

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NUMBER: CCT07/10**

In the matter between:-

**MINISTER FOR CORRECTIONAL SERVICES** First Applicant

**COMMISSIONER OF CORRECTIONAL SERVICES** Second Applicant

and

**PAUL FRANCIOSUS VAN VUREN** First Respondent

**CHAIRPERSON, NATIONAL COUNCIL  
FOR CORRECTIONAL SERVICES** Second Respondent

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**APPLICANTS' HEADS OF ARGUMENT**

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**INTRODUCTION:**

1.

1.1 The Applicants approach the Court for an order in the following terms:

1.1.1 That it is declared that the First Respondent, or any other offender who was serving a sentence of life imprisonment before 1 October 2004, shall not be considered by the

Minister of Correctional Services for placement under day parole or parole unless the National Council for Correctional Services (“the NCCS”) has made a recommendation to the Minister regarding his or her placement on parole;<sup>1</sup>

1.1.2 That paragraph [78]g) of the order made in the application under case no. CCT07/10 (“the main application”) is varied to read as follows:

“g) *The Case Management Committee, to the extent that it is statutorily authorised to do so, the Correctional Supervision and Parole Board and the Minister for Correctional Services, acting on the recommendation of the National Council for Correctional Services, are ordered to consider the applicant for release and placement under community corrections, with immediate effect*”.<sup>2</sup>

1.2 By way of directions issued by the Chief Justice dated 1 February 2011, the parties are invited to submit written

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<sup>1</sup> See: Notice of motion, prayer 2.

<sup>2</sup> See: Notice of motion, prayer 3.

argument on the following questions:

“(a) *Whether the order granted by this Court on 30 September 2010 requires clarification or amendment, and, if so,*

*(b) What the terms of the amended order should be.”*

**AD RELIEF CLAIMED:**

**The clarification or amendment of the order:**

2.

2.1 The NCCS, on its interpretation of the majority judgment in the main application, adopts the stance that it no longer has jurisdiction to consider the placement on parole of offenders who are serving a sentence of life imprisonment.<sup>3</sup>

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<sup>3</sup> See: Founding affidavit, para 7.

2.2 It would appear that the NCCS adopts the stance that it no longer has jurisdiction to consider the placement on parole of such offenders on the basis of the following having been stated in the majority judgment (in which mention is not expressly made of the NCCS):

2.2.1 *“A positive action must, therefore, be taken by the Department of Correctional Services, in particular, the CMC and the Correctional Supervision and Parole Board as well as the Minister”;*<sup>4</sup>

2.2.2 *“An effective remedy, in the circumstances of this case, would be an order directing the CMC to assess Mr van Vuren and to submit a report to the Correctional Supervision and Parole Board. The latter, in turn, will make an appropriate recommendation to the Minister regarding the possible placement on parole of Mr van Vuren”;*<sup>5</sup>

2.2.3 *“It would then follow that the authorities that would be*

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<sup>4</sup> See: Judgment, para [76].

<sup>5</sup> See: Judgment, para [76].

*competent to consider Mr van Vuren's application for parole would be the CMC, the Correctional Supervision and Parole Board and the Minister";<sup>6</sup>*

2.2.4 *"The Case Management Committee, to the extent that it is statutorily authorised to do so, the Correctional Supervision and Parole Board and the Minister for Correctional Services are ordered to consider the applicant for release and placement under community corrections, with immediate effect".<sup>7</sup>*

2.3 Equally, the view adopted by the attorney acting for the First Respondent is that the NCCS does not have the authority to consider the First Respondent for parole, for purposes of a recommendation to the Minister.<sup>8</sup>

2.4 As a consequence of its interpretation of the majority judgment that it no longer has jurisdiction to consider the placement on parole of offenders serving a sentence of life imprisonment, for purposes of a recommendation to the Minister, the NCCS is no

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<sup>6</sup> See: Judgment, para [75].

<sup>7</sup> See: Judgment, para [78]g).

<sup>8</sup> See: Founding affidavit, para 8.

longer considering such offenders for placement on parole.<sup>9</sup>

2.5 It is accordingly submitted that paragraph [78]g) of the order contained in the majority judgment requires clarification or amendment, in terms of Rule 42(1)(b) of the Uniform Rules of Court read with Rule 29 of the Rules of the Constitutional Court, to resolve the impasse concerning the consideration for placement on parole of prisoners who were sentenced to life imprisonment before 1 October 2004.

