

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG HIGH COURT, GAUTENG DIVISION)

9/9/2013

CASE NO: 69585/11

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

9 SEPTEMBER 2013


FHD VAN OOSTEN

In the matter between

K BROODRYK

RS SINDANE

HL BOTHA

and

THE MINISTER OF CORRECTIONAL SERVICES

**THE NATIONAL COMMISSIONER OF
CORRECTIONAL SERVICES**

**THE CORRECTIONAL SUPERVISION
AND PAROLE BOARD: RUSTENBURG
MANAGEMENT AREA**

**THE HEAD OF PRISON: LOSPERFONTEIN
CORRECTIONAL CENTRE**

**THE CASE MANAGEMENT COMMITTEE:
LOSPERFONTEIN CORRECTIONAL CENTRE**

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

**PRO-LIBERTY CONSTITUTION COMPLIANCE
ASSOCIATION**

AMICUS CURIAE

J U D G M E N T

VAN OOSTEN J:

[1] This application concerns a constitutional challenge of the provisions of s 136(1) of the Correctional Services Act 111 of 1998 (the Act) on the ground of an alleged inconsistency thereof with the provisions of s 35(3)(n) of the Constitution.

[2] The applicants are offenders serving determinate sentences of 14, 18 and 20 years respectively in the Lospersfontein Correctional Centre. Their sentences were imposed after 1 October 2004 (the operative date). The operative date is the crucial date for purposes of determining the parole regime provided for in the Correctional Services legislation. In respect of offenders sentenced prior to the effective date, s 65(4)(a) read with s 22A of Act 8 of 1959 (the old Act) in effect provides for the consideration of parole after the offender has served one-third of the sentence. Post the operative date the provisions of s 136(1) read with s 173(6)(a) of the Act applies: in terms thereof parole will be only be considered after the offender has served at least one half of the sentence.

[3] The respondents are collectively Correctional Services. The first and second respondents oppose the application. The Pro-Liberty Constitution Compliance Association¹ was at its request allowed to be joined in the proceedings as *amicus curiae*.

[4] It is necessary at the outset to pay regard to the statutory framework within which the impugned sections falls (see *Van Vuren v Minister of Correctional Services and others* 2010 (12) BCLR 1233 (CC); 2012 (1) SACR 94 (CC) para [24]-[35]; *Mafoho v The State* (149/12) [2012] ZASCA 49 (28 March 2013)). Commencing with s 73 of the Act, which

¹ A prison rights association with main objective within its means to establish and promote the best interests of prisoners in the South African penal system.

deals with correctional supervision and prisoners out on day parole or parole, s 73(6)(a) provides that an offender serving a determinate sentence or cumulative sentences of more than 24 months may not be placed on day parole or parole until such sentenced offender has served either the stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence, but day parole or parole must be considered whenever a sentenced offender has served 25 years of a sentence or cumulative sentences. Section 136 was one of the transitional provisions brought into force before the Act came into operation. It provides:

'(1) Any person serving a sentence of imprisonment immediately before the commencement of Chapters IV², VI and VII³ is subject to the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters.

(2) When considering the release and placement of a sentenced offender who is serving a determinate sentence of incarceration as contemplated in subsection (1), such sentenced offender must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act No. 8 of 1959).'

The applicants were, as I have mentioned, sentenced after the operative date⁴ and are therefore excluded from the operation of s 136 with the result that they are required to serve at least one half of their sentences before being eligible for parole. The kernel of their attack on the constitutionality of the impugned section is based on s 35(3)(n) of the Constitution which provides:

'(3) Every accused person has a right to a fair trial, which includes the right-

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;

² The date of coming into operation was 31 July 2004.

³ Which came into operation on 1 October 2004, that accordingly being the operative date.

⁴ In respect of offences committed before the operative date.

Against this background I now turn to consider the applicants' constitutional challenge of the impugned section.

THE SCOPE OF THE APPLICANTS' CHALLENGE

[5] The applicants contend that the parole policy applicable at the time of commission of the offences in respect of which they are serving their sentences, should apply and that they are therefore entitled to be considered for parole after having served one third of their sentence. The main focus of the applicants' constitutional attack in the papers before me concerns an alleged conflict of the impugned section with s 35(3)(n) of the Constitution on the ground that it also affords to them, as offenders serving sentences of incarceration, the right to benefit from the least form of punishment. In argument before me counsel for the applicants with reference to the judgment of the Constitutional Court in *S v Zuma and others* 1995 (2) SA 642 (CC), sought to widen the scope of the attack in relying on substantive fairness as a requirement for parole policy. In *Shaik v Minister of Justice and Constitutional Development and others* 2004 (3) SA 599 (CC) para [25] Ackermann J concerning the observance of accuracy in a constitutional attack, said:

'It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. This is not an inflexible approach. The circumstances of a particular case might dictate otherwise. It is, however, an important consideration in deciding where the interest of justice lies.'

