IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER CCT07/2010

In the matter between:

THE MINISTER FOR CORRECTIONAL SERVICES First Applicant

COMMISSIONER FOR CORRECTIONAL SERVICES Second Applicant

and

PAUL FRANCIOUS VAN VUREN First Respondent

THE CHAIRPERSON: NATIONAL COUNCIL FOR CORRECTIONAL SERVICES Second Respondent

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FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1.1 The Applicants applied to the above Honourable Court on an urgent basis for an order in terms of Rule 12 read with Rule 29 of the Rules of the Constitutional Court and read further with Rule 42(1)(b) for the variation of the order dated 30 September 2010 issued by the Honourable Court.

2.

Applicants first and foremost seek a declarator in the following terms:

2.1 Firstly, that it is declared that First Respondent, or any other offender who was serving a sentence of life imprisonment before October 2004, shall not be considered by the Minister of Correctional Services (the First Applicant) for placement under day parole or parole unless the National Council for Correctional Services (the Second Respondent) has made a recommendation to the Minister regarding his or her placement on parole.

See: ***Notice of Motion, prayer 2***

2.2 Secondly, a variation of Paragraph [78](g) of the order made to read as follows:

> "*78(g) The Case Management Committee, to the extent that 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."

See: ***Notice of Motion, prayer 3***

3.

The parties were invited by the Honourable Chief Justice in terms of a directive dated 1 February 2011 to submit argument on the following questions:

"*Whether the order granted by this Court on 30 September 2010 requires clarification or amendment and, if so;*

What terms of the amended order should be."

4.

REASONS FOR THE APPLICATION

4.1 The National Council for Correctional Services (hereinafter referred to as "*NCCS*" has adopted the view on its interpretation of the judgment that the NCCS no longer has jurisdiction to consider the placement of offenders sentenced to life incarceration on parole.

See: ***Paragraph 7 of the founding affidavit***

4.2 That view is shared by First Respondent.

See: ***Paragraph 8 of the founding affidavit***

5.

Pre-constitutional cases recognised certain exceptions to the general rule that a judge has no authority to amend his or her final order. The exceptions are:

5.1 That the principal judgment order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant.

5.2 That the Court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "*the sense and substance*" of the judgment or order.

5.3 That the Court may correct a clerical arithmetical or other error in its judgment or order so as to give effect to its true intention.

5.4 That the Counsel has argued the merits and not the costs of the case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning costs, it may thereafter correct, alter or supplement that order.

See: ***Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) SA 298 AD at 306 H – 307 G***

5.5 The powers of the Honourable Court when deciding matters within its jurisdiction are set out in Section 172(1) of the Constitution which reads:

> "*(1) When deciding a constitutional matter within its power, a Court –*
>
> *(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
>
> *(b) may make any order that is just and equitable, including –*
>
> *(i) an order limiting the retrospective effect of a declaration of invalidity;*
>
> *and*

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct its effects."

5.6 It is submitted that this Court exercised its power when granting the order in terms of Section 172(1)(b) of the Constitution.

See: ***Para 73 of the judgment***

6.

It is submitted that the order granted is a final order.

See: ***Zondi v MEC, Traditional and Local Affairs and Others 2006 (3) SA 1 CC at para 28 and 29***

See also: ***Ex Parte Women's Legal Centre: In Re Moise v Greater Germiston Transitional Local Council 2001 (4) SA 1288 CC at para 4 and 11***

7.

The question is whether the words "*acting on the recommendation of the National Council for Correctional Services*" sought to be added to the order in Paragraph [78](g) are what the Court had in mind when the order was granted. (My underlining).

8.

The judgment is not intended to create a new parole regime for all inmates sentenced to life incarceration. It deals with a particular group and class of inmates that were sentenced at a time when the policy and guideline of the Correctional Services stipulated that inmates may be considered for parole when incarcerated for life after a period of ten years but may only be released after a period of fifteen years has expired.

See: ***Judgment, para 74***

9.

9.1 The Court proceeded to consider which institutional authority would have been competent at 13 November 1992 to consider the application for parole of First Respondent and which authority is the equivalent present day mechanism to consider First Respondent' application for release on parole.

See: ***Judgment, para 75***

9.2 The Court concluded that the present day institution are the Case Management Committee (established in terms of Section 42 of the Correctional Services At of 1998 ("*the Act*"). The Correctional Supervision Parole Boards, (established in terms of Section 74 of the Act) and the Minister (in terms of Section 75(1)(c) of the Act.)

See: ***Judgment, para 75 read with para 24 - 30***

9.3 Section 78(1) of the Act empowers the NCCS having considered the record of proceedings of the Correctional

Supervision and Parole Board and its recommendations in a case of a person's sentence of life incarceration subject to the provisions of Section 73(6)(b)(iv) recommend to the Minister to grant parole or day parole and prescribe the conditions of community corrections in terms of Section 52. (The heading of Section 78 is somewhat misleading).

10.

10.1 The functions of the NCCS are set out in Section 84:

"*84(1) The primary function of the National Council is to advise, at the request of the Minister or on its own accord, in developing policy in regard to the correctional system and the sentencing process.*

84(2) The Minister may refer draft legislation in major proposed policy development regarding the correctional system to the

National Council for its comments and advice.

84(3) The National Commission must provide the necessary information and resources to enable the National Council to perform its primary function.

84(4) The National Council may examine any aspect of the correctional system and refer in an appropriate matter to the Inspecting Judge.

84(5) The National Council must fulfil any other function ascribed to it in this Act".

10.2 The Court, in making the order that is just and equitable, directed that, in essence the process for placement prescribed by the Act for an inmate who was sentenced to life incarceration, be followed with the exception of Section 73(6)(b)(i) which stipulates that inmates that was

sentenced to life incarceration may not be placed on parole until he or she has served at least 25 year of the sentence.

10.3 The present day position is that the NCCS in terms of Section 78(1) read with Section 84(5) of the Act has the jurisdiction to consider the placement of an inmate serving life incarceration on parole subject to the following.

10.4 Nowhere in the Act is it stipulated that the Correctional Supervision and Parole Board has to refer an application to the NCCS or that the Minister has to refer the matter to the NCCS for a recommendation or that an inmate may not be released unless the NCCS has made a recommendation to that effect to the Minister.

10.5 Section 78(1) also does not stand in the way of the Minister exercising his/her discretion to grant or refuse parole. Put differently, a recommendation by the NCCS is not a condition precedent to the exercise of the discretion by the Minister to grant or refuse parole.

10.6 The Minister is not empowered to request the NCCS to consider the parole of an inmate sentenced to life incarceration in terms of Section 78(1). Neither is the recommendation of the NCCS compulsory in terms of the Act before parole may be considered by the Minister.

10.7 The NCCS however may advise the Minister on request in terms of Section 78(3) and 78(4).

10.8 It follows, with respect, that paragraph [78](g) of the order is clear and unambiguous in its terms. The sense and substance of the order will be altered if the words sought to be included, are included in the order.

11.

CONCLUSION

The declaration sought in prayer 2 of the notice of motion is an inappropriate remedy under Rule 42. It is not an order to vary or supplement an existing order.

12.

In the premises the application falls to be dismissed.

DATED at PRETORIA on this _____ day of FEBRUARY 2011.

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G C MULLER SC
COUNSEL FOR FIRST RESPONDENT