

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

CASE NO: 54507/08

DATE: 17/03/2009

UNREPORTABLE

IN THE APPLICATION OF

CLIVE JOHN DERBY-LEWIS

APPLICANT

AND

THE MINISTER OF CORRECTIONAL SERVICES

1ST RESPONDENT

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

2ND RESPONDENT

THE CHAIRPERSON OF THE NATIONAL
COUNCIL FOR CORRECTIONAL SERVICES

3RD RESPONDENT

THE CHAIRPERSON OF THE CORRECTIONAL
SUPERVISION AND PAROLE BOARD

4TH RESPONDENT

LIMPHO HANI

5TH RESPONDENT

JUDGMENT

VAN DER MERWE, J

On 15 October 1993 the applicant and his co-accused, Mr Janusz Walus, were convicted of the murder of Mr Chris Hani during April 1993. The applicant and his co-accused were both sentenced to death.

The applicant applied for the re-opening of his trial to advance further evidence during October 1994. The application was refused. A subsequent appeal by the applicant to the Supreme Court of Appeal against his conviction and sentence was dismissed. An application for amnesty in terms of the Promotion of National Unity and Reconciliation Act, 33 of 1995, was refused by the Amnesty Committee on 7 April 1999. A review application brought against the decision of the Amnesty Committee was dismissed on 15 December 2000. In the meantime the death sentences imposed on the applicant and his co-accused were substituted by the Supreme Court of Appeal in November 2000 for terms of life imprisonment, antedated to the original sentencing date, ie 15 October 1993.

The applicant says that "at all relevant times (he) was made aware or became aware of the existence and nature of policies regarding parole and the expectations to be made towards fulfilment of the requirements to be considered for parole".

The applicant therefore, according to him, actively partook in all activities which were aimed at personal development and rehabilitation in order to enhance his chances regarding entitlement to parole as well as the nature of the conditions of parole.

It is common cause that the applicant completed several rehabilitation programs in prison for which he received recognition by way of certificates. It is also common cause that the applicant was involved in a number of voluntary psychotherapy sessions,

that he underwent religious counseling and that he was actively involved in the Pretoria Central Sports, Recreation & Arts Committee in prison. All in all it appears that the applicant has an excellent record in prison.

Although I will later deal with the applicable legislation in some detail it is necessary to refer to three institutions created in terms of the Correctional Services Act, 111 of 1998 ("the 1998 Act").

In terms of section 42 of the 1998 Act, one or more Case Management Committees ("the Committee") are established in each prison. Such a committee's duties and functions are set out in section 42. In terms of section 74 of the 1998 Act the Minister of Correctional Services is empowered to establish Correctional Supervision and Parole Boards ("the Boards"). A National Council for Correctional Services ("the Council") is established in terms of section 83 with functions and duties as set out in section 84 of the 1998 Act.

A function of the Committee is to submit a report to the Board regarding the possible placement of a prisoner on parole and the conditions for parole. [See section 42(2)(d)(vii).] A function of the Board in respect of a prisoner serving a sentence of life imprisonment (a lifer) is to make recommendations to the court on the granting of parole.

It is common cause that the Committee complied with its duties in respect of the applicant and submitted a report to the Board regarding his placement on parole.

It is also common cause that the Board recommended on 2 November 2007 that the applicant be placed on parole after he has completed a minimum of fifteen years imprisonment. The applicant was therefore eligible to be placed on parole after 15 October 2008 when he would have completed the minimum period required by the Board (as well as by the applicable legislation as will be seen later herein).

It is common cause that the applicant was not placed on parole on 16 October 2008 or thereafter. The primary reason being that the Council required the Board to enquire from Ms Hani, the widow of the late Mr Chris Hani, whether she wanted to make representations regarding the applicant's placement on parole or to attend a meeting of the Board to give verbal inputs regarding such placement. Before Ms Hani could make representations to the Board the applicant brought a notice of motion on 9 October 2008 under case no 47117/08 for an order that he be granted parole on the terms and conditions as the court deems fit. The second, third and fifth respondents were not parties to that application. The third and fifth respondents filed applications to be joined in that application. That application was eventually postponed *sine die*. This court was informed that the application was later withdrawn but that the applicant did not tender the costs of the application.