(Cf *Knox D'Arcy AG v Land and Agricultural Development Bank of South Africa* [2013] 3 All SA 404 (SCA) para [35])

The fundamental requirement of accuracy should, in my view, be extended to include the grounds of attack. The constitutionality of the impugned section is a serious matter and of vital importance with far-reaching effects not only to the applicants and the various parties cited as respondents in this application but also to other offenders serving incarceration and finally, the requirements of legal certainty. The aspect of fairness was neither mentioned nor addressed in the papers before me. I accordingly consider it in the interests of justice to confine the present application to the attack based on s 35(3)(n) of the Constitution.

PROPER INTERPRETATION OF s 136

[6] In interpreting the impugned section I propose to adopt the approach and apply the principles relating to interpretation enunciated by the Constitutional Court in *Van Vuren*. I do not consider it necessary to traverse those principles but what bears repeating is the governing principle of the supremacy of the Constitution, which constitutes the starting point in interpreting any legislation. An interpretation is accordingly demanded that promotes the spirit, purport and objects of the Bill of Rights. At issue in *Van Vuren* was the interrelation between ss 3(a) and ss (1) of s 136 in regard to lifers, which formed the basis of the constitutional attack. Concerning the constitutionality of the impugned section, Nkabinde J, who wrote for the majority of the court, found a coherency and sensibility between the sub-sections and concluded that ss 136(3)(a) is not superfluous and does not nullify s 136(1), and was therefore constitutionally compliant. It is true that the Constitutional Court in *Van Vuren* did not deal with the basis of the present attack. On the other hand, as a point of departure, it is important in deciding the present application, that the section was subjected by our highest court to constitutional scrutiny and that it passed constitutional muster. All that needs to be added to the principles of interpretation is the much-quoted reminder borrowed from Lord Wilberforce by Kentridge AJ in *Zuma* (para [18]) that 'even a constitution is a legal instrument the language of which must be respected'. The learned Justice continued

'If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination. If I may again quote *S v Moagi* ⁵(*supra* at 184), I would say that a constitution

'embodying fundamental rights should as far as its language permits be given a broad construction' (*My emphasis.*)'

[7] More directly in point is the judgment of Lekale J in *Makaba v The Minister of Correctional Services and others* (FSHC, case no 5369/2011, unreported, delivered on 16 August 2012) where the constitutional challenge similar to the present by the applicant, who was sentenced after the operative date, in respect of offences he had committed before that date, was dismissed. The learned Judge proceeded from the premise that the provisions of s 35(3)(n) of the Constitution 'are clear and the values

⁵ The reference is to *Attorney-General v Moagi* 1982 (2) Botswana LR 124.

underpinning it, as well as its scope, are apparent from a reading of the Constitutional provision as a whole' and held that it applied to accused persons who have not been sentenced and further that the impugned section generally did not affect any of the applicant's constitutional rights especially the right of an accused person to benefit from any less severe punishment. I am unable to find that the reasoning or the interpretation of the learned Judge was in way 'restrictive' or 'contrary to the spirit of the Constitution' as was submitted by counsel for the applicants and I accordingly respectfully agree with the learned Judge's interpretation of s 35(3)(n) of the Constitution.

[8] This brings me to the judgment of Hiemstra AJ in *Van Wyk v Minister of Correctional Services and others* 2012 (1) SACR 159 (GNP). The judgment and its effect was extensively dealt with in the applicants' founding affidavits.⁶ The Minister of Correctional Services, in a public announcement, commented on the consequences of the judgment on the eligibility for parole and an official notice to all correctional officials and offenders serving life sentences was issued containing instructions to implement the orders made in *Van Wyk*. The applicants contend that those instructions were not carried out.⁷ Before me counsel for the applicants sought to derive support for his contentions from one of the sub-paragraphs of the order that was made while counsel for the respondents submitted that the *ratio* of the judgment supports the respondents' contentions concerning the constitutionality of the impugned section. In view of the opposing contentions it is necessary to consider the orders granted in *Van Wyk* in the light of the facts, issues and findings that were made. The applicant was a lifer who had been sentenced prior to the effective date. The parole provisions of the old Act were accordingly applicable to him in terms of which he had to serve at least 20 years before becoming eligible for parole subject to the allowance of credits. Subsequent the transitional provisions having come into force the Department of Correctional Services issued an order containing criteria and guidelines in respect of prisoners sentenced to life imprisonment, in accordance with the transitional provisions (the order). The order incorrectly reflected that credits could *not* advance the consideration date for parole. The incorrect order prompted the applicant to launch the application in which he sought wide ranging orders including a declaration of unconstitutionality of the impugned

⁶ The applicants prepared and launched the application in person.

