As for his physical condition, Mr Potgieter submitted, the applicant was indisputably "asymptomatic" and "fully functional", as properly held by the third respondent in exercising his discretion to refuse parole on medical grounds.

[77] The applicant's outward appearance of good health and the fact that he could still live for some twelve months justified, according to Mr Potgieter, the third respondent's

conclusion that he could still commit crimes. This, and the fact that the applicant had served only a short period of his sentence, were indeed factors that had to be considered by the third respondent in making his decision.

[78] In any event, Mr Potgieter submitted, the fact that the applicant's condition was continuously being monitored and that his case would be automatically reconsidered if his condition should deteriorate, indicated that the third respondent's approach was objectively rational.

[79] Regarding the allegation that the third respondent had supplemented his initial reasons, Mr Potgieter argued that the mere fact that such reasons were hand-written indicated that they were *ex tempore* and not intended to be exhaustive of everything considered by the third respondent. The adequacy of the medical facilities at the Drakenstein prison was clearly a factor taken into consideration by the third respondent. The fact that the applicant was still smoking (para 12 above), on the other hand, did not carry significant weight. Yet it should not, Mr Potgieter opined, be regarded as irrelevant or extraneous matter.

THE RELEVANT PROVISIONS OF THE ACT

[80] The *Correctional Services Act* 8 of 1959 (previously known as the *Prisons Act* 8 of 1959) has been amended many times, most recently by the *Correctional Services Act* 111 of 1998, which has not yet come into operation. Section 63 thereof deals with the

powers, functions and duties of parole boards, while section 65 deals generally with the release and placement of prisoners on parole. The most relevant section for purposes of this application is section 69, which bears the heading "**Placement on parole on medical grounds**" and reads as follows:

> A prisoner serving any sentence in a prison -
> *a)* who suffers from a dangerous, infectious or contagious disease; or
> *b)* whose placement on parole is expedient on the grounds of his physical condition or, in the case of a woman, her advanced pregnancy,
> may at any time, on the recommendation of the medical officer, be placed on parole by the Commissioner: Provided that a prisoner sentenced to imprisonment for life shall not be placed on parole without the consent of the Minister

[81] In terms of the interpretation provisions of section 1 of the Act, the Commissioner is the Commissioner of Correctional Services appointed under section 4(1) (the second respondent in the present case). The Commissioner in turn appoints the medical officer for a prison or group of prisons in terms of section 6(2). Section 6(1) provides that the medical officer performs such duties as are assigned to him by or under the Act. One of these duties is to make a recommendation regarding placement on parole of a prisoner on medical grounds in terms of section 69(b), when it is "expedient on the grounds of his physical condition".

[82] It seems clear from the relevant wording of section 69 that the Commissioner (or his duly appointed delegate - the third respondent in the present matter) has a discretion **at any time** to place on parole a prisoner serving **any sentence** in a prison, provided his placement on parole is **expedient on the ground of his physical condition** and further

provided it is preceded by **the recommendation of the medical officer**. It is hence irrelevant what the nature of his conviction and the length of his sentence of imprisonment might be. It is equally irrelevant what period of imprisonment he has actually served. The only requirements for release on parole on medical grounds are that the medical officer should recommend it and that it should be "expedient" having regard to his "physical condition".

[83] In the Afrikaans text, which was signed by the Governor-General on 20 March 1959, "expedient" is rendered as "raadsaam". Although "expedient" may bear the meaning of "advisable" (in a practical rather than a moral sense), in the present context it usually means "useful", "beneficial", "advantageous", "appropriate", "suitable" or "convenient". Derived from the Latin *expedire* (literally "to free the feet" in the sense of disengaging, extricating or untangling something), it may be used impersonally (*expedit*) to mean "serviceable", "profitable", "advantageous", "useful" or, simply, "expedient" (see Lewis and Short *A Latin Dictionary* sv *expedio*). In *The Shorter Oxford English Dictionary* "expedient" is rendered as, *inter alia*, "advantageous", "fit", "proper" or "suitable to the circumstances of the case". It also occurs as "useful", "politic" or, in substantive form, as "[t]hat which helps forward, or conduces to an object; a means to an end" or "[a] device adopted in an exigency".

[84] The concept of "physical condition" (Afrikaans text: "liggaamlike toestand") relates to the realm of natural philosophy, natural science or physics (ancient Greek:

physiké; classical Latin: *physica*), which has its origin in the simplicity (and complexity) of nature (ancient Greek: *phýsis*). "Physical" (medieval Latin: *physicalis*) is that which pertains to material nature, as opposed to the psychic, mental or spiritual realm. In anatomical sense it relates to the body and may hence be rendered as "bodily" or "corporeal". In the medical sphere it relates to medicine and the healing of diseases, whence the term "physician". In *The New Shorter Oxford English Dictionary* the primary sense of "physical" is rendered as "[p]ertaining to medicine" or "[p]ertaining to matter" in the sense of "material" rather than mental or spiritual, or "bodily" rather than moral.

[85] It should be noted that the provisions and requirements of section 69 of the Act differ in marked respects from the proposed amendment thereto by virtue of section 79 of the *Correctional Services Act* 111 of 1998. It appears under the heading **Correctional supervision or parole on medical grounds**, but has not yet been proclaimed and is hence not yet operative. It reads thus:

> Any person serving any sentence in a prison and who, based on the written evidence of the medical pratitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death.

Although the requirement that the prisoner should be "in the final phase of any terminal disease or condition" features strongly in the proposed amendment, it is not, and never has been, a requirement in terms of section 69 of the current Act. This may account for the reference to terminal illness in the standing correctional order "B" and the circular of 21 December 2001 (para 24-25 above).

[86] It should be noted further that there are no requirements in section 69 relating to life expectancy, a state of being bedridden or the imminence of death. There is likewise no suggestion that the prisoner should be (physically or otherwise) unable to commit any crime should he be released on parole for medical reasons.

THE RIGHTS OF A DETAINEE OR PRISONER

[87] It must not, of course, be forgotten that this court is enjoined by section 39(2) of the Constitution, Act 108 of 1996, to promote the spirit, purport and objects of the Bill of Rights when interpreting section 69 of the Act. Section 7(1) of the Constitution describes the Bill of Rights, contained in chapter 2 thereof, as "a cornerstone of democracy" that "enshrines the rights of all people" and "affirms the values of **human dignity**, **equality** and **freedom**".

[88] In this regard section 9(1) of the Constitution propounds the value of **equality** by making it clear that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". **Human dignity** comes to the fore in section 10, where we are told that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". Personal **freedom** is guaranteed in section 12 in the form of various rights, including (in section 12(1)(e) thereof) the right "not to be treated or punished in a cruel, inhuman or degrading way".

[89] Every sentenced prisoner is entitled to respect for and recognition of his equality, human dignity and freedom, in the sense of his right not to be treated or punished in a cruel, inhuman or degrading way. Section 35(2)(e) ensures that he has the right "to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment". What will be "consistent with human dignity" in any particular case will, of course, depend on the facts and circumstances of each such case.

[90] The right to acceptable conditions of detention or imprisonment, consistent with the tenets of human dignity has long been established in our jurisprudence. In the early case of *Whittaker vs Roos and Bateman; Morant vs Roos and Bateman* 1912 AD 92, in which a delictual claim for damages arising from illegal confinement of awaiting trial prisoners in a "punishment cell" was considered, Innes J stated (at 122-123) that such conduct was "a wrongful and intentional interference with those absolute natural rights relating to personality, to which every man is entitled". Although the freedom of the detainees had been impaired by the legal process of imprisonment, "they were entitled to respect for what remained". In this regard the learned judge said:

> They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed".

[91] This approach was confirmed in the minority judgment of Corbett JA in *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A) at 39C-F:

It seems to me that fundamentally a convicted and sentenced prisoner retains all

> the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily makes upon a prisoner's personal rights and liberties (for sake of brevity I shall henceforth speak merely of "rights") are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal redress.

[92] The aforesaid *dicta* of Innes J and Corbett JA were approved and elaborated upon by Hoexter JA in *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 141C-142A:

> The Innes *dictum* serves to negate the parsimonious and misconceived notion that upon his admission to gaol a prisoner is stripped, as it were, of all his personal rights; and thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations. The Innes *dictum* is a salutary reminder that in truth the prisoner retains all his personal rights save those abridged or proscribed by law. The root meaning of the Innes *dictum* is that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights.

