IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number In the matter between: PAUL F VAN VUREN Applicant And

MINISTER OF JUSTICE 1st Respondent MINISTER OF CORRECTIONAL

SERVICES 2nd Respondent

FOUNDING AFFIDAVIT

I the undersigned,

Paul Francious van Vuren

Do hereby state under oath:

a. I am an adult male currently incarcerated at Pretoria Central Correctional Centre, No. 1 Potgieter Street, Pretoria, 0002.
b. I am the applicant in this application.
c. The facts contained herein are within my own personal knowledge unless otherwise stated and to the best of my belief both true and correct.
d. I bring this application in my personal capacity (unrepresented) and in the interests of justice.

1. Service of process

1.1 In terms of Court Rule 6, subrules (1) and (2) read with rule 4 and rule 10A of the Uniform Rules of Court, this application was served on the attorney for the respondents by the Deputy Sheriff.

1.2 The relevant Ministers have direct, abiding and crucial interests in the outcome of the litigation.

1.3 The 1st respondent is the Minister of Justice and Constitutional Development in her official capacity.

1.4 The 2nd respondent is the Minister of Correctional Services in his official capacity.

2. Direct access in the interests of justice (Prayer 1)

2.1 This application is brought in terms of sections 38 and 167(6)(a) of the

Constitution.

2.2 Direct access to this Honourable Court is sought due to, inter alia, the following reasons:

2.2.1 It is my respectful submission that there is sufficient urgency in this matter as the following are directly impacted upon:

2.2.1.1 The right to freedom of a person in terms of section 12 of the Constitution, at this instance my right to be considered for placement on parole, and

2.2.1.2 The right to the benefit of the least severe of the prescribed punishments, at this instance consideration for placement on parole after 10 (ten) to 15 (fifteen) years and not 20 (twenty) years.

2.2.2 I have locus standi in that, objectively speaking, a right in the Bill of Rights has been threatened or infringed, and I have an interest in obtaining the remedy sought in this application.

2.2.3 Injustice to prisoners sentenced before 1994 at this instance refusal of the 2nd respondent to consider me for placement on parole in terms of the policy that was in force when the crimes were committed.

2.2.4 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 both section 35(3)(n) of the Constitution as well as section 136(1) of Act 111 of 1998.

2.2.5 This matter contains:

2.2.5.1 Only constitutional issues, i.e. the declaration of section 136(3)(a) of Act 111 of 1998 as unconstitutional. It is my respectful submission that this matter may be disposed of without any practical problems. Should section 136(3)(a) be declared unconstitutional, the previous policies of the Department of Correctional Services under section 136(1) will become operational again resulting in prisoner rights being restored/upheld in terms of the Constitution, and

2.2.5.2 No factual issues that are in dispute. I respectfully submit that the hearing of oral evidence will not be required. The main application will therefore not be “clouded” by this Honourable Court having to decide factual issues.

2.2.6 Although the main application involves the interpretation of legislation, I respectfully submit 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. I have approached the High Court, Transvaal Provincial Division (See Annexure ‘A1’ page 28 to 34 of this application) but that application was dismissed (See Annexure ‘A2’ page 35 of this application).

2.2.7 Resolution of the constitutionality of section 136(3)(a) will have practical benefit for me and hundreds of other prisoners in similar positions as it will restore the previous policies of the Department of Correctional Services whereby prisoners with life sentences were considered for placement on parole after 10 years (See Annexure ‘B’ page 37 of this application).

2.2.8 There is a pressing need for a ‘definite and final’ decision on this controversial point affecting countless other cases.

2.2.9 In terms of section 38(a) of the Constitution anyone acting in his/her/their own interest may approach a competent Court alleging that a right in the Bill of Rights has been infringed. I am told that this Honourable Court qualifies as such.

2.2.10 This matter has been before the High Court, Transvaal Provincial Division (See Annexure ‘A1’ page 28 to 34 of this application) but has been dismissed (See Annexure ‘A2’ page 35 of this application) and I have been advised to approach this Honourable Court as a matter of last resort to resolve the issue once and for all.

