

# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number In the matter between: PAUL F VAN VUREN Applicant And  
MINISTER OF JUSTICE 1<sup>st</sup> Respondent MINISTER OF CORRECTIONAL  
SERVICES 2<sup>nd</sup> Respondent

## WRITTEN ARGUMENT

### 1. AD Direct access in the interests of justice

- 1.1 This application is brought in terms of the Constitution which states that a person must be allowed to bring a matter directly to this Honourable Court when it is in the interests of justice.

See: Section 167(6)(a) of the Constitution

Notice of Motion, prayer 1, page 9  
Founding Affidavit, page 12 to 14

- 1.2 It is respectfully submitted that applicant is entitled to direct access to this Honourable Court due to (inter alia) the following reasons:

- 1.2.1 That there is sufficient urgency in this matter as the following rights of the applicant are directly impacted upon:

- 1.2.1.1 The right to freedom of a person in terms of section 12 of the Constitution, at this instance my right to be considered for release on parole. Although being released on parole does not mean “freedom” in the normal sense of the word as parole involves (inter alia) house arrest, it does allow for more freedom than being incarcerated, and

See: Section 12 of the Constitution

1.2.1.2 The right 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.

See: Section 35(3)(n) of the Constitution

1.2.2 Injustice to prisoners sentenced before 1994 at this instance refusal of the 2<sup>nd</sup> respondent to consider applicant for release on parole in terms of the policy that was in force when the crime was committed.

See: Christian Education South Africa v Minister of Education 1999 (2) SA 83 (CC), 1998 (12) BCLR 1449 (CC) at para [11]

Bruce v Fleecytex Johannesburg CC 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) at para [19]

1.2.3 The prospects of success of the main application in having section 136(3)(a) of Act 111 of 1998 declared unconstitutional is good as this section is contrary to section 35(3)(n) of the Constitution as well as contrary to section 136(1) of the Act. This is a relevant factor in considering direct access.

See: Christian Education South Africa v Minister of Education (supra)

Legal Soldier (Pty) Ltd v Minister of Defence 2002 (1) SA 1 (CC) at para [7]

1.2.4 This matter contains only constitutional issues, i.e. the declaration of section 136(3)(a) as unconstitutional. It is respectfully submitted that this matter may be disposed of without any practical problems. Should section 136(3)(a) be declared unconstitutional, the previous policy of the Department of Correctional Services becomes operational resulting in prisoner rights being restored/upheld in terms of the Constitution/Bill of Rights.

See: Premier of the Province of the Western Cape v Electoral Commission and Another 1999 (11) BCLR 1209 (CC) at para [5]

1.2.5 No factual issues are in dispute. It is respectfully submitted that the hearing of oral evidence will not be required. The main

application will therefore not be “clouded” by having to decide factual issues.

See: Hekpoort Environmental Preservation Society v Minister of Land Affairs 1998 (1) SA 349 (CC), 1997 (11) BCLR 1537 (CC) at para [10]

1.2.6 Although the main application involves the interpretation of legislation, it is respectfully submitted that this Honourable Court is the correct forum as the main issue to be decided is the constitutionality of section 136(3)(a) of Act 111 of 1998. The applicant approached the High Court, Transvaal Provincial Division but that application was dismissed. Although that application contained other factual and related interpretation issues, the matter now brought before this Honourable Court is clear and succinct.

See: National Gambling Board v Premier, KwaZulu Natal 2002 (2) SA SA 715 (CC) at para [38]

Annexure ‘A1’, page 28 to 34

Annexure ‘A2’, page 35

1.2.7 Resolution of the constitutionality of section 136(3)(a) will have practical benefit for the applicant and hundreds of other prisoners in similar positions as it will restore the previous policy of the Department of Correctional Services whereby prisoners with life sentences were considered for release on parole after 10 years.

See: Veersamy v Engen Refinery and Another 2000 (3) SA 337 (CC) at para [5]

Annexure ‘B’, page 36 to 41

1.2.8 There is a pressing need for a ‘definite and final decision on a controversial point springing up throughout the country daily, frequently at any rate, and affecting countless other cases.

See: Luitingh v Minister of Defence 1996 (2) SA 909 (CC), 1996 (4) BCLR 581 (CC) at para [15]

1.2.9 In terms of section 38(a) of the Constitution anyone acting in their own interest may approach a competent Court alleging that a right in the Bill of Rights has been infringed. It is respectfully submitted that this Honourable Court qualifies as

a competent Court in this regard.

See: Section 38(a) of the Constitution

Ferreira v Levin NO 1996(1) SA 984 (CC) where this Honourable Court allowed that '...when viewed objectively, legislation is inconsistent with a right contained in the Bill of Rights, this should be sufficient to conclude that a right has been infringed or threatened'

1.2.10 This matter has been before the Honourable High Court, Transvaal Provincial Department but has been dismissed and applicant has been advised to approach this Honourable Court as a matter of last resort to solve the issue once and for all.

See: Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC)

Zantsi v The Council of State, Ciskei 1995 (4) SA 615 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)  
Van Vuren v Minister of Correctional Services  
(Unreported case 31596/2006 Transvaal Provincial Division)

1.2.11 It is respectfully submitted that the matter cannot be appealed from the High Court as the application in the Court a quo is flawed in that it does not contain a prayer for the declaration of section 136(3)(a) of Act 111 of 1998 as unconstitutional. The applicant was appearing in person in the Court a quo. He does not have the legal expertise and cannot be blamed for not including a prayer to that effect.