It is self-evident that the extent to which imprisonment will make necessary inroads upon a particular prisoner's personal rights will depend upon the reason for his detention and the legislation applicable to him. Making full allowance therefor, it seems to me nevertheless that although the *Whittaker* case was concerned with the plight of awaiting-trial prisoners, the Innes *dictum* is one of general application. As a matter of logic and legal principle I am unable to see why it should not apply to every prisoner in a gaol irrespective of the reason for his detention. As to principle, subsequent to the *Goldberg*

case the following general proposition was stated by Jansen JA in delivering the judgment of this Court in *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) (at 957E-F).

'On principle a basic right must survive incarceration except insofar as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration.'

For these reasons I would respectfully express my agreement with the general approach reflected in the *residuum* principle enunciated by Corbett JA in the *Goldberg* case. Moreover, in seeking to identify or to circumscribe basic rights, I would approve the critical approach adopted by Corbett JA in the *Goldberg* case in regard to the efficacy or otherwise of a test based upon the distinction between 'comforts' on the one hand and 'necessities' on the other hand. In this field of inquiry, so I consider, the line of demarcation between the two concepts is so blurred and so acutely dependent upon the particular circumstances of the case that the distinction provides a criterion of little value. An ordinary amenity of life, the enjoyment of which may in one situation afford no more than comfort or diversion, may in a different situation represent the direst necessity. Indeed, in the latter case, to put the matter starkly, enjoyment of the amenity may be a lifeline making the difference between physical fitness and debility; and likewise the difference between mental stability and derangement.

See also *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS) at 60G-61A (*per* Gubbay CJ), cited with approval by Navsa JA in

Minister of Correctional Services and Others v Kwakwa and Another 2002 (4) SA 455 (SCA) para 24-25 at 467G-468D; *August and Another v Electoral Commissioner and Others* 1999 (3) SA 1 (CC) para 18-19 at 10E-11D.

THE STANDARD OF REVIEW

[93] The judicial review of decisions taken by executive and other functionaries in the exercise of public power has long been recognised by our common law and in the far-reaching jurisprudence arising therefrom. In general terms, with a view to establishing grounds of review, it must be shown that the decision-maker failed to apply his mind to the relevant issues in accordance with the applicable statutory provisions and the requirements of natural justice. See *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735F-G; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895B-C; *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14F-G.

[94] These authorities, and the principles demonstrated by them, were cited with approval by Corbett JA in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152A-B. In assessing whether the decision of the president of the Johannesburg Stock Exchange to suspend the listing of securities should be set aside on review, the learned judge considered the allegation that the president had failed to apply his mind as aforesaid, and continued (at 152B-D):

> Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated… Some of these grounds tend to overlap.

[95] The common law grounds of review have been bolstered by section 33(1) of the Constitution, Act 108 of 1996, which provides, under the heading **Just administrative action**, that "[e]veryone has the right to administrative action that is **lawful**, **reasonable** and **procedurally fair**". This emphasis on lawfulness (or legality), reasonableness (or rationality) and fairness (or equity) has not rendered the common law grounds of review redundant. On the contrary, they have become firmly interlinked with such constitutional norms, having been "subsumed under the Constitution" and deriving their force from the Constitution. See *Pharmaceutical Manufacturers Association of SA and Another; In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 33. Chaskalson P explains this in para 50-51:

> [50] What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them… What is "lawful administrative action,""procedurally fair administrative action" and administrative action "justified in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law.

[51] Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution

and in accordance with its provisions…

[96] As required by section 33(3) of the Constitution, national legislation has, in the meantime, been enacted to give effect to these rights. I speak of the *Promotion of Administrative Justice Act* 3 of 2000 ("PAJA"), and more particularly to sections 3 to 6 thereof. See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* [2003] 2 All SA 616 (SCA) para 46 at 631*j*, where Schutz JA opined that the common law and the said sections of PAJA give content to the standards required by section 33(1) of the Constitution for administrative actions.

[97] The unfairness of a decision as such cannot constitute a ground for review unless the unfairness is of such a nature and degree that it may justify the inference that the decision-maker has erred to an extent rendering the decision reviewable. Such inference is not easily drawn. See *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) para 86. In para 87 Chaskalson CJ continues to say:

> [87] The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision.

[98] The need for administrative action to be reasonable, in terms of section 33(1) of the Constitution, gives rise to what has probably become the essential standard of review,

namely the rationality of the action, conduct or decision in question. This must be assessed objectively and dispassionately, since the counter-side of rationality is usually arbitrariness and even capriciousness justifying the review and setting aside of the administrative act in question.

[99] In the *Pharmaceutical Manufacturers* case (para 95 above) Chaskalson P explained it in the following way (in para 85, 86 and 90):

> [85] It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.

...

> [90] 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 the public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision

> simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision…

[100] These requirements apply with equal force to decisions taken in terms of a discretion vested in the decision-maker. However wide such discretion may be, it is not unfettered. See *Ismail and Another v Durban City Council* 1973 (2) SA 362 (N) at 371H-372B, cited with approval in the *Goldberg* case (para 91 above) at 48D. It requires a proper consideration and assessment of all the relevant facts and circumstances. If such facts are ignored or misconstrued, the discretion cannot be properly exercised. See *Pepkor Retirement Fund and Another v Financial Services Board and Another* [2003] 3 All SA 21 (SCA) para 32, 45 and 47. In para 47 Cloete JA said the following:

> [47] In my view a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been made before the functionary, the decision should … be reviewable …

[101] Should the reasoning of the decision-maker, in exercising his discretion, be partly good and partly bad, the degree of the bad reasoning must be determined. If it has been material or substantial, the decision will fall to be set aside on review. Should it be impossible to determine this, the court would be constrained to set the decision aside. See *Cabinet for the Interim Government of South West Africa v Bessinger* 1989 (1) SA 618 (SWA) at 627H-I, where Levy J relied on the authorities cited by Baxter *Administrative Law* (1984) 520-521. See also De Smith, Woolf & Jowell *Judicial Review of*

Administrative Action (1995) 346-347 (para 6-084):

> If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally hold that the power has not been validly exercised. It may be immaterial that an authority has considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters; and yet it may be right to overlook a minor error of this kind even if it has affected an aspect of the decision. The influence of extraneous matters will be manifest if they have led the authority to make an order that is invalid *ex facie*, or if the authority has set them out as reasons for its order or has otherwise admitted their influence.

In para 6-086 the learned authors say:

> If the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial. For this reason there may be a practical advantage in founding a challenge to the validity of a discretionary act on the basis of irrelevant considerations rather than extraneous purpose, though the line of demarcation between the two grounds of invalidity is often imperceptible.

[102] I respectfully associate myself with this pragmatic approach, particularly in view thereof that no administrative decision would, generally speaking, be wholly good or wholly bad. The truth will more often than not lie somewhere in between. If the decision in question points, on balance, to bad or flawed reasoning and such reasoning was of material or substantial significance in prompting the decision-maker to come to his decision, the decision would be invalid and liable to be set aside on review. This would, in my view, be consonant with the well-established values of justice, fairness and reasonableness. It would also accord with the requirements of good faith and public

interest.

CONSIDERATION OF THE THIRD RESPONDENT'S DECISION

[103] With this factual and legal background I turn now to a consideration of the third respondent's decision. At the outset it must be made clear that there is no indication of bad faith, improper purpose or ulterior motive on the part of the third respondent in deciding not to release the applicant on parole on medical grounds. I am satisfied that, at all relevant times he acted in good faith and in accordance with what he believed was the proper interpretation of section 69 of the Act, as read with the applicable administrative guidelines.

[104] This does not, of course, mean that his conduct was objectively rational or reasonable, warranting the inference that he had properly applied his mind to the matter requiring his decision. In this regard I shall deal, firstly, with his consideration of the applicant’s physical condition in the context of section 69. Secondly I shall have regard to his views on available medical facilities and the expediency of retaining the applicant in the medical hospital of the Drakenstein prison or, for that matter, of any other prison. In the third place reference will be made to the applicant’s inherent right to human dignity as set forth in section 10, read with section 39, of the Constitution, and raised by the applicant in his founding affidavit (para 15 above). I shall then conclude with remarks on the reviewability of the third respondent’s decision with reference to his primary reasons for refusing the application in terms of section 69.