WHEREFORE I pray that I be granted leave to bring this application direct.

3. Condonation (Prayer 2)

3.1 I am lodging this application in person and do not have an address

available within 25 kilometres of this Honourable Court for the acceptance of process.

3.2 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.

3.3 In terms of rule 31 of the Court Rules I request condonation of the fact that I do not have an address within 25 kilometres of this Honourable Court.

3.4 It is my respectful submission that having my address for acceptance of notice and service in Pretoria, the same city as the Attorney for the respondents, will not inconvenience the respondents, nor cause them any unnecessary financial burden.

WHEREFORE I pray for condonation regarding noncompliance with rule 10(1)(b) only in terms of the 25 kilometre requirement of the rule.

4. Factual background to application

4.1 On 13 November 1992, I was convicted on charges of murder, robbery with aggravating circumstances, possession of an unlicensed firearm and ammunition and theft. I was sentenced to death on the first two counts, to 3 (three) years imprisonment on counts 3 (three) and 4 (four) and to 5 (five) years on count five.

4.2 The crimes were committed during 1991.

4.3 On 20 September 2000, the death penalties imposed were commuted to life imprisonment. The sentences were antedated to 13 November 1992.

4.4 The life sentences run concurrently in terms of section 39(2)(a)(ii) of Act 111 of 1998.

4.5 I have received amnesties amounting to 24 (twenty four) months.

4.6 To date, I have served almost 14 years 4 months of the sentence.

4.7 When the crimes were committed and up to March 1994, the policy of the Department of Correctional Services was to consider life prisoners for placement on parole after they had served 10 (ten) years of their sentences, but placement occurred only in exceptional cases before 15 (fifteen) years had been served. (See Annexure ‘B’ page 36 to 41 of this application).

4.8 I approached the High Court of South Africa, Transvaal Provincial Division in Case 31596/2006 (See Annexure ‘A1’ page 28 to 34 of this application) to obtain an order instructing the 2nd respondent (and others) to consider me for placement on parole. This application was dismissed (See Annexure ‘A2’ page 35 of this application) due to section 136(3)(a) of Act 111 of 1998 requiring a minimum of 20 years imprisonment before being eligible for consideration for placement on parole.

4.9 I was advised to approach this Honourable Court to have section 136(3)(a) of Act 111 of 1998 declared unconstitutional.

2 Eligibility for consideration for placement on parole

5.1 Section 136(1) of Act 111 of 1998 provides that a person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII of the Act is subject to the provisions of the Correctional Services Act, Act 8 of 1959 (hereinafter 'Act 8 of 1959') relating to placement under community corrections (parole). This sub-section ensures that prisoners who were sentenced prior to the operation of these Chapters, are considered in terms of the previous parole policies (see Annexure 'B' page 37 of this application) upholding their rights in terms of section 35(3)(n) of the Constitution.

5.2 Chapters IV, VI and VII of the Act came into operation on 1 October 2004.

5.3 Section 136(1) therefore finds application in my case.

5.4 The policy applied by the Department of Correctional Services from August 1987 to March 1994 provided that a prisoner sentenced to life imprisonment became eligible for placement on parole after having served 10 (ten) years of his sentence, but that placement on parole would only occur in exceptional cases before the prisoner had served 15 (fifteen) years (See Annexure 'B' page 37 to 39 of this application).

5.5 On 1 March 1994 the policy was amended to provide for a term of 20 (twenty) years before a prisoner became eligible for consideration for placement on parole (hereinafter called the 'nonparole period'). This policy was turned into law by the introduction of section 136(3)(a) of Act 111 of 1998 which now provides that any prisoner serving a sentence of life imprisonment immediately before the commencement of Chapters IV, VI and VII is entitled to be considered for parole only after he/she has done 20 (twenty) years of his/her sentence.

5.6 Act 8 of 1959 did not contain any reference similar to section 136(3)(a) of the Act and therefore Department of Correctional Services policy guidelines were followed. These policy guidelines were obtained from, inter alia, court decisions, political developments, the Advisory Release Board and the National Advisory Council on Correctional Services (See Annexure 'B' page 37 to 41 of this application).

5.7 This policy created a right to be considered for placement on parole after serving 10 (ten) years of the life sentence, and to be released after having served 15 (fifteen) years of a life sentence.

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

6.1 Section 2 of the Constitution determines that the Constitution is the supreme law of the Republic of South Africa and any law inconsistent with it, is invalid.

6.2 Section 8(1) of the Constitution determines that the Bill of Rights applies to all law, binds the legislature, executive, judiciary and all organs of state.

6.3 Section 35(3)(n) of the Constitution declares that every person has the right 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).

6.4 At this instance the previous policy of consideration after 10 (ten) years applied when the crimes were committed in 1991, being less severe than the subsequent policy (and current legislation) which requires a 20 (twenty) year nonparole period when I was sentenced to life imprisonment in 2000.

6.5 Section 136(3)(a) of Act 111 of 1998 has retrospective effect and includes ALL prisoners irrespective of when they were sentenced, when crimes were committed as well as the difference in policies applied by the Department of Correctional Services over the years.

6.6 Section 136(3)(a) of Act 111 of 1998 also contradicts section 136(1) of the same Act. According to section 136(1) the previous policies of the Department of Correctional Services for placement on parole used under the Old Act should be followed.

6.7 When section 136(1) of Act 111 of 1998 was introduced, no sub-section 136(3) existed.

6.8 Section 136(3)(a) of Act 111 of 1998 in its current format was only introduced in terms of section 42 of Act 32 of 2001 commencing on 14 December 2001. It only had effect from 1 October 2004.

6.9 Section 136(3)(a) of Act 111 of 1998 is unconstitutional in terms of section 35(3)(n) of the Constitution as it does not allow differentiating between the different policies were applied over time (See Annexure ‘B’ page 37 of this application). This means that the least severe punishment cannot be applied as required by section 35(3)(n) as section 136(3)(a) applies to all those sentenced prior to 1 October 2004.

6.10 In the unreported case of Mflori v Minister of Correctional Services and another (unreported case number 26486/04 Witwatersrand Local Division) the Honourable Justice Msimeki stated as follows:

"Section 136(3)(a) gives the prisoner the entitlement – the 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." (See Annexure 'D' page 5 para [20] on page 49 of this application).

According to this judgement no "clear right" to be considered for release on parole existed prior to the introduction of section 136(3)(a).

6.11 I am told that this view is, with respect, incorrect. A person serving a sentence during any of the periods mentioned in the Department of Correctional Services circular (See Annexure 'B' page 37 of this application) had a legitimate expectation and therefore a right to be considered for parole after serving the nonparole period and he/she is (since the introduction of the Constitution) also entitled to the benefit of the least severe of the punishments in terms of the Bill of Rights.

6.8 Should section 136(3)(a) of Act 111 of 1998 be declared unconstitutional, Act 8 of 1959 will apply in relation to nonparole periods in terms of section 136(1) of Act 111 of 1998 restoring the policies of the Department of Correctional Services in force prior to enactment of section 136(3)(a). This will prevent any further infringement of the right to be considered for parole.

WHEREFORE I pray for section 136(3)(a) of the Act to be declared inconsistent with the Constitution and invalid to the extent of its inconsistency.

Signed at PRETORIA on this day of March 2007.

Applicant Paul F van Vuren MediumC Pretoria Central Correctional Centre 1 Potgieter Street PRETORIA

Thus signed and sworn before me at PRETORIA on this day of March 2007 by the deponent having acknowledged that he knows, understands and has no objections to the contents contained herein and considers the prescribed oath to be binding on his conscience.

Commissioner of Oaths