2.6 For reasons stated in paragraph 3 below, it is submitted that:

2.6.1 a recommendation by the NCCS is a jurisdictional fact for the exercise of administrative action on the part of the Minister by way of any decision for the placement on parole of an offender who was serving a sentence of life imprisonment before 1 October 2004;

2.6.2 in the absence of such a recommendation by the NCCS, any decision by the Minister for the placement on parole of such an offender would be *ultra vires*, and would accordingly constitute reviewable administrative action.

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<sup>9</sup> See: Founding affidavit, para 7.

2.7 In the premises, it is submitted that for this reason also, the order requires clarification or amendment.

**The terms of the amended order:**

3.

3.1 It is pertinently stated in the majority judgment in the main application that (emphasis added):

3.1.1 *“Section 64 of the Old Act, as amended, empowered the Minister to authorise the release of an offender sentenced to life incarceration on parole **after having been advised by the National Advisory Council**”*.<sup>10</sup>

**3.1.2** section 136(1) of the Correctional Services Act 111 of 1998 (“the Act”) requires one to consider *“both which authority, on the wording of section 136(1), **would have been competent, as at 13 November 1992, to consider Mr van Vuren’s application for release on parole and***

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<sup>10</sup> See: Judgment, para [27].

***which institutional mechanisms would be the equivalent present-day authority***;<sup>11</sup>

3.1.3 As at 13 November 1992, the relevant section of the Old Act would have been section 64 which “*empowered the Minister to authorise the release of an offender sentenced to life incarceration on parole **after having been advised by the National Advisory Council**, the latter having considered the report of an institutional committee*”.<sup>12</sup>

3.2 The successor to the National Advisory Council, in terms of the Act, is the NCCS.

3.3 It is accordingly submitted that it is implicit, (if not explicit), in the majority judgment that the NCCS, as the successor to the National Advisory Council, is required to make a recommendation to the Minister for the placement on parole of an offender, such as the First Respondent, sentenced to life imprisonment.

3.4 It is submitted further that the order contained in paragraph

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<sup>11</sup> See: Judgment, para [75].

<sup>12</sup> See: Judgment, para [75].



[78]g) of the majority judgment should not be viewed in isolation in that:

- 3.4.1 the order contained in paragraph [78]g) is qualified by the order in paragraph [78]h) which in explicit language states that (own emphasis):

***“the consideration referred to above must comply with the provisions of the Correctional Services Act, Act 8 of 1959, relating to placement under community corrections”;***

- 3.4.2 section 64 of the Old Act required that the consideration by the Minister of a prisoner upon whom a life sentence has been imposed be preceded by and based on a recommendation by the National Advisory Council.

- 3.5 It is accordingly submitted that the order in paragraph [78]g) of the majority judgment, which provides that the Case Management Committee, the Correctional Supervision and Parole Board and the Minister for Correctional Services are ordered to consider the First Respondent for placement under community corrections, must be read together with paragraph

[78]h) thereof and be construed as being a reference to the Minister acting on a recommendation by the NCCS.

3.6 In the premises, it is submitted that paragraph [78]g) of the order ought to be amended to read as follows:

“(g) *The Case Management Committee, to the extent that it is statutorily authorised to do so, the Correctional Supervision and Parole Board and the Minister for Correctional Services, acting on the recommendation of the National Council for Correctional Services, are ordered to consider the applicant for release and placement under community corrections with immediate effect*”.

3.7 Finally, it is submitted that it is well settled that the Court may, by way of clarifying its order, vary a final order where the meaning of the order is in any way ambiguous or uncertain.<sup>13</sup>

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<sup>13</sup> *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H-308A; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) at paras [21] – [22]; *Ex Parte Women’s Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) at para [4]; *Zondi v MEC, Traditional and Local Government Affairs and Others* 2006 (3) SA 1 (CC) at paras [28] – [29]; *Minister for Justice and Constitutional Development v Chonco* 2010 (7) BCLR 629 (CC) at paras [11] – [13].

DATED AT PRETORIA THIS 8<sup>TH</sup> DAY OF FEBRUARY 2011

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**ADV. M T K MOERANE SC**

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ADV. T W G BESTER

**Counsel for the Applicants**