On 9 December 2008 the present application was brought as an urgent application. Again the fifth respondent was not joined as a party. On 9 December 2008 a draft order

was made an order of court. I will later deal with the draft order in more detail when I deal with the question of costs in the application under case no 47117/08.

In the present application the relief sought in the notice of motion reads as follows:

" PART A:

1. That this application be dealt with as one of urgency and that any deviation from the prescribed rules with regard to times and forms of service be condoned;
2. That section 136(1) of the Correctional Services Act, Act 111 of 1998 ('the Act') be declared to be unconstitutional, in so far as it may be interpreted to provide that the applicant is subject to the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), ('the Old Act') relating to his or her placement under community corrections release and placement on parole, in so far as those provisions are in conflict with the provisions of sections 73(6)(b)(iv) and 78(1) of the Act;
3. Alternatively, to prayer 2 above:
That section 136(1) of the Act, be read down and interpreted to provide that it is not in conflict with the provisions of sections 73(6)(b)(iv) and 78(1) of the Act.

That section 136(3)(a) of the Act be declared to be unconstitutional in so far as it may be interpreted to provide that the applicant may not be considered for day parole and parole before he has served 20 years of his sentence;

5. Alternatively, to prayer 4 above:

That section 136(3)(a) of the Act, be read down and interpreted to provide that the applicant may be considered for day parole and parole before he has served 20 years of his sentence.

6. That sections 136(3)(b) and (c) of the Act, be declared to be unconstitutional and discriminatory in so far as it may be interpreted to provide that the applicant's case: 'must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the applicant under day parole or parole and if the recommendation of the National Council is favourable, the Minister may order that the applicant be placed under day parole or parole, as the case may be';

PART B:

7. That this honourable court, having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations in respect of the applicant in terms of the provisions of section 78(1) and

subject to the provisions of section 73(6)(b)(iv) of the Act, grant parole or day parole or prescribe the conditions of community corrections in terms of section 52, to the applicant;

8. That the first respondent is ordered to immediately implement the order of this honourable court in terms of prayer 8 (*sic*) above and to release the applicant on parole or day parole on the conditions of community corrections as prescribed by this honourable court;
9. That all the respondents who may oppose this application are ordered to pay the costs of the application jointly and severally;"

Prayers 4 and 5 were not proceeded with. Prayer 7 was on 10 March 2009 amended to read as follows:

- "7. That this honourable court, having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations in respect of the applicant grant parole or day parole or prescribe the conditions of community corrections to the applicant;"

For the sake of completeness it must be pointed out that the third respondent on 23 January 2009 filed a notice of motion in terms of which the following relief is sought:

- "1. That section 78(1) of the Correctional Services Act 111 of 1998 be declared to be inconsistent with the Constitution of the Republic of South Africa and invalid.
2. That any party to this application who opposes this application be ordered to pay the costs of the application.
3. That the further conduct of the main application, including the filing of any further affidavits, if any, will be governed by the Uniform Rules of Court;
4. That the costs of this application be costs in the cause of the main application;"

This application was not persisted with.

Before dealing with the applicant's contentions it is necessary that the statutory history and background pertaining to parole be discussed and considered.

When the applicant was sentenced on 15 October 1993 the Correctional Services Act, 8 of 1959 ("the 1959 Act") was the applicable Act.

Section 62 deals with the powers, functions and duties of Institutional Committees established in terms of section 5A of the 1959 Act. In summary section 62 provides that an Institutional Committee should make decisions with regard to credits to be awarded to a prisoner, make certain recommendations to the Commissioner of Prisons and exercise the powers and perform such functions and duties as prescribed by regulation.

Section 63 of the 1959 Act deals with the powers, functions and duties of Parole Boards. It provides *inter alia* that a Parole Board shall submit a report to the Minister with regard to, *inter alia*, the conduct, adaptation, training, aptitude, industry and physical and mental state of a prisoner and the possibility of his relapse into crime. It further provides that together with the report on each prisoner the Parole Board shall make recommendations regarding the placement of a prisoner on parole in terms of section 65 of the 1959 Act.

