

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT07/10

In the matter between:-

MINISTER FOR CORRECTIONAL SERVICES First Applicant

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES Second Applicant

and

PAUL FRANCIOS VAN VUREN First Respondent

CHAIRPERSON, NATIONAL COUNCIL FOR CORRECTIONAL SERVICES Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

LIRETTE LOUW

do hereby make oath and state:

1.

- 1.1 I am employed as Legal Adviser to the Minister of Correctional Services in terms of section 12A of the Public Service Act, 1994, (Act No. 103 of 1994). I am duly authorised to depose to the founding affidavit herein on behalf of the First and Second Applicants.
- 1.2 The facts herein contained fall within my personal knowledge, except where appears otherwise from the context, and are true and correct.

THE PARTIES:

2.

- 2.1 The First Applicant is **THE MINISTER FOR CORRECTIONAL SERVICES** in her official capacity as the political head of the Department of Correctional Services, c/o the State Attorney, Johannesburg, 10th Floor, North State Building, 95 Market Street, Johannesburg.
- 2.2 The Second Applicant is **THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES** in his official capacity as the administrative head of the Department of Correctional Services, c/o

the State Attorney, Johannesburg, 10th Floor, North State Building,
95 Market Street, Johannesburg

- 2.3 The First and Second Applicants were the First and Third Respondents respectively in the application under case no. CCT07/10 ("the main application"), heard in this Court.

3.

- 3.1 The First Respondent is **PAUL FRANCIOS VAN VUREN**, who is serving a sentence of life imprisonment at the Pretoria Central Correctional Centre.

- 3.2 The First Respondent was the Applicant in the main application.

4.

- 4.1 The Second Respondent is **THE CHAIRPERSON, NATIONAL COUNCIL FOR CORRECTIONAL SERVICES**, a statutory body established in terms of section 83 of the Correctional Services Act 111 of 1998, who is cited herein in her nominal capacity as such.

- 4.2 The Second Respondent was the Fourth Respondent in the main application.

PURPOSE OF THE APPLICATION:

5.

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

5.1.1 That it is declared that the First Respondent, or any other offender serving a sentence of life imprisonment, 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;

5.1.2 That paragraph [78](g) of the order made in the main application ("the order") 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".

5.2 For reasons set out below, it is submitted that:

5.2.1 the order falls to be varied, in the terms contained in paragraph 5.1.2 above, in terms of Rule 42(1)(b) of the Uniform Rules of Court, read with Rule 29 of the Rules of the Constitutional Court, as being an order in which there is an ambiguity;

5.2.2 the matter falls to be dealt with as a matter of urgency in terms of Rule 12 of the Rules of this Court.

FACTUAL BACKGROUND:

6.1 In terms of the majority judgment handed down on 30 September 2010 in the main application, the Court made an order in the following terms:

"[78](f) It is declared that the applicant is eligible to be considered for release and placement under community corrections in terms of the policy and guidelines that were applicable on 13 November 1992.

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 are ordered to consider the applicant for release and placement under community corrections, with immediate effect.

(h) 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 and also in terms of the policy and guidelines that were applied by the former Parole Boards as at 13 November 1992."

6.2 It is stated with reference to the Correctional Services Act 8 of 1959 ("the Old Act") in the majority judgment (at paragraph [27]) as follows:

"[27] 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, the latter having considered the report of an institutional committee".

6.3 Section 64 of the Old Act, as amended by section 20 of the Correctional Services and Supervision Matters Amendment Act 122 of 1991, which came into operation on 15 August 1991 (prior to the First Respondent having been sentenced to life imprisonment on 13 November 1992), provides:

"(1) A prisoner upon whom a life sentence has been imposed shall not be released unless the National Advisory Council –

(a) after having been requested by the Minister to advise him in relation to that prisoner; and

(b) after considering a report of an institutional committee, with

due regard to the interests of society, has made a recommendation to the Minister for release of the prisoner and the Minister has accepted that recommendation.