See: Annexure 'A1' page 28 to 29

Brink v Kitshoff NO 1996 (4) SA 197 CC, 1996 (6) BCLR 752 (CC) at para [18]  
Besserglik v Minister of Trade, Industry & Tourism (Minister of Justice Intervening) 1996 (4) SA 331 (CC), 1996 (6) BCLR 745 (CC) at para [7]

WHEREFORE it is respectfully submitted that the application for direct access should be granted.

2. AD Condonation (Prayer 2)

- 2.1 This application is brought in person. Applicant is currently incarcerated at Pretoria Central Correctional Centre and do not have an address available within 25 kilometres of this Honourable Court for the acceptance of process.
- 2.2 In terms of Court Rule 6 read with Rule 4 of the Uniform Rules of Court, this application had to be served on the respondents at the address of the State Attorney in Pretoria. This was done.
- 2.3 In terms of rule 31 of the Court Rules this Honourable Court is respectfully requested to excuse the applicant from this requirement.
- 2.4 It is respectfully submitted that having his address for acceptance of notice and service in Pretoria, the same city as the Respondent's Attorney will not inconvenience the respondents, nor cause them any unnecessary financial burden.

See: Rule 31, Constitutional Court Rules

WHEREFORE it is respectfully submitted that condonation regarding noncompliance with rule 10(1)(b) only in terms of the 25 kilometre requirement of the rule should be granted.

3. Constitutionality of section 136(3)(a) of the Act (Prayer 3)

- 3.1 There is no question that subsection 136(3)(a) of Act 111 of 1998 is subject to scrutiny of constitutionality under the Constitution. If it is found to be inconsistent with the Constitution, it will be invalid.

See: Section 2 of the Constitution

Section 8 of the Constitution

Section 35(3)(n) of the Constitution

Section 136(3)(a) of Act 111 of 1998

- 3.2 Section 35(3)(n) of the Constitution refers to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence had been changed between the time the offence

was committed and the time of sentencing (own emphasis).

The word punishment, according to the dictionary includes sentence, penalty, chastisement, castigation, reprimand and/or retribution. It is respectfully submitted that the word also refers to the nonparole period of a sentence. Being incarcerated is a more severe punishment than being on parole.

It is respectfully submitted that “prescribed punishment” includes reference to nonparole periods.

See: Section 35(3)(n) of the Constitution

- 3.3 It is a fact that the previous policy of consideration after 10 (ten) years applied when the crimes were committed in 1991. It is also true that this punishment is less severe than the subsequent policy (and current legislation) requiring a 20 (twenty) years nonparole period when applicant was sentenced to life imprisonment in 2000.

It is therefore respectfully submitted that this falls squarely in the circumstances foreseen by the legislature when section 35(3)(n) of the Constitution was enacted.

- 3.4 Section 136(3)(a) of Act 111 of 1998 has retrospective effect without taking into consideration that policies differed and the last 20 (twenty) year policy was not the only one.

See: Section 136(3)(a) of Act 111 of 1998

Annexure ‘B’ page 37

Plank v Minister of Correctional Services and Others  
(Unreported case 14313/2005 Witwatersrand Local Division)  
Annexure ‘C’ para [13] page 44

- 3.5 Section 136(3)(a) of Act 111 of 1998 contradicts section 136(1) of the same Act. This contradiction can be resolved by declaring subsection 136(3)(a) unconstitutional.

See: Section 136(1) of Act 111 of 1998

Section 136(3)(a) of Act 111 of 1998

- 3.6 According to the decision in the unreported case of Mflori v Minister of Correctional Services and another (unreported case number 26486/04 Witwatersrand Local Division) a prisoner only obtains a right to be considered

for day parole and parole after he/she has served 20 years of his/her sentence. "The question of legitimate expectation does not even arise in the absence of a clear right." This decision is, with respect, incorrect as it ignores the previous policies of the Department of Correctional Services altogether. It would appear as if the Court is of the opinion that only the act established a "clear right". The practice of applying nonparole periods of 10 (ten) to 20 (twenty) years previously is not seen as creating a legitimate expectation to be considered.

See: Mflori v Minister of Correctional Services and another

(unreported case number 26486/04 Witwatersrand Local Division) Annexure 'D'  
page 45 to 50 Annexure 'B' page 37 Plank v Minister of Correctional Services and  
Others

(Unreported case 14313/2005 Witwatersrand Local Division)  
Annexure 'C' page 42 to 44

- 3.7 The Department of Correctional Services, on apparent instruction from the Chairperson of the National Council on Correctional Services indicated that they want to determine the status of "lifers" who have served more than 15 (fifteen) years. This is an indication that they consider/considered releasing prisoners with life sentences on parole after completion of a 15 (fifteen) year nonparole period.

See: Annexure 'E' page 51 to 52

WHEREFORE it is respectfully submitted that subsection 136(3)(a) of the Act should be declared inconsistent with the Constitution and invalid to the extent of its inconsistency.

Signed at PRETORIA on this day of March 2007.

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