Section 65(1) of the 1959 Act provides that a prisoner shall be released upon the expiration of the term of imprisonment imposed upon him. The section then continues to deal with the possibility of a prisoner being placed on parole. Section 65(5) and (6) provide as follows:

- "(5) Upon receipt of a report from a parole board regarding a prisoner who has been sentenced to life imprisonment, the Minister shall refer the matter to the National Advisory Council, which, after considering the report of the parole board, and having regard to the interests of the community, shall

make a recommendation to the Minister regarding the placement of the prisoner on parole.

- (6) The Minister may, after considering such recommendation, authorise the placement of the prisoner on parole subject to any conditions which he may determine and as from a date determined by him up to the date of such prisoner's death."

The Parole and Correctional Supervision Amendment Act, 87 of 1997 ("the 1997 Act") was assented to on 26 November 1997. The date of commencement will be dealt with later herein.

Sections 62, 63 and 65 of the 1959 Act were amended by the 1997 Act while sections 64B and 64C, which have a bearing on the present application, were inserted in the 1959 Act by the 1997 Act.

The amendment to section 62 of the 1959 Act provides that the Institutional Committee shall, in respect of a prisoner sentenced to imprisonment exceeding twelve months, submit a report to a Parole Board regarding, *inter alia* the conduct, adaptation, etc as well as the possible placement of such prisoner on parole and the period for and the conditions under which such prisoner should be so placed.

Section 63 of the 1959 Act was completely substituted. The new section 63(2) reads as follows:

"(2) A Parole Board shall, in respect of any prisoner serving a sentence of life imprisonment, submit a report with recommendations on the possible placement of the prisoner concerned on parole or on day parole, and the conditions under which the prisoner may be so placed, to the court which sentenced the prisoner."

The scheme in the 1997 Act regarding parole was therefore that the Institutional Committee submits a report to the Parole Board which in turn submits a report to court.

The other amendments to section 63 concern notice to the prisoner, his right to make written representations regarding the recommendation to court and his acceptance of the recommendations. It also provides that if a prisoner's placement on parole has been approved but circumstances regarding his placement change before he is so placed to such an extent that placement is no longer advisable, that placement could be deferred until the Parole Board again approves such placement.

The most important amendment affecting the applicant, however, is the fact that it is no longer the Minister who decides on the placement on parole but the court which sentenced the prisoner.

The amendments to section 65 of the 1959 Act also take the Minister out of the decision making process and replaces him with the court. Also of importance is the provision in section 65(4)(b)(v) which provides that a person who has been sentenced to life imprisonment shall not be placed on parole until he has served at least twenty five years of his sentence provided that he may be placed on parole when he has reached the age of 65 years and he has served at least fifteen years of his sentence.

The new section 64B merely makes provision that a court to which a report has been submitted in terms of section 63(2) of the Act may order that the prisoner concerned be placed on parole and determine the conditions on which the prisoner shall be so placed.

The new section 64C in turn provides that when a court sentences a person to imprisonment for *inter alia* murder, it shall inform any relative of the deceased present in court that he/she has a right to make representations when placement of the prisoner on parole is considered or to attend any meeting of the Parole Board.

The 1998 Act was assented to on 19 November 1998. I will later deal with the date of commencement of this Act.

Earlier in this judgment I dealt with sections 42, 74 and 83 of the 1998 Act dealing with the report by the Committee to the Board and the Board's recommendations

to the court regarding the placement of a lifer on parole. It is therefore only necessary to refer to the following further provisions of the 1998 Act.

Section 78 deals with the powers of the court in respect of prisoners serving life sentences. In broad terms it provides that the court, having considered the record of proceedings of the Board and its recommendations in the case of a lifer, may grant parole to such prisoner subject to the provisions of section 73(6)(b)(iv) which provides that a lifer may not be placed on parole until he or she has served at least twenty five years of the sentence but that the prisoner, on reaching the age of 65 years, may be placed on parole if he or she has served at least fifteen years of such sentence.

The 1998 Act contains a transitional provision in section 136 thereof. The section prior to any amendment thereof reads as follows:

"(1) Any person serving a sentence immediately before the commencement of this Act will be subject to the provisions of the Correctional Services Act, 1959 (Act No 8 of 1959), relating to his or her placement under community corrections, but the Minister may make such regulations as are necessary to achieve a uniform policy framework to deal with prisoners who were sentenced immediately before the commencement of this Act, and no prisoner may be prejudiced by such regulations.