⁷ This aspect was not persisted with in argument before me.

section as well as the order. As the learned Judge remarked, all the orders sought were aimed at his entitlement to have his parole date advanced through credits in terms of s 22A of the old Act. The learned Judge with reliance on *Van Vuren* found that the constitutional challenge was 'misconceived' and 'superfluous', that the impugned section passed constitutional muster and that it was free from contradictions. This is the finding embraced by the counsel for the respondents. The learned Judge further held that the order did not correctly reflect the provisions of s 136, that it constituted deprivation⁸ and as such offended the rule of law. The resultant orders made were, first, a declarator that the order was inconsistent with the Constitution, and, second,

'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 s 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.*

[emphasis added]

Counsel for the applicants relied on paragraph 2.2 of the order. The subsequent instructions issued by the Department of Correctional Services, to which I have referred were premised on and indeed followed the exact wording of paragraph 2 of the order.⁹

[9] Paragraph 2.2 of the order in *Van Wyk*, in my view is an apparent misnomer. It is clearly inconsistent with and moreover flies in the face of the findings made by the learned Judge, in particular in upholding the constitutionality of the impugned section. The issue pertaining to the operative date for purposes of parole consideration was not dealt with in the body of the judgment, which, I regret to say, has the inevitable result of paragraph 2.2 of the order being a *non-sequitur*. I accordingly conclude that the applicants' reliance on paragraph 2.2 of the order *Van Wyk* is misplaced.

⁸ See *Van Vuren* para [60].

⁹ The applicant in *Van Wyk* committed the offences on 13 October 1991, and he therefore, pursuant to paragraph 2.2 of the order, became eligible for parole in terms of the parole policy in force at the time which in somewhat inelegant terms, provided eligibility for parole after having served 10 years 'but only in exceptional cases prior to 15 years'. This is indeed way beyond what the applicant sought to achieve in the application.

[10] Two Canadian cases dealing with the effective date for determining the applicable parole regime, by way of comparison, need to be considered. The first is *R v Gamble* [1988] 2 SCR 595 where Wilson J, in the majority judgment, held that extended parole ineligibility constituted continuing deprivation of liberty which is contrary to the principle of fundamental justice that an accused person must be tried and punished under the law in force at the time an offence is committed. The judgment therefore is authority for the proposition that parole eligibility is determined in accordance with the law at the time of the commission of the offence. Counsel for applicants urged me to approve of the judgment which he submitted should be afforded considerable persuasive force in view of it having been referred to with approval by the Constitutional Court in *Van Vuren*. Considered in its proper context I do not think that *Gamble*, although referred to in *Van Vuren*,¹⁰ was approved. I am unable to find any persuasive support in the majority judgment in *Gamble*. It was disapproved of by *inter alia* the Ontario Supreme Court in *Caruana v Director of Bath Institution, Commissioner of Corrections and Attorney General of Canada* 2002 CanLII 49628 (ON SC) where the distinct dividing line between the proceedings up to and including sentencing of an accused person (indictment, trial and sentencing) and the process thereafter (the manner in which a sentence of detention is to be served) was, which in my view lies at the heart of arriving at a proper interpretation of s 35(3)(n) of the Constitution.

[11] Section 35(3) of the Constitution, as the plain wording of the introductory sentence conveys, deals with an accused person's right to a fair trial. The trial of an accused person is conducted in court and reaches conclusion when the accused person has been sentenced. The serving of the sentence, in this case incarceration, on the other hand constitutes an entirely different process which is administered by Correctional Services. The prescribed punishments referred to in s 35(3)(n) can only be to those that may be imposed on an accused person after conviction. Counsel for the applicants sought to rely on an extended dictionary meaning of the word 'punishment' as 'an act or a way of punishing' in support of the argument that the section should also apply to the serving of sentences. I am unable to agree. The word 'punishment' as used in s 35(3)(n), in my view, does not refer to the way in which punishment is served. And,

¹⁰ *Van Vuren* 132 footnote 80.

finally, and decisively, the subsection expressly, in clear wording, provides for changes in the prescribed punishments 'between the time that the offence was committed' and 'the time of sentencing'. To extend the meaning of the subsection to include the serving of sentence would constitute reading into it what one wishes it to mean which plainly is impermissible.¹¹

[12] For all the above reasons the attack on the constitutionality of the impugned section cannot be sustained. I further hold that the date of sentencing is the operative date for purposes of determining parole eligibility in terms of the statutory provisions I have referred to.

[13] Counsel for the respondents fairly and properly did not ask for costs against the applicants.

[14] In the result I make the following order:

1. The application is dismissed.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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APPLICANTS' ATTORNEYS

PRETORIA JUSTICE CENTRE

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¹¹ Zuma 652J.

**ATTORNEYS FOR AMICUS
CURIAE**

JULIAN KNIGHT AND ASS

**DATE OF HEARING
DATE OF JUDGMENT**

**2 SEPTEMBER 2013
9 SEPTEMBER 2013**