The Applicant's Physical Condition

[105] It is common cause that the applicant was diagnosed on 22 May 2003 as suffering from an incurable and inoperable lung cancer known as "small cell carcinoma" (para 5 above). Even with chemotherapy and radiotherapy his life expectancy was no more than a year. This treatment would have debilitating side-effects such as hair loss, vomiting, nausea, diarrhoea and weight loss. His immune system would be affected negatively, exposing him to a high risk of infection, particularly in the unhygienic and crowded conditions prevailing in our prisons (para 6 above). Three medical specialists, Dr Chapman, Dr Eedes and Prof du Toit, unhesitatingly recommended that he be placed on parole with immediate effect (para 10 above). Dr Frank, the medical officer, agreed with this recommendation on the basis that the Department had no prison that could adequately care for the applicant (para 11 above).

[106] The first seeds of confusion were sown, however, when Dr Frank said that the applicant exhibited "no overt sign of his disease" and appeared "externally, to be in good health" (para 11). This seems to have prompted Mr Pepler to recommend rejection of the parole application, amongst other reasons because the applicant appeared to be in good health and was able to feed, dress and wash himself (para 12 above).

[107] The third respondent was clearly influenced by Mr Pepler's observations, since he himself had established, during a visit to the applicant (para 13 above), that he appeared externally to be "very normal" and not yet "bedridden". His reading of the medical

reports was that "physically" the applicant appeared to be normal and self-sufficient.

[108] This use of the word "physically" would appear to allude to the applicant's external or outward appearance as opposed to his internal or "medical" condition (see also para 29 and 38 above). This attempt to distinguish between the “physical” as opposed to the “medical” condition of the applicant is clearly wrong and not justified by the ordinary meaning of the words used in section 69 of the Act. As mentioned above (para 82) the third respondent was, after receiving a recommendation from the medical officer, empowered to exercise his discretion to release the applicant on parole for medical reasons if he was satisfied that it was “expedient on the ground of his physical condition”. On the assumption that he understood “expedient” to mean “advisable” (see para 83 above), there is no basis on which he could have accepted that “physical condition” related merely to the applicant’s external or outward appearance. This would be in conflict with the ordinary meaning of “physical condition” as pertaining to his bodily or corporeal condition, as opposed to his mental, spiritual or moral condition. It would hence include both internal and external aspects of his bodily condition, in so far as it can be medically determined (see para 84 above).

[109] The requirement that the applicant should be terminally ill, in the sense that his life expectancy should be short and his demise imminent, appears to have been introduced by the standing correctional order “B” and the circular of 21 December 2001 (para 24-25 above). Similarly the suggestion that he should be “in the final phase of

terminal illness" (para 28 above) appears to come from section 79 of the *Correctional Services Act* 111 of 1998 (para 85 above), which indeed refers to "the final phase of any terminal disease or condition", but which is not yet operative. It would appear that the third respondent has, in his consideration of the requirements of section 69 of the Act, allowed himself to be confused by terminology which is nowhere to be found in or required by the Act. The same can be said of the apparent requirement that the applicant should be "bedridden" before being regarded as terminally ill.

[110] The suggestion by the third respondent that the applicant's life expectancy was "not so short" that further incarceration would not serve a purpose and that there was no assurance that he would abstain from committing a crime (para 13 above) cannot, in my view, constitute a requirement in terms of section 69 of the Act. There is no indication of what a "short", as opposed to a "not so short", life expectancy may be. Nor can it be determined when a prisoner is so ill that it would be physically impossible for him to commit a crime. I should imagine that the commission of further crimes would be the last thing on the mind of any prisoner released on parole for medical reasons, particularly when he knows that he has only a few months to live.

[111] Likewise unacceptable is the further reason put forward by the third respondent for his rejection of the applicant's parole application, namely that the applicant had committed a serious crime and that, should he be released forthwith, he would have served less than one third of his sentence. This consequence would, according to the third

respondent, impact negatively on other prisoners diagnosed with terminal illnesses and who were anxiously awaiting the outcome of the present application (para 34 and 36 above). There is no merit in these contentions. Section 69 of the Act makes it clear that a prisoner may be placed on parole for medical reasons “at any time”.

