

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ☒ YES ☐ NO
(2) OF INTEREST TO OTHER JUDGES YES ☒ NO
(3) REVISED
DATE 25/07/11  SIGNATURE

Case heard: 20 April 2011
Date of judgment: 2011-07-15

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case number: 40915/10

In the matter between:

26/7/2011

CORNELIUS JOHANNES VAN WYK

APPLICANT

and

MINISTER OF CORRECTIONAL SERVICES

FIRST RESPONDENT

COMMISSIONER OF CORRECTIONAL SERVICES

SECOND RESPONDENT

CHAIRPERSON, NATIONAL COUNCIL FOR
CORRECTIONAL SERVICES

THIRD RESPONDENT

MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

FOURTH RESPONDENT

JUDGMENT

HIEMSTRA AJ

[1] The applicant was convicted on several counts, including three of murder, and sentenced on 5 September 2004 to life incarceration on each of the murder counts, and further terms of incarceration on the other counts. It does not appear from the papers whether the sentences are running concurrently. Nothing turns on this question. He has served 16 years of his sentences.

[2] His convictions and sentences arose from his involvement with the *National Socialist Partisans*, an underground component of the *Blanke Bevrydingsbeweging*, whose objective it was to secure self-determination for Afrikaners through a right-wing uprising and to resist

the National Party government's intended termination of white rule in South Africa. His convictions and sentences were the following:

Count 1: Car theft: 5 years

Count 2: Murder: life

Count 3: Murder: life

Count 4: Murder: life

Count 5: Attempted robbery with aggravating circumstances: 8 years

Count 6: Contravention of s 2, read with s 1, 39 and 40 of the Arms and Ammunition Act 75 of 1969 (unlawful possession of firearms): 1 year

Count 7: Housebreaking with the intent to steal: 5 years

Counts 8 and 9: Robbery: taken together for purposes of sentence: 12 years

Count 10: Housebreaking with the intent to steal: 8 years

Count 11: Unlawful possession of firearms: 10 years.

[3] The applicant applied to the Truth and Reconciliation Commission for amnesty, but his application was dismissed on the ground that the *National Socialist Partisans* were not a recognised liberation movement.

[4] When the sentences were imposed, his incarceration was subject to the Correctional Services Act, 8 of 1959 (the old Act).

[5] Section 64 of the old Act regulated the release on parole of lifers. The section was amended from time to time, but it provided in essence at all times that such an offender shall not be released until the National Advisory Council (formerly the Advisory Release Board) has advised the Minister, upon the Minister's request, and after considering a report of an institutional committee, with due regard to the interests of society, and after the Minister has accepted the recommendation. These bodies, during their currencies, have since 1910 made recommendations to the successive ministers on policy guidelines, which policies were accepted by him or her. They were then implemented by the Department of Correctional Services.

[6] Section 64 was repealed by the Correctional Services Act, 111 of 1998 (the new Act) with effect from 1 October 2004. When the applicant was sentenced, in September 2004, the policy was that an offender sentenced to life incarceration (lifer) had to serve 20 years before he could be considered for parole. When he committed the offences, on 13 October 1991, he had to serve 10 years prior to being eligible for parole, but only in exceptional cases prior to 15 years.

[7] The periods that offenders have to serve are now determined by the provisions of Chapter VII of the new Act. Section 73(6)(iv) provides that lifers may not be placed on parole until they have served at least 25 years of the sentence. An offender who has reached the age of 65 may be considered after completion of 15 years.

[8] In terms of section 22A of the old Act, there was a system for the allocation of credits to offenders for their observance of the rules of the correctional institution and their active participation in programmes which were aimed at their treatment, training and rehabilitation. The section stated the following:

“(1) A prisoner may earn credits to be awarded by an institutional committee, by observing the rules which apply in the prison and by actively taking part in the programmes which are aimed at his treatment, training and rehabilitation ... Provided that—

- (a) a prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served;
- (b) ...
- (c) ...

(2) The number of days and months earned by a prisoner as credits may be taken into account in determining the date on which a parole board may consider the placement of such a prisoner on parole.”

[9] This system has been abolished by the new Act. However, the system is retained in the transitional provisions of the new Act to the extent set out therein.

[10] The transitional provisions are contained in section 136 of the new Act. They are the subject of the current controversy, and provide as follows:

“136. **Transitional provisions.**—(1) Any person serving a sentence of incarceration immediately before commencement of Chapters IV, VI and VII¹ is subject to the provisions of the Correctional Services Act, 1959 (Act No. 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such

¹ Chapter IV came into operation on 31 July 2004 and chapters VI and VII on 1 October 2004. The operative date is therefore the last one, namely 1 October 2004.

release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters.

(2) When considering the release and placement of a sentenced offender who is serving a determinate sentence of incarceration as contemplated in subsection (1), such sentenced offender must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act 8 of 1959).

(3) (a) Any sentenced offender serving a sentence of life incarceration immediately before the commencement of Chapters IV, VI and VII, is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence.

(b)

[11] The Department of Correctional Services issued Order BVI(1A)(22), which purports to incorporate the transitional provisions. It provides as follows:

“CRITERIA FOR CONSIDERATION FOR PAROLE: GUIDELINES IN RESPECT OF PRISONERS SENTENCED TO LIFE IMPRISONMENT²

- (a) The conditional placement of this category of prisoners is determined by Section 64³ of the Act.
- (b) The term “life” means exactly what the words imply, namely for the duration of the prisoner’s natural life to be in detention or be in the community under supervision.
- (c) A prisoner sentenced to life imprisonment must serve at least 20 years of his/her sentence before his/her placement on day parole/parole can be considered by the National Advisory Council on Correctional Services.
- (i) – (iv)
- (d) The consideration date cannot be advanced by credits allocated. [My emphasis]

[12] The predecessor to the above order reflects the position under the old Act and provided as follows:

- “21 OORWEGINGSKRITERIA VIR PAROOL: RIGLYNE VIR GEVANGENES TOT LEWENSLANGE GEVANGENISSTRAF
- (i) Algemeen
 - (ii) Die voorwaardelike uitplasing van hierdie kategorie gevangenes word ingevolge artikel 65 van die Wet bepaal.
 - (iii) Die term lewenslank beteken presies wat die bewoording impliseer.
 - (iv) ‘n Gevangene met ‘n vonnis van lewenslank kan vir uitplasing oorweeg word mits daar so-danige gronde gevind kan word, na voltooiing van twintig (20) jaar minus krediete.⁴ [My emphasis]

² The new Act changed the terminology as follows: “imprisonment” becomes “incarceration”; “prisoner” becomes “offender”

³ Section 64 was repealed by the new Act with effect from 1 October 2004.

⁴ Only the Afrikaans version has been made available.

[13] Accordingly, it would appear that the applicant, who was sentenced during the currency of the old Act, had been entitled to have the date on which he could be considered for parole, advanced by the earning of credits. In terms of the current Order, he no longer qualifies for credits. This constitutes a retrospective removal of a right he previously enjoyed.

[14] The applicant now seeks the following orders:

1. That s 136(2) of the Correctional Services Act 111 of 1998 be declared inconsistent with the Constitution of the Republic of South Africa;
2. That the omission from s 136(2) of the new Act, after the word "*determinate*", of the words "*or indeterminate*", be declared to be inconsistent with the Constitution and that s 136(2) of the new Act is to be read as though the words "*or indeterminate*" appear after the word "*determinate*".
3. That Correctional Service Order BVI(1A)(22)(d), issued under the new Act, be declared inconsistent with the Constitution.
4. That s 136(3)(a) of the new Act be declared inconsistent with the Constitution.
5. That the omission from s 136(3)(a) of the new Act, after the words "*20 years of the sentence*" of the words "*minus credits*" be declared inconsistent with the Constitution, and that s 136(3)(a) of the new Act be read as though the words "*minus credits allocated*" appear after the words "*20 years of the sentence*".
6. That s 136(1) of the new Act be declared inconsistent with the Constitution.
7. That the applicant and other offenders who were serving a sentence of incarceration for life on 1 October 2004 be considered for placement on parole:
 - 7.1 by way of the consideration date for parole being advanced by the allocation of credits, subject to the applicable criteria for the allocation of credits;

7.2 in terms of the policy of the Department of Correctional Services which applied at the date of the commission of the crimes for which the applicant and such other offenders are serving incarceration for life.

[15] All these prayers are aimed at restoring the applicant's entitlement to have his parole date advanced through credits in terms of section 22A of the old Act.

[16] In my view, the challenge to the constitutionality of the various subsections to section 136 is misconceived and superfluous. The constitutionality of section 136 was considered by the Constitutional Court in *Van Vuuren v Minister of Correctional Services*.⁵ Nkabinde J said the following:

"In the light of these considerations, subsection (3)(a) can be given a coherent and sensible meaning alongside subsection (1). This can be done by examining the position of individual offenders during three distinct periods. The first is those sentenced to life incarceration after the commencement of the Act. Section 73(6), which subjects all offenders sentenced to life incarceration to 25 years before parole, applies to all life sentences imposed after the commencement of the Act. For those sentenced to life incarceration during the period of 1 March or 3 April 1995, when the 20-year pre-parole minimum was introduced, to the commencement of the Act, section 136(3)(a) preserves an entitlement to be considered after 20 years. Section 136(1), by contrast, preserves the position of those sentenced to life incarceration even further back – before 1 March 1994 or 3 April 1995 – for example Mr Van Vuuren."

[17] That the section passes constitutional muster has therefore conclusively been decided and it cannot be revisited. However, the Constitutional Court did not consider the question of the extent to which the system of the allocation of credits in terms of section 22A of the old Act has been preserved.

[18] All three subsections of section 136 deal with the position of offenders serving a sentence of incarceration before 1 October 2004. Subsection (1) deals with all offenders who had been serving sentences of incarceration immediately before that date. Subsection (2)

⁵ 2010 (12) BCLR 1233 (CC) para [5] at 1257

deals with offenders who had been serving determinate sentences of incarceration immediately before that date. Subsection 3(a) deals with lifers who had been serving their sentences immediately before that date.