- (2) For the purposes of considering the placement of such person under community corrections, the relevant authority provided for in this Act will have the power to consider such a placement."

The commencement date of this section was 19 February 1999 in terms of Proclamation 20, *Government Gazette* 19778 dated 19 February 1999.

It is clear that the provisions of the 1959 Act would still have been applicable to the placement on parole of all prisoners after the commencement date of the 1998 Act. To achieve a uniform policy framework to treat pre and post commencement date prisoners equally, the Minister was empowered to make regulations.

Section 136 was substituted by section 42 of Act 32 of 2001 ("the 2001 Act") with date of commencement 14 December 2001. The amended section 136 reads as follows:

"136. (1) Any person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII 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 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 prisoner who is serving a determinate sentence of imprisonment as contemplated in subsection (1), such prisoner must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act No 8 of 1959).

(3)(a) Any prisoner serving a sentence of life imprisonment 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) The case of a prisoner contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the prisoner under day parole or parole.

(c) If the recommendation of the National Council is favourable, the Minister may order that the prisoner be placed under day parole or parole, as the case may be.

(4) If a person is sentenced to life imprisonment after the commencement of Chapters IV, VI and VII while serving a life sentence imposed prior to the commencement, the matter must, after the prisoner has served 25 years accumulatively, be referred to the court which imposed the last sentence of life imprisonment for consideration of placement under day parole or parole."

I will later herein deal with this section again.

Different sections of the 1998 Act commenced on different dates. As a result thereof the 1998 Act has become a labyrinth where one can easily lose one's way. In what is to follow I hope to give some direction to get out of this labyrinth.

In terms of Proclamation R20, 1999 published in *Government Gazette* no 19778 dated 19 February 1999 a number of sections of the 1998 Act were brought into operation and a number of sections in the 1959 Act were repealed with effect from 19 February 1999. In terms of Proclamation R38, 2004 published in *Government Gazette* no 26626 dated 30 July 2004 certain sections of the 1998 Act were put into operation and certain sections of the 1959 Act were repealed with effect from 31 July 2004. The 1997 Act which amended the 1959 Act commenced on 1 October 2004 in terms of Proclamation 45, 2004 published in *Government Gazette* no 26808 dated 1 October 2004. In Proclamation R30, 2004, referred to above, it was also proclaimed that certain sections relevant to this application in the 1998 Act were put into operation and certain sections in the 1959 Act relevant to this application were repealed. These sections include sections 73, 74 and 75 of the 1998 Act and sections 62, 63, 64 and 65 of the 1959 Act. Sections 62, 63, 64 and 65 of the 1959 Act represented amendments to that Act, brought about by the 1997 Act which came into operation on the very same day, namely 1 October 2004.

In summary, from the foregoing it is clear that the 1997 Act, which was intended to amend the 1959 Act, was only put into operation on 1 October 2004 by which time the legislature had already decided to substitute some of the provisions in the 1997 Act (and

therefore the 1959 Act) with provisions in the 1998 Act, which had in turn been amended by the 2001 Act.

Section 137 of the 1998 Act deals with the repeal of laws and reads as follows:

"The Acts set out in the schedule are hereby repealed or amended to the extent set out in the third column of the schedule."

It is clear from the provisions of this section read with the schedule that the intention of the legislature was to repeal the whole of the 1959 Act as at the date of commencement of the 1998 Act.

From the foregoing it is also clear that with the introduction of the 1997 Act it was intended to amend certain provisions of the 1959 Act.

Proclamation 38, 2004 referred to, puts section 137 into operation "only with reference to the amendment of the Criminal Procedure Act, 1977 (Act no 51 of 1977)". It therefore excludes the repeal of the whole of the 1959 Act. In my judgment Proclamation 38, 2004 read with section 137 of the 1998 Act and the schedule mean that the whole of the 1959 Act had not been repealed but only those sections specifically mentioned in Proclamation 38, 2004.

To add to the haze of statutory enactments the Correctional Services Amendment Act 2008, Act 25 of 2008, was assented to on 8 November 2008. The only relevance of

the 2008 Act for purposes of the present application is that it contains an amendment of section 78 of the 1998 Act in terms of which the right to place a prisoner on parole is taken away from the court and put into the hands of the Minister after certain administrative steps have been taken. This court was informed that the 2008 Act will be promulgated in the very near future.