- (2) *If the Minister accepts the recommendation for the release of such a prisoner, he may authorise the release of the prisoner on the date recommended by the National Advisory Council or on any other date, either unconditionally or subject to any such condition as he may determine, on parole as he may direct."*

6.4 It is stated in the majority judgment (at para [75]) as follows:

- 6.4.1 *"This requires us 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 which institutional mechanisms would be the equivalent present-day authority. As at 13 November 1992, the relevant section of the Old Act would have been section 64. As mentioned, previously, section 64 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" (My emphasis);

6.4.2 "It would then follow that the authorities that would be competent to consider Mr van Vuren's application for parole would be the CMC, the Correctional Supervision and Parole Board and the Minister".

6.5 It is stated further in the majority judgment (at para [76]) as follows:

6.5.1 "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";

6.5.2 "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".

- 7.1 The National Council for Correctional Services ("the NCCS") was scheduled to sit from 1 to 3 December 2010 to consider, for purposes of a recommendation to the Minister, the placement on parole of 20 offenders, including the First Respondent, who are serving a sentence of life imprisonment.
- 7.2 On 2 December 2010, however, the Chairperson of the NCCS (the Honourable Justice Ndita) and the Vice Chairperson (the Honourable Justice Lacock) at a meeting convened with me indicated that on the NCCS's interpretation of the majority judgment, the NCCS no longer has jurisdiction to consider the placement on parole of offenders who were sentenced to life imprisonment before 1 October 2004, for purposes of a recommendation to the Minister.
- 7.3 The NCCS accordingly, on its interpretation of the majority judgment that the NCCS no longer has jurisdiction to consider the placement on parole of offenders serving a sentence of life imprisonment, did not at its sitting which was scheduled from 1 to 3 December 2010 consider any of the 20 offenders who are serving life imprisonment for parole (for purposes of a recommendation to the Minister). Of these 20 offenders:

7.3.1 17 offenders had already served 20 years or more of their sentence;

7.3.2 3 offenders (including the First Respondent) had not yet served 20 years of their sentence but were to be considered by the NCCS for purposes of a recommendation to the Minister regarding their placement on parole in the light of the majority judgment in the main application.

7.4 The stance adopted by the NCCS (on its interpretation of the majority judgment in the main application) that it no longer has jurisdiction to consider the placement on parole of offenders who are serving a sentence of life imprisonment, persists to date.

8.

8.1 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. I attach in this regard as Annexure "FA1", a copy of a letter dated 26 November 2010 to me from Jaco du Plessis Attorneys in which it is stated, by way of a reliance on

paragraphs [75] and [76], and the order contained in paragraph [78](g), of the said majority judgment, as follows:

"It is our instruction that the National Council for Correctional Services does not have the authority to consider our client's application for parole. The only authorities competent to consider our client's application for parole are the CMC, the Correctional Supervision and Parole Board and the Minister".

8.2 In similar vein, it is stated in the letter dated 1 December 2010 to me from the First Respondent's attorney, a copy of which is attached hereto as Annexure **"FA2"**, as follows:

"It is our client's view that the Constitutional Court in paragraph 75 of the judgment evaluates the position as it would have been in 1992 and then concludes that the authorities that would be competent to consider our client's application for parole would be the CMC, the Correctional Supervision and Parole Board, the latter in turn will make a recommendation to the Minister.

We do not agree with you (sic) interpretation of the judgment to the effective remedy in the circumstances of our client's case, more specifically your interpretation that our client must be considered by

the National Council for Correctional Services (NCCS) who will make a recommendation to the Minister".

AD RELIEF CLAIMED:

9.

9.1 It is pertinently stated in the majority judgment in the main application:

9.1.1 in paragraph [27] that "*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***" (My emphasis);

9.1.2 in paragraph [75] that 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 which institutional mechanisms would be the equivalent present-day authority***" (My emphasis);

- 9.1.3 in paragraph [75] that 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***" (My emphasis).
- 9.2 The successor to the National Advisory Council, in terms of the Act, is the NCCS.
- 9.3 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.
- 9.4 Moreover, the order contained in paragraph 78(g) of the judgment should not be viewed in isolation. Paragraph 78(g) is qualified by paragraph 78(h) which, in explicit language states that -
"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.....” (My emphasis).

