

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 5369/2011

In the matter between:

PHILLIP PHIL MAKABA

Applicant

and

**THE MINISTER OF CORRECTIONAL
SERVICES**

First Respondent

**THE REGIONAL COMMISSIONER OF
CORRECTIONAL SERVICES**

Second Respondent

**THE AREA COMMISSIONER (GROENPUNT
MANAGEMENT AREA)**

Third Respondent

**THE HEAD OF CORRECTIONAL CENTRE
(GROENPUNT MAXIMUM PRISON)**

Fourth Respondent

**THE CHAIRPERSON OF THE CORRECTIONAL
SUPERVISION AND PAROLE BOARD**

Fifth Respondent

**THE CHAIRPERSON OF THE CASE
MANAGEMENT COMMITTEE**

Sixth Respondent

HEARD ON:

2 AUGUST 2012

JUDGMENT:

LEKALE, J

DELIVERED ON:

16 AUGUST 2012

INTRODUCTION AND BACKGROUND

[1] This is an opposed application for an order in the following

terms, among others:

- 1.1 that the provisions of section 136(1) of the Correctional Services Act, No 111 of 1998 (the new Act), are inconsistent with the provisions of section 35(3)(n) of the Constitution of the Republic of South Africa of 1996 (the Constitution) and are, as such, unconstitutional;
- 1.2 that the application of the release and placement policies of the Department of Correctional Services, applicable from the 1st October 2004 and which prescribe that the applicant, as a correctional centre inmate, must be considered for parole after having served half of his sentence of imprisonment, are similarly unconstitutional for being inconsistent with section 35(3)(n) of the Constitution;
- 1.3 that the applicant falls to be dealt with, for parole purposes, in terms of the Correctional Services Act, No 8 of 1959 (the old Act) and the release and placement policies applicable before the 1st October 2004 and, as such, should be considered for parole after having served one third of his sentence.

- [2] The applicant, who is appearing in person, is an inmate at Groenpunt Maximum Correctional Centre in Vereeniging where he serves an effective 33 years imprisonment. He was sentenced to a total of 97 years imprisonment on the 14th April 2005 after he was arrested on the 7th September 2001 for offences committed on the 13th July 2001.
- [3] The respondent is generally the Department of Correctional Services although the applicant has taken the liberty to cite all the authorities involved and associated with the said Department.
- [4] Section 65(4)(a) of the old Act entitles inmates serving a determinate sentence to be considered for placement on parole when they have served half of their terms of imprisonment. It, however, makes provision for acceleration of the date on which such inmates may be considered for parole on the basis of the credits earned by them.

- [5] The new Act repealed the old Act *in toto* with effect from the 1st October 2004. It generally and uncompromisingly limits the right of inmates sentenced to determinate incarceration to be considered for parole to service of half of their sentences or 25 years of a sentence or cumulative sentence in the absence of a court stipulated non-parole period.
- [6] The new Act, however, subjects inmates serving custodial sentences as at the 1st October 2004, to the parole regime of the old Act.
- [7] The applicant feels aggrieved by the fact that he is being dealt with in terms of the new parole regime, which does not provide for anticipation of the date of parole consideration.
- [8] The respondents, on their part, generally maintain that the law in question does not offend the Constitution.

ISSUE IN DISPUTE

- [9] The parties are, effectively, in dispute over whether or not the

provisions of section 136(1) of the new Act, (the transitional provisions) are inconsistent with the Constitution and are, as such, unconstitutional.

APPLICANT'S CASE

[10] In support of his contentions the applicant deposed to, *inter alia*, the effect that the impugned provisions violate his right to the benefit of the least severe of the prescribed punishments where the prescribed sentence for the offence has changed between the time of the commission of the offence and the time of the imposition of the sentence.

[11] In his view the fact that the offences for which he was sentenced were committed before the 1st October 2004, entitles him to be treated in terms of the old parole dispensation notwithstanding the fact that he was sentenced after that date.

[12] He, further, feels that the provisions of section 35(3)(n) of the Constitution are applicable in his case because, as at the 1st October 2004, he was still an accused person as opposed to a

sentenced correctional centre inmate following his arrest in September 2001.

RESPONDENTS' CONTENTIONS

[13] The respondents' case, both in opposing papers and in argument, through Mr Cronje, is effectively that neither section 35(3)(n) of the Constitution nor the impugned provisions of the new Act, is applicable to the applicant as the sentenced inmate because:

13.1 as at the 1st October 2004, when the new Act came into operation, he was not serving a sentence of incarceration;

13.2 both the old Act and the new Act apply only to sentenced inmates and not to arrested, accused or detained people even if they are awaiting-trial-inmates at correctional centres;

13.3 when the applicant was, eventually, exposed to the parole regime provided for by the new Act after his sentencing in 2005, he was no longer an arrested, accused or detained

person within the contemplation of the Constitution.