As appears from prayer 2 in Part A of the notice of motion the applicant wants this court to declare section 136(1) of the 1998 Act unconstitutional if it is to be interpreted that the applicant is subject to the provisions of the 1959 Act relating to his placement on parole, in so far as section 136(1) is in conflict with certain provisions of sections 73 and 78 of the 1998 Act. In the alternative the applicant wants this court to read section 136(1) of the 1998 Act down and interpret it as not to be in conflict with provisions of section 73 and 78 of the 1998 Act.

In the applicant's papers and his original heads of argument it is the applicant's case that if section 136(1) of the 1998 Act provides that he is subject to the provisions of the 1959 Act, his placement on parole will have to be dealt with by the Minister whereas in terms of the 1998 Act a lifer's placement on parole is dealt with by the court. That, the applicant argued, amounts to discrimination between himself and a prisoner sentenced to life imprisonment subsequent to October 2004. The applicant further contends in his papers and original heads of argument that section 136(1) of the 1998 Act is in any event not applicable to him because section 136(1) does not refer to prisoners sentenced to life imprisonment but to prisoners sentenced to determinate sentences. For this last

mentioned argument the applicant relies on an unreported judgment by ELLIS, AJ in the matter of *P F van Vuren v Minister of Correctional Services & six others*, case no 37771/08 delivered, in this court during September 2008. In paragraph 16 the learned acting judge states the following:

"In terms of the principle *generi per speciem derogatur* and in order to avoid a finding that section 136(3)(a) is superfluous, the only meaning which can be ascribed to section 136(1), interpreted in the light of section 136(3)(a), is that section 136(1) deals with all prison sentences except life imprisonment for which specific provision was made in the other enactment."

The learned acting judge also remarked as follows in paragraph 19 of the judgment:

"In the light of my finding above that section 136(1) is not applicable to life sentences, which are dealt with expressly in section 136(3)(a), ..."

It is at present common cause between the applicant and all the respondents that this finding by ELLIS, AJ is wrong. On a mere reading of section 136(1) it is clear that it refers to any person serving a sentence of imprisonment before the commencement of chapters IV, VI and VII of the 1998 Act. The applicant falls squarely under the provisions of section 136(1) because chapter IV came into operation on 31 July 2004 and chapters VI and VII on 31 October 2004, in terms of Proclamation R38, 2004. It is clear that the learned acting judge was not referred to the different Acts applicable as this court was.

As stated earlier herein the applicant's initial attack on the constitutionality of section 136(3)(a) of the 1998 Act has fallen away because it became common cause on the papers before us that the applicant was eligible for parole after having served fifteen years imprisonment as a minimum and having reached the age of 65 years.

When Mr Van Loggenberg SC stepped into the shoes of applicant's former senior counsel, supplementary heads of argument were filed in which there was a new approach namely that after the amendment of the 1959 Act by the 1997 Act, all discrimination between pre and post October 2004 lifers fell away, because, as a result of the 1997 Act, the 1959 Act was amended to provide for the court to consider the placement of a lifer on parole and not the Minister.

On behalf of the first and fourth respondents, Mr Tokota SC referred us to the Acts referred to above, as well as Proclamations 45, 200 and R38, 2004 and submitted that while the 1997 Act was hovering in the air, waiting to be promulgated to amend the 1959 Act, the legislature had assented to the 1998 Act with a view of streamlining all enactments affecting the Department of Correctional Services. For that reason, when provisions of the 1997 Act came into effect on 1 October 2004, they were immediately repealed on the very same day.

Mr Tokota's submission was further that the terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of chapters IV, VI and VII are to be considered and applied when any prisoner sentenced prior to the

commencement of those chapters is considered for parole. Mr Tokota's submission was further that as all the provisions of the 1959 Act dealing with parole had been repealed, prisoners sentenced to life imprisonment pre October 2004 had to be dealt with in terms of section 136 of the 1998 Act. It was therefore only the Minister who could place a lifer on parole. In respect of lifers sentenced pre October 2004 the position was as it was before the 1997 Act came into operation. In respect of parole for lifers post October 2004 the court was the decision making body. In order not to make any distinction between pre and post October 2004 lifers the 2008 Act amending the 1998 Act was enacted.