- 9.5 As stated above, and in the majority judgment, the relevant provisions of the Old Act required that the “consideration” by the Minister be preceded by and be based on a positive recommendation by the National Advisory Council.

10.

- 10.1 In the premises, it is submitted that 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. Absent 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.

- 10.2 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.

10.3 It is submitted further that the Court may, by way of clarifying its order, vary a final order made in constitutional matters also in circumstances where the meaning of the order is in any way ambiguous or uncertain, provided it does not thereby alter 'the sense and substance' of the order. Furthermore, the variation of the order in paragraph [78](g) sought in terms of prayer 3 of the notice of motion will not, on a proper interpretation of the order, alter the 'sense and substance' of the order.

URGENCY:

11.

I submit that this application is of such urgency as to require the Chief Justice to dispense with the forms and service provided for in the rules of this Court. I say so for the reasons that follow hereunder.

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Upon receiving the Court's judgment, the Department immediately studied it with the aim of giving effect thereto. On 7 October 2010, the National

Commissioner issued an instruction to the Regional Commissioner for Gauteng on the steps to be taken to give effect to the Court's order in relation to the First Respondent. A copy of the said instruction is attached hereto as Annexure **"FA3"**.

13

On 8 October 2010, the National Commissioner issued a further instruction to all regions to conduct an audit of all persons sentenced to life imprisonment, (hereinafter referred to as "lifers"), before 1 October 2004 to identify inmates in a position similar to that of the First Respondent as well as other lifers when different policy considerations applied within the Department. A copy of the said instruction is attached hereto as Annexure **"FA4"**.

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Having gathered the necessary information a National Circular was issued on 12 November 2010, to instruct all stakeholders on the processing of lifers sentenced during different policy periods prior to 1 October 2004. A copy of the Circular is attached hereto as Annexure **"FA5"**.

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The audit identified 385 lifers sentenced during the policy period applicable to the First Respondent. A copy of the audit results is attached hereto as

Annexure “**FA6**”.

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The Circular mentioned above set out a process to ensure that all these lifers are considered for parole without delay. However, this process cannot proceed at present until the role of the NCCS has been clarified. This uncertainty has however impacted upon the consideration of all lifers sentenced before 1 October 2004 creating an additional backlog of inmates who have already served at least 20 years, since the NCCS did not consider these inmates at their December meeting and no meetings can be scheduled until the role of the NCCS has been clarified.

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I was present on 13 December 2010 when the First Applicant, after obtaining an urgent opinion from Senior Counsel on the matter, held an urgent meeting with the Second Respondent and other members of the NCCS in an attempt to resolve the impasse created by the conflicting interpretations of the *Van Vuren* judgment. The meeting could not arrive at a common interpretation of the said judgment and it was mutually agreed that clarification, on an urgent basis, should be obtained from this Court.

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As a result of the current situation, whereby no lifers sentenced before 1

October 2004 are being considered for placement on parole, they are increasingly turning to High Courts around the country to seek clarity and are alleging, *inter alia*, that they are being detained unlawfully.

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In the 3rd Quarter, the Department's legal services in KwaZulu-Natal reported 28 motion applications of which 90% are linked to the **Van Vuren** judgment. I annex hereto, marked "FA7", an affidavit of Mr Sifiso Emanuel Ndlovu, senior legal administration officer in the Department's legal services in KwaZulu Natal confirming this fact.

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I respectfully submit that, in the light of the foregoing, this application is urgent justifying a departure from the ordinary procedures of this Court.

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In the premises, I pray for an order in terms of the notice of motion prefixed hereto.

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and sworn to before me at Pretoria on this day of January 2011, and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

FULL NAMES:
STREET ADDRESS:
CAPACITY:
AREA: