CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/07

PAUL F VAN VUREN Applicant

versus

MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT First Respondent

MINISTER OF CORRECTIONAL SERVICES Second Respondent

Decided on : 1 June 2007

JUDGMENT

THE COURT:

[1] The applicant, Mr Paul van Vuren, seeks direct access to this Court in terms of section 167(6)(a) of the Constitution[1] and Constitutional Court Rule 18,[2] to obtain an

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[1] Section 167(6)(a) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court to bring a matter directly to the Constitutional Court . . . ."

[2] Rule 18 reads:

> "(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
>
> (2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
>
> (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;

order declaring section 136(3)(a)[3] of the Correctional Services Act 111 of 1998 (the Act) to be inconsistent with the Constitution.

[2] The applicant represents himself. He is presently serving sentences in the Pretoria Central Correctional Centre. He also seeks an order condoning his non-compliance with Rule 11(1)(b), which requires that an address for service be provided within 25 kilometres from the office of the Registrar.

[3] The respondents are the Minister of Justice and Constitutional Development and the Minister of Correctional Services. Neither has, within the time periods provided for in the Rules, indicated an intention to oppose the application.

[4] On 13 November 1992 the applicant was convicted of murder, robbery with aggravating circumstances, theft and possession of an unlicensed firearm and ammunition. On the counts of murder and robbery, he received death sentences. For theft a sentence of five years' imprisonment was imposed. He was sentenced to three years' imprisonment on the possession counts.

(b) the nature of the relief sought and the grounds upon which such relief is based;

(c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot,

(d) how such evidence should be adduced and conflicts of fact resolved."

[3] Section 136(3)(a) provides:

"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."

[5] On or about 20 September 2000 the death sentences imposed on the applicant were commuted to life imprisonment, antedated to 13 November 1992. The determinate sentences run concurrently with the life sentences.[4] During his imprisonment, Mr van Vuren apparently received amnesty credits which, he submits, allows a reduction of 24 months in relation to the sentences imposed.

[6] According to the applicant, from the time that the crimes were committed until March 1994, the policy of the Department of Correctional Services was to consider parole for persons sentenced to life imprisonment after they had served a minimum of ten years' imprisonment. The norm, however, was that persons were usually paroled only after having served fifteen years of their sentences. To date, the applicant has served over fourteen years of his sentence.

[7] The applicant alleges that the policy was changed on 1 March 1994 to provide that a prisoner sentenced to life imprisonment had to serve twenty years' imprisonment before he or she became eligible for parole. That policy was later

[4] Section 39(2)(a)(ii) of the Act provides:

> "Subject to the provisions of paragraph (b), a person who receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but . . . one or more life sentences and one or more sentences to be served in consequence of a person being declared an habitual criminal or a dangerous criminal also run concurrently . . . ."

Section 39(2)(a)(ii) of the Act replaced section 32(2) of the Correctional Services Act 8 of 1959 Act, which provided:

> "When a person receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, each such sentence shall be served the one after the expiration, setting aside or remission, unless the court specifically directs otherwise . . . or unless the court directs that such sentences shall run concurrently: . . . Provided further that any determinate sentence of imprisonment to be served by any person shall run concurrently with a life sentence or with an indeterminate sentence of imprisonment to be served by such person in consequence of being declared an habitual criminal . . . ."

turned into a statutory provision, through the enactment of section 136(3)(a) of the Act.[5] In relation to sentences imposed before the enactment of the new policy, section 136(1) of the Act provides:

> "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."

[8] In late 2006 the applicant applied to the Pretoria High Court for an order in the following terms:[6]

> "1. That the 4th Respondent be ordered to consider the Applicant for recommendation for placement on parole in terms of the parole policies and Act(s) that were in effect on 13th November 1992 when Applicant was first sentenced, and
> 2. That the Respondents take into account the amnesties and credits the Applicant qualified for since incarcerated when considering recommending Applicant for parole and/or placement on parole, and
> 3. That the Applicant be considered for placement on parole with immediate effect, and
> 4. That the 1st Respondent shall forward a decision regarding the Applicant's release on parole no later than 30 November 2006, failing which the Applicant shall be entitled to approach the Honourable Court for an order requesting his release on parole from this Court, and
> 5. That the Respondents be ordered jointly and severally to pay the costs of this application on an attorney client scale . . . ."