Mr Van Loggenberg at the outset submitted that there are three questions in this application that must be answered. Firstly, whether this court is statutorily empowered to place the applicant on parole. Secondly, whether the fifth respondent has a common law right to make recommendations to the Parole Board regarding the placement of the applicant on parole. Thirdly, whether this court should place the applicant on parole.

From the foregoing it is, in my judgment, clear that this court is not statutorily empowered to place the applicant on parole. I say that because I agree with the respondents' submissions that only the provisions of section 136 of the 1998 Act are applicable to lifers sentenced pre October 2004. All the provisions of the 1959 Act regarding parole for lifers have been repealed and the provisions of section 136(1) do not keep those provisions alive in spite of their repeal in terms of Proclamation R38, 2004.

Only the policy and guidelines applied by the former Parole Boards prior to the repeal of the provisions of the 1959 Act dealing with parole remained intact and had to be applied by the Board.

Mr Van Loggenberg referred us to the contents of paragraph 56 of the applicant's founding affidavit where the following is stated:

"I am challenging the constitutionality of certain sections of the Act to the extent as set out in the notice of motion, but only in so far as any of the respondents may decide to rely on any of those sections, in opposition to the granting of my parole."

In the heads of argument filed by Mr Van Loggenberg he reserved the right to fall back on the original approach followed by the applicant, ie to challenge the constitutionality of section 136 of the 1998 Act.

In my judgment, if this court should find that section 136 is unconstitutional, and that is to be confirmed by the constitutional court, there is nothing left in the 1959 Act for the applicant to fall back on. If the applicant is, under those circumstances, entitled to rely on the provisions of the 1998 Act for his placement on parole, the intent of the legislature is now clear in the light of the 2008 amendment which, as stated, will in the very near future be put into operation. The result thereof will be that the applicant will still be subject to the decision of the Minister regarding his placement on parole.

The second question posed by Mr Van Loggenberg SC concerns the alleged right of the fifth respondent to make recommendations to the Parole Board regarding the placement of the applicant on parole.

As stated earlier in this judgment the Council requested the Board to contact the fifth respondent to ascertain whether she intended making representations to the Board. That delayed the placement of the applicant on parole. As a result thereof the first application was launched. As also stated earlier herein, the fifth respondent applied to be joined in that application. The present application followed without the fifth respondent being joined. As also stated earlier a draft order was made an order of court on 9 December 2008 in the present application. In terms of paragraph 2 thereof the fifth respondent was joined in the application. She was by then at least, seen to have a substantial interest in the outcome of the application. The fifth respondent's right to be a respondent in this matter and her right to make recommendations regarding the placement of parole of the applicant was acknowledged and supported by all the respondents. Such a right was denied by the applicant.

Section 299A of Act 51 of 1977 provides that when a court sentences a person to imprisonment for, *inter alia*, murder, it shall inform any immediate relative of the deceased, if he or she is present, that he or she has a right to make representations when placement of the prisoner on parole is considered. The section also places a duty on the relative to inform the Commissioner of Correctional Services of such intention in writing

and to provide the Commissioner with his or her postal and physical address and to inform the Commissioner of any change of such address.

Section 299A was inserted in Act 51 of 1977 by section 6 of Act 55 of 2003, subsequent to the applicant's trial and subsequent to the date when his sentence of death was commuted to one of life imprisonment. It was therefore submitted on behalf of the applicant, and accepted on behalf of the fifth respondent, that section 299A of Act 51 of 1977 is not applicable to the fifth respondent.

I do not agree. The section refers to the sentencing court informing the relative of his or her right to make representations. In my judgment it does not mean that if a court does not inform the relative of his or her right, that that relative's right falls away.

The right of a relative to make representations and to attend board meetings is acknowledged in section 75(4) of the 1998 Act.

Mr Bizos SC referred in some detail to the Service Charter for Victims of Crime in South Africa. It was submitted that the Charter is compliant with the spirit of the South African Constitution and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.

It is true as was submitted by Mr Bizos that the Charter provides that a victim may attend a parole hearing and submit written inputs.

It was further submitted on behalf of the fifth respondent that the Council considered the fifth respondent as having a right to intervene in the applicant's parole proceedings and therefore instructed the Board to make contact with her. She was in fact contacted and invited to make representations which invitation she accepted. She therefore has a legitimate expectation to be heard.