[112] The supporting affidavit of Mr August gave the third respondent anything but support in this regard. He also plainly laboured under the mistaken impression that the applicant's "physical condition" related to his outward appearance. In this regard he was satisfied that the applicant's physical condition was good in that he was not bedridden and was in fact completely self-sufficient (para 44 above).

[113] In the meantime Dr Frank managed to execute a classic *volte face* by suggesting that, statistically, the applicant could still live for five years. In this regard he apparently latched onto the applicant's exterior as indicating his "physical condition". He related this to the applicant's appearing to be "asymptomatic" in that he had no complaints, was not experiencing pain or discomfort, could conduct a coherent conversation and did not appear to have lost any weight (para 45-46 above). Dr Frank, of all people, should have realised that the symptoms referred to above (para 105) were side-effects of the palliative treatment the applicant would receive. Such side-effects, it seems obvious, would become prevalent in the course of time as the treatment was applied. The fact that they were not visible at the time of his interview with the applicant did not mean that they would not eventuate or that the applicant’s condition was improving.

[114] This is clearly how Dr Mallet, the applicant's general practitioner, understood it (para 18 above) when he stated that the applicant's inoperable cancer of the lung would only be palliated by chemotherapy and that his physical condition had already weakened to such an extent that he would be physically unable to commit a crime. This opinion was confirmed in no uncertain terms by Prof du Toit (para 56-60 above) when he pointed out that the applicant was indeed in the final phase of a terminal illness, a view concurred in by Dr Eedes (para 65 above). During the course of this illness the aggressive cancer would invade every organ in his body and ultimately lead to his death as a result of respiratory failure. The chemotherapy was purely palliative and could not assist in effecting recovery or improvement. Although the applicant might initially look well, his outward appearance belied the terminal stage of his illness, an opinion likewise shared by Dr Eedes (para 65 above). The effects of chemotherapy and radiotherapy would inevitably lead to his debilitation and chronic illness within the few months left of his life, while the side-effects and symptoms referred to above would manifest themselves within a relatively short time.

[115] It is clear from the above that the third respondent totally misunderstood and misconstrued the medical opinions of Dr Eedes, Dr Chapman and Prof du Toit. In addition he misinterpreted the relevant provisions of section 69 of the Act by reading into it non-existent requirements, or by allowing himself to be wrongly influenced by departmental guidelines and the provisions of an Act that had not yet become operative. By misinterpreting the concept of "physical condition" he could not apply his mind

properly to the expediency of placing the applicant on parole on medical grounds.

The Available Medical Facilities

[116] Despite Dr Frank having categorically stated in his report to Mr August (para 11 above) that there was, to his knowledge, no medical facility within the jurisdiction of the Department of Correctional Services that could adequately care for the applicant, Mr Pepler gave the assurance (para 12 above) that the Department could comply with the minimum requirements set by Dr Eedes for the applicant's care. In the written reasons for his decision not to release the applicant on parole on medical grounds, the third respondent accepted Mr Pepler's recommendation, and rejected that of Dr Frank to the contrary, without making any reference to the medical facilities pertaining in any departmental prison hospital.

[117] He attempted to cure this lacuna in his opposing affidavit (para 30-33 above) by relying on obvious hearsay placed before him by Mr August, who had conducted an investigation but was not said to have any medical qualifications. In this regard Mr August had been assured by Sister Matshibane of the Drakenstein prison hospital that they would be able to comply with the requirements laid down by Dr Eedes. This was never confirmed in a supporting affidavit by Sister Matshibane and no explanation was tendered as to its glaring absence. Yet the third respondent, who was likewise not medically qualified, was quite happy to say that the Drakenstein prison hospital could cater for the applicant's needs and meet the requirements set by both Dr Eedes and Dr Frank. The applicant could, in fact, receive the same treatment there as he was presently

receiving and nothing prevented the doctors currently treating him from doing so in the prison hospital.

[118] Mr August in turn attempted to cure the deficiencies in his report by adding that the applicant would be under twenty-four hour surveillance in “humane and adequate” circumstances that would “effectively eliminate the risk of infection” (para 42 above). In any event there was a private medical facility close by where he could obtain “the best medical treatment”. This turned out to be the Panorama hospital which was, according to Ms Malan (para 43 above) situated “within a reasonable distance” from the Drakenstein prison and where the applicant could receive “certain of his treatment” should his doctors so advise and should it be expedient to treat him there. How this could be a viable alternative to the present situation is extremely difficult to grasp, particularly since it is made conditional to the advice of his doctors and the expediency of treating him there.