[19] Subsection (1) preserves all the policies and guidelines applied by former parole boards prior to 1 October 2004 in respect of all offenders serving sentences of incarceration immediately before that date. This applies to lifers and persons serving determinate sentences as at that date. These policies and guidelines included the allocation of credits in terms of section 22A of the old Act.

[20] Subsection (2) deals only with persons serving determinate sentences immediately before 1 October 2004 and provides that such persons shall be allocated the maximum number of credits in terms of section 22A of the old Act.

[21] Subsection (3) preserves the 20-year pre-parole period that applied immediately before the enactment of the new Act, but does not specifically preserve any other provisions of the old Act or the policies and guidelines applied by former parole boards. The reason is obvious. Subsection (1) has already preserved those provisions, policies and guidelines in respect of all persons serving sentences of incarceration immediately before 1 October 2004. It would have been superfluous to refer to them again.

[22] Correctional Service Order BVI(1A)(22) purports to incorporate section 136. However, it does not correctly reflect the provisions of section 136. If the Order is correct, the section has retrospective effect. An offender who committed an offence, or had been sentenced to life incarceration prior to the new Act, was entitled to have the date on which he could be considered for parole advanced by the earning of credits. According to the Order, credits no longer apply. This would constitute a deprivation of the offender's liberty, and it does not conform to the principles of the rule of law.⁶ In this regard the oft quoted passage from *De Smith, Woolf and Jowell*⁷, is apposite:

⁶ *Van Vuuren v Minister for Correctional Services* 2010 (12) BCLR 1233 (CC) at 1257, paragraph [60]; *Ferreira v Levin NO and Others* 1996 (1) BCLR 1 (CC) at paragraph [72]

⁷ *Judicial Review of Administrative Action*, 5th edition, 14 - 15

*“the rule of law embraces some internal qualities of all public law: that it should be certain; that it is ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation.”*⁸

[23] The Constitution is founded on the values set out in section 1 thereof, including the supremacy of the constitution and the rule of law.⁹ To the extent that retrospectivity offends the rule of law, it offends the Constitution. Correctional Service Order BVI(1A)(22) is therefore clearly unconstitutional. That, of course, does not mean that section 136 is unconstitutional. Correctly interpreted, it has no retrospective effect.

[24] It was held by Langa DP (as he then was) in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Distributors (Pty) Ltd and Others v Smit NO and Others*¹⁰ as follows:

“The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far possible in conformity with the Constitution.”

This method of interpretation is known as “reading down”.

[25] Before a provision is declared unconstitutional, an attempt must be made to read it down so that it conforms not only to the *ipsissima verba* of the Constitution, but also to its objectives and spirit.

[26] The misunderstanding on the part of the authors of Correctional Service Order BVI(1A)(22) is caused by the fact that subsection (2) applies only to offenders serving determinate sentences at the relevant date. It provides that the maximum number of credits in

⁸ Quoted with approval by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Others: In Re Ex parte Application of the President of the RSA and Others* 2000 (3) BCLR 241 (CC); 2000 (2) SA 210 (CC) at paragraph [39]

⁹ Section 1(c)

¹⁰ 2001 (1) SA 545 CC para 22

terms of s 22A of the old Act must be allocated to them. Lifers are excluded from this provision. What the authors of the Order did not appreciate, is that subsection (2) does not exclude lifers entirely from the allocation of credits. While offenders serving determinate sentences are entitled to the maximum number of credits as of right, lifers must earn all their credits. This is no different from the position prior to the new Act.

[27] I therefore find that section 136 contains no contradictions and has no retrospective effect in the sense that it abolishes rights of lifers that they enjoyed at the time of committing their offences or at the time that they were sentenced. Insofar as Correctional Service Order BVI(1A)(22) has retrospective effect, it militates against the objects and spirit of the Constitution.

I therefore make the following order:

1. Correctional Service Order BVI(1A)(22) is declared inconsistent with the Constitution of the Republic of South Africa;
2. The applicant and other offenders who were serving sentences of life incarceration immediately before 1 October 2004 are entitled:
 - 2.1 to have the date on which they may be considered for parole advanced by credits earned in terms of section 22A of the Correctional Services Act 8 of 1959, subject to the applicable criteria for the allocation of credits;
 - 2.2 to be considered for parole in terms of the policy of the Department of Correctional Services which applied at the date of the commission of the crimes for which they are serving life imprisonment.
3. The First and Second Respondents are ordered to pay the costs of this application jointly and severally, the one paying, the other to be absolved.

.....
J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	20 April 2011
Date of judgment:	26 July 2011
Counsel for the Applicant:	Adv T.W.G. Bester
Attorney for the Applicant:	Julian Knight & Associates Inc.
Counsel for first to third Respondents:	Adv B.R. Tokota SC
	Adv L.D. Halam
	Adv T. Williams
Attorney for the first to third Respondents:	The State Attorney