[14] Mr Cronje, further, effectively submits that release on parole and the policies and guidelines governing the same, do not constitute a punishment within the contemplation of the Constitution. Nor do they serve to aggravate the punishment imposed on the applicant by the court.

[15] In Mr Cronje's view, the wording of the impugned provisions of the new Act is clear and in interpreting it the language of the legislature should be read in its original sense.

EXPOSITION OF THE LAW INVOLVED

[16] Section 35(3)(n) of the Constitution 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;”

[17] Section 136(1) of the new Act, on its part, provides:

“136 Transitional provisions

- (1) Any person serving a sentence of incarceration immediately before the commencement of Chapters IV, VI and VII 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.”

APPLICABLE LEGAL PRINCIPLES

[18] Constitutional interpretation, in the context of the present matter, aims at ascertaining the meaning of a provision in the

Bill of Rights viz section 35(3)(n) of the Constitution so as to establish whether the impugned law is inconsistent with the Constitutional provision. (See Iain Currie and Johan de Waal in **The Bill of Rights – Handbook**, 5th Edition, p 145.)

[19] The said interpretation involves two enquiries. Firstly it seeks to determine the meaning or scope of a right involved, where after, the exercise is concerned with the determination of the question whether the impugned law or conduct conflicts with the constitutional right in question. (See **Bill of Rights – Handbook**, *supra*, at 145.)

[20] Constitutional interpretation pays due regard to the language used by the legislature whilst, at the same time, being “generous” and “purposive” and giving expression to the underlying values of the Constitution. (See **S v MAKWANYANE AND ANOTHER** 1995 (3) SA 391 (CC) at par [9].)

[21] Purposive interpretation, on the other hand, seeks to ascertain

the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom. Once the purpose of the listed right has been established an interpretation which best supports and protects the values so established, is to be preferred. (See **S v ZUMA AND OTHERS** 1995 (2) SA 642 (CC) at par [15] and **The Bill of Rights – Handbook**, at p 148.

- [22] A generous interpretation required by a supreme constitution should be “**suitable to give to individuals the full measure of the fundamental rights and freedoms referred to in the Bill of Rights**”. (See **S v ZUMA AND OTHERS**, *supra*, at par [14] citing with approval **MINISTER OF HOME AFFAIRS (BERMUDA) v FISHER** [1980] AC 319 (PC) 328-9.)
- [23] In interpreting the impugned legislative provision, to test it against the Constitutional provision, one gives words used their original and ordinary meaning bearing in mind the general duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any

legislation. Statutory interpretation seeks to give effect to and promote the Bill of Rights and Constitutional provisions. (See

INVESTIGATING DIRECTORATE: SERIOUS ECONOMIC OFFENCES AND OTHERS v HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS; IN RE HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS v SMIT NO AND OTHERS 2001 (1) SA 545 (CC) at par [22] and section 39(2) of the Constitution.)

FINDINGS AND APPLICATION OF APPLICABLE PRINCIPLES

[24] The provisions of section 35(3)(n) of the Constitution are clear and the values underpinning it, as well as its scope, are apparent from a reading of the Constitutional provision as a whole.

[25] As correctly submitted by Mr Cronjè, the provision in question applies to accused persons who have not yet been sentenced.

[26] The provision in question confirms and upholds the principle of legality by ensuring that accused persons do not get caught by

surprise in the sense that the punishment meted out is not more severe than what they bargained for when they set out to commit the relevant offences.

[27] As further correctly contended for the respondents, the impugned provisions are axiomatic and only have to be read out to appreciate their import.

[28] The said provision applies to inmates in the sense of convicted and sentenced people who are incarcerated at correctional centres in terms of court orders.

[29] The said legislative provision, in my view, seeks to promote the spirit, purport and object of the right to just administrative action conferred by section 33(1) of the Constitution by ensuring that the pre-existing right to be considered for parole at an earlier date is not unfairly disturbed.

[30] The impugned provision generally does not affect any of the applicant's constitutional rights and, in particular, the right which

he had, when he was an accused person, to benefit from any less severe punishment.

[31] In conclusion, I may emphasise that the impugned section does not offend the Constitution, as contended by the applicant and, as such, is not unconstitutional.

[32] The application, therefore, falls to be dismissed. No order as to costs is appropriate in the present matter, because the applicant is an inmate and not likely to be able to pay any costs.

[33] The applicant does, in fact, fall to be dealt with in terms of the parole regime provided by the new Act.

ORDER

[34] In the result the application is dismissed.

[35] No order as to costs is made.

L. J. LEKALE, J

On behalf of applicant:

In person
Groenpunt Maximum Correctional
Centre
VEREENIGING

On behalf of respondents:

Adv P R Cronjé
Instructed by:
State Attorney
BLOEMFONTEIN

/sp