[119] Even more incomprehensible is how Mr August’s extremely superficial and wholly inadequate report, even as supplemented in his affidavit, could ever have satisfied the third respondent. At the very least one would have expected the respondents to furnish a full report by an adequately qualified and experienced medical doctor as to the exact nature and ambit of the medical facilities in the Drakenstein prison. They clearly did not mandate Dr Frank, a suitably qualified and experienced medical doctor with specialist knowledge of prison medical facilities, to do a full and proper investigation of such facilities. In his further affidavit (para 47 above) Dr Frank, in a weak and quite unpersuasive explanation as to why he had changed his mind regarding the adequacy of

departmental medical facilities, appears simply to have accepted the third respondent's allegations in this regard. There is no indication of what gave rise to this startling *volte face*.

[120] In this regard I have no hesitation in accepting Prof du Toit's observation (para 61 above) that the applicant's medical condition requires considerable medical skill and expertise for its proper monitoring and treatment. It is quite obvious that only highly qualified medical specialists would be able to manage and supervise the extremely specialised care required by a person in his condition. This was confirmed by Dr Eedes (para 65 above).

[121] That the medical facilities at the Drakenstein prison cannot be said to provide an uncrowded environment free of infection and twenty-four hour medical surveillance, is jarringly brought home by the affidavit of Mr Morris (para 63 above). As a director in the Judicial Inspectorate of Prisons he must be accepted as being suitably qualified to make such assessments. According to him the prison hospital is, ordinarily, a large communal cell with no specialist facilities and housing prisoners suffering from all manner of infectious diseases. This was confirmed, with specific reference to the Drakenstein prison hospital, by Ms Ndinisa (para 64 above), who has been visiting the said facilities regularly since March 2002 in her capacity as an "independent prison visitor".

[122] It is abundantly clear from the above that the third respondent could not reasonably have accepted that the Drakenstein prison's medical facilities would be

adequately equipped to provide proper care to a person in the applicant's medical condition. I have no hesitation in holding that, in this respect also, he failed to determine, and apply his mind to, the true facts pertaining to such medical facilities. They are quite obviously hopelessly inadequate for providing specialist treatment and care to a person suffering from inoperable and incurable cancer.

The Applicant's Inherent Right to Human Dignity

[123] It is true that Mr Pepler gave the assurance (para 12 above) that the applicant would be treated in a humane way ("heel menswaardig"). It is equally true that the third respondent accepted (para 37 above) that the applicant was entitled to his dignity in line with a humane approach. It cannot, however, be said that either the said assurance or acceptance was visible in the third respondent's consideration of the applicant's physical condition and the adequacy of the medical facilities at the Drakenstein prison. On the contrary, I am of the view that his inherent right to human dignity, as set forth in the discussion on the rights of a detainee or prisoner (para 87-92 above), has not been observed in the consideration of his application for release on parole on medical grounds. I say so for the following reasons.

[124] The third respondent's failure to respect the applicant's inherent right to human dignity came to the fore, firstly, in his assessment of the applicant's physical condition for purposes of section 69 of the Act. By restricting his understanding of such condition to the applicant's external or outward appearance, which is clearly only temporary and

will undoubtedly undergo a radical change in the near future, the third respondent chose to ignore, or downplay, the fact that he is suffering from an inoperable and incurable disease that will inevitably cause his death within a few months. To insist that he remain incarcerated until he has become visibly debilitated and bedridden can by no stretch of the imagination be regarded as humane treatment in accordance with his inherent dignity. On the contrary, the overriding impression gained from the third respondent's attitude in this regard is that the applicant must lose his dignity before it is recognised and respected.

[125] The third respondent's failure to recognise and accept the obvious inadequacy of the medical facilities at the Drakenstein prison or, for that matter, at any other prison under the jurisdiction of the Department, is a second instance of his failure to respect the applicant's inherent right of dignity. Although such facilities may be adequate for the treatment of ordinary, run-of-the-mill illnesses and medical problems, it is abundantly clear that they are totally inadequate for the treatment of terminally ill patients such as the applicant. To insist that he remain incarcerated while being housed in the said facilities constitutes a blatant denial of his most basic right to be treated with dignity and respect, regardless of the crime he has committed and the period of his sentence that he has actually served.

[126] The third respondent's suggestion, in the additional reasons raised by him for his decision, that the applicant may still, at the present time, be able to commit a crime or crimes, constitutes, in my view, a third instance of his failure to respect the applicant's

inherent right to dignity. It is extremely unlikely that the applicant's thoughts, urges and desires are directed at anything but being reunited with his family during the last few months of his life. He has given the assurance that he will not be involved in crime and has accepted the conditions of his parole as required by the respondents and this court (para 2 above). To insist that he remains imprisoned until it is physically impossible for him to commit any crime is, in my view, inhuman, degrading and thoroughly undignified.

[127] The suggestion that the release of the applicant on parole for medical reasons will impact negatively on the penal system and on the expectations of other prisoners suffering from terminal diseases may be regarded as a fourth instance of the third respondent's failure to respect the applicant's inherent right to dignity. It amounts to no more than a lumping together of all prisoners suffering from terminal diseases, with no thought whatever being directed to the particular facts and circumstances relating to each prisoner individually. The applicant is an individual and deserves to be assessed as such.

[128] The facts set forth in the most recent annual report of the Judicial Inspectorate of Prisons (para 51 above) indicate a shocking state of affairs. Despite the huge increase in the prevalence of HIV/AIDS and other terminal diseases in our prisons, only the tiniest percentage of prisoners suffering from such diseases were released on medical grounds during 2002. I associate myself fully with the call by Inspecting Judge J J Fagan that the release of terminally ill prisoners should receive far more attention, if not priority attention, than is the case at the present time. The alternative is grotesque: untold

numbers of prisoners dying in prisons in the most inhuman and undignified way. Even the worst of convicted criminals should be entitled to a humane and dignified death.

[129] From this it is clear that the third respondent has failed to accord the applicant the dignity inherently forthcoming to him. This may be attributable to the strict, if not rigid, policy developed by the Department in apparent conflict with the provisions of section 69 of the Act and also with the provisions of section 35(2)(e) of the Constitution, which assures the applicant that he has the right to "conditions of detention that are consistent with human dignity" (para 89 above). It is likewise in conflict with the provisions of section 10 of the Constitution, in terms of which he has the right to have his inherent dignity respected and protected. It is doubtful whether the third respondent took cognisance of these provisions, or of the all-important provisions of section 39(2) of the Constitution, which enjoins a person interpreting any legislation to "promote the spirit, purport and objects of the Bill of Rights".

CONCLUSION

[130] The inevitable conclusion to which I must come is that the third respondent's decision to refuse the applicant parole on medical grounds was, objectively, so irrational and unreasonable that the inference must necessarily be drawn that he failed to apply his mind to the relevant facts and circumstances. He clearly misconstrued and misinterpreted section 69 of the *Correctional Services Act* 8 of 1959 by allowing himself to be influenced by extraneous guidelines not included in or required by the said section.

[131] In terms of section 33(1) of the Constitution, Act 108 of 1996, it cannot be said that the third respondent's decision constituted lawful, reasonable or procedurally fair administrative action. Such decision did not, in my view, contain the seeds of justice, fairness or reasonableness, and failed to promote the spirit, purport and objects of the Bill of Rights as required by section 39(2) of the Constitution. Even accepting, as I have, that the decision was made in good faith, it cannot be said that it was so much in the public interest as it was in the interest of policy considerations emanating from the Department of Correctional Services.

[132] For these reasons I am quite satisfied that the third respondent should, in terms of the provisions of section 69 of the said Act, have granted the application for the release on parole of the applicant on medical grounds. It was clearly expedient with reference to his physical condition. The applicant is fully entitled to spend the remaining portion of his life ensconced in his own home in the consolatory embrace of his family. When the time comes for him to pass on, he must be able to do so peacefully and in accordance with his inherent right to human dignity.

[133] In the event I confirm the order granted by me on 4 August 2003, as supplemented and amended by my order of 8 August 2003.

D H VAN ZYL

Judge of the High Court