[5] Above n 3. The Act came into operation on 31 July 2004 (unless otherwise indicated). Section 136(3)(a) does not indicate otherwise.

[6] Case No 31596/06.

[9] In respect of the credits claimed by the applicant, Molopa J, relying on sections 65(4)(a) of the Correctional Services Act 8 of 1959[7] and 136(2) of the Act,[8] held that since life imprisonment is not a determinate sentence, credits have no role to play. In relation to the applicant's eligibility to be placed on parole, the High Court considered the provisions of section 136(3)(a) of the Act and held that he would only qualify to be considered to be placed on parole after serving a minimum of twenty years of his sentence. The application was dismissed and no order was made as to costs.[9]

[10] The relief sought by the applicant in the High Court was materially different from the relief now sought in this Court. In the High Court the applicant did not seek an order declaring section 136(3)(a) of the Act unconstitutional. He sought an interpretation of the section that enabled him to qualify for parole in terms of a pre-existing parole policy.

[11] This Court has stressed that it is ordinarily not in the interests of justice for it to sit as a court of first and last instance and that direct access should only be granted in exceptional circumstances.[10] Assuming that the High Court was correct concerning

[7] Section 65(4)(a), as amended by the Correctional Services Amendment Act 68 of 1993, and now repealed, provided that:

> "…the date on which consideration may be given to whether a prisoner may be placed on parole may be brought forward by the number of credits earned by the prisoner."

[8] Section 136(2), under the heading "Transitional provisions", provides:

> "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)."

[9] Court order dated 13 February 2007, reasons furnished on 10 May 2007.

[10] See for example *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government*

the credits claimed by the applicant, the fifteen-year period for the threshold requirement would be reached approximately six months from now.

[12] Mr van Vuren's case appears to be premised on the prejudice he may suffer if the statutory provision in question is retrospective in effect. His case may implicate any changes in parole policy from 1994 and the proper interpretation of related provisions of the Act. His case has not been clearly and properly formulated. He contends that others in a similar position are also affected. The issue is certainly one of importance and complexity and it may be that adjudication is required. The interests of justice require that he receive legal advice to enable him to launch an application in the High Court, properly formulated and substantiated. It would also be fair to the respondents, who will then be in a position to formulate a response and place evidence before the court.

[13] It must be noted, however, that the papers in this matter were served on the State Attorney, Pretoria, as the legal representative of the respondents. Regrettably, no notice of intention to oppose, or any other response, has been filed, even though the constitutionality of national legislation was put in issue.[11]

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and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae*)* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 11; *Mnguni v Minister of Correctional Services and Others* 2005 (12) BCLR 1187 (CC); *De Kock v Minister of Water Affairs and Forestry and Others* 2005 (12) BCLR 1183 (CC) at paras 3-4; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 7-9.

[11] The difficulties associated with the lack of submissions by the State Attorney on matters that raise the constitutional invalidity of legislation have been set out in *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others* 2006 (8) BCLR 901 (CC). This case also clearly sets out this Court's response to such conduct of the State Attorney at paras 50-54. A similar situation recently occurred in the case of *Dingaan Hendrik Nyathi v MEC for the Department of Health, Gauteng and Another*, CCT 19/07, in which this Court made a punitive costs order against the State.

[14] In the circumstances, it is appropriate to direct the Registrar to bring this judgment to the attention of the Law Society of the Northern Provinces, with a request to consider whether one of its members might provide assistance to Mr van Vuren and perhaps, if his claim is deemed meritorious, to institute appropriate action in the High Court. The judgment must also be brought to the attention of both respondents as well as the State Attorney in Pretoria.

[15] In our view, the applicant has not shown that it would be in the interests of justice to grant direct access to this Court.

[16] Accordingly, the following order is made:

1. The application for condonation is granted.
2. The application for direct access is refused.
3. The Registrar is directed to bring this judgment to the attention of the Law Society of the Northern Provinces, the respondents and the State Attorney, Pretoria.

Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J.