Mr Bizos also submitted that the 1998 Act requires a Board to consider and make its decision to place a prisoner on parole based on a report compiled, and in terms of section 42 of that Act, "in the light of any other information or argument". He said that must of necessity refer to *inter alia* information that may come from a relative.

I agree with that submission. Before a prisoner can be placed on parole all possible relevant information should be considered. One cannot argue, as the applicant now does, that the fifth respondent's representations will be of a political nature and nothing else. Any person, including the applicant, may put relevant information before a Board. It is the duty of that Board to weigh and consider all information placed before it and to exclude information that may be irrelevant.

Mr Bizos also referred to foreign and international law on the right of a victim to make representations during the parole process. In this respect reference was made to the law in England and Wales, Scotland, certain states of Australia and Canada. I do not find it necessary to deal with the foreign and international law in any detail, save to say that it

supports Mr Bizos' submissions that the fifth respondent is entitled to be heard during the parole proceedings.

I therefore conclude that the fifth respondent has indeed a right to make representations before the applicant is placed on parole.

The third question posed by Mr Van Loggenberg is whether this court should grant an order placing the applicant on parole.

Even if I am wrong in my conclusion that the Minister has the final say to place the applicant on parole and that it is this court that must do so, I am of the view that this court is not in a position to place the applicant on parole. I say that for the following reasons. In the amended notice of motion the applicant asks for an order in paragraph 7 that this court, "having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations", grant parole. It is common cause that we do not have the record of the proceedings of the Board. We obviously also do not have the fifth respondent's representations to the Board. The judgment of the trial court, not only on the merits, but also on sentence, is of the utmost importance for a proper decision on the placement of the applicant on parole. Many other documents such as the application to re-open the trial, the appeal to the Supreme Court of Appeal, the application for amnesty and the review of the Amnesty Committee's decision are also relevant and are not before this court.

In my judgment the application by the applicant, even if he was entitled to approach the court to be placed on parole, was premature.

It is clear from the papers that the applicant fears that the Minister will arbitrarily refuse his placement on parole. If that is to happen, it may be a proper cause to apply for a review of the Minister's decision.

Earlier herein I referred to the withdrawal of the applicant's first application and the fact that no costs were tendered in the notice of withdrawal. I also referred to the order of court of 9 December 2008. In paragraph 3 of that order it was ordered that "the costs incurred by Ms Hani in the previous application under case no 4117/2008 (should read 47117/08) are reserved". In paragraph 4 thereof the previous application's costs as well as the costs of 9 December 2008 were also reserved. That is a reference to the costs of the respondents in the first application as well as the respondents in the present application.

Mr Van Loggenberg referred us to rule 41 and in particular to rule 41(1)(c) which reads:

"If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."

Mr Van Loggenberg's submission was that the respondents who ask for the costs of the first application, should apply therefore on notice of motion.

I disagree. By order of court those costs were reserved. The costs were reserved for determination by this court. In my judgment there is no need for any of the respondents to apply by notice of motion for those costs.

I have earlier herein referred to the manner in which not only the 1998 Act was put into operation, but also to the manner in which sections in the 1959 and 1997 Acts were put into operation and then repealed. This has led to uncertainty and confusion in the minds of prisoners, Correctional Service officials and even lawyers regarding parole. I am of the view that urgent and real attempts should be made by all role players to bring harmony and consistency in legislation concerning the Department of Correctional Services and in particular the handling of parole.

The following orders are issued:

1. The applicant's application is dismissed with costs which costs will include the costs occasioned by the employment of two counsel in respect of each of the respondents.
2. The applicant is ordered to pay the costs that were reserved in terms of the order of court dated 9 December 2008 which costs will include the costs occasioned by the employment of two counsel in respect of those respondents who employed two counsel.

W J VAN DER MERWE
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

J B SHONGWE
DEPUTY JUDGE-PRESIDENT
NORTH GAUTENG HIGH COURT

I agree

W L SERITI
JUDGE OF THE NORTH GAUTENG HIGH COURT

54507-2008

HEARD ON:

FOR THE APPLICANT:

INSTRUCTED BY:

FOR THE RESPONDENTS:

INSTRUCTED BY: