CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 07/10
[2010] ZACC 17

In the matter between:

PAUL FRANCIOUS VAN VUREN	Applicant
and	
MINISTER FOR CORRECTIONAL SERVICES	First Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
COMMISSIONER OF CORRECTIONAL SERVICES	Third Respondent
CHAIRPERSON, NATIONAL COUNCIL FOR CORRECTIONAL SERVICES	Fourth Respondent
CHAIRPERSON, CSPB PRETORIA CENTRAL CC	Fifth Respondent
CHAIRPERSON, CMC PRETORIA CENTRAL CC	Sixth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Seventh Respondent

Heard on : 6 May 2010

Decided on : 30 September 2010

JUDGMENT

NKABINDE J:

Introduction

[1] This is an application for leave to appeal against a decision of the North Gauteng High Court, Pretoria (High Court),[1] dismissing an application for certain relief[2] in terms of the Correctional Services Act, 1998[3] (Act). In the alternative, the applicant seeks direct access to this Court,[4] for an order declaring section 136(3)(a) of the Act unconstitutional.[5]

[2] Direct access is sought, provisionally, if it is found that the applicant had abandoned the constitutional attack to section 136(3)(a) in the High Court. The declaration of invalidity was sought to overcome the hurdle presented by the impugned provision that ostensibly requires offenders sentenced to life incarceration to serve 20 years before becoming eligible for consideration for placement on parole.[6] The applicant's case has throughout been premised on the likely prejudice he might suffer if the impugned provision were found to be retrospective in effect. He also seeks

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[1] The order concerning the applicant was made in *P F van Vuren v Minister of Correctional Services*, Case No. 37771/08, North Gauteng High Court, Pretoria, 3 August 2009, unreported, while the reasons for the order are set out in a judgment in the case of *J L van Vuuren & Seven Others v Minister of Correctional Services*, Case No. 46062/08, North Gauteng High Court, Pretoria, 17 August 2009, unreported. Both the judgment and the order were delivered on 3 July 2009.

[2] The relief sought in the High Court is set out at [12] below.

[3] Act 111 of 1998.

[4] Section 167(6)(a) of the Constitution 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—
>
> (a) to bring a matter directly to the Constitutional Court . . . ."

[5] The full text of section 136 is to be found at [31] below.

[6] The Correctional Services Act 111 of 1998 (Act) has now been amended to use certain new terminology and it is appropriate, unless the context indicates otherwise, to employ these terms in this judgment: "imprisonment" is now "incarceration", "prison" is a "correctional centre" and "sentenced prisoner" is "sentenced offender".

condonation for the late filing of the application for leave to appeal and non-compliance with the 25 kilometre requirement in terms of the Constitutional Court Rules.[7]

[3] In essence, this application concerns the proper interpretation of section 136 of the Act. The application also raises the question whether the applicant is eligible for consideration for placement on parole. In particular, the question is whether the provisions of the Correctional Services Act, 1959[8] (Old Act) and the policy and guidelines applied by the former Parole Boards[9] apply to the applicant, or whether the applicant is entitled to be considered for placement on parole only after completing 20 years in detention in terms of section 136(3)(a) and the new policy and guidelines of the Department of Correctional Services (Department).

[4] The respondents are the Minister for Correctional Services (Minister), the Minister for Justice and Constitutional Development (Minister for Justice), the Commissioner of

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[7] Rule 11(1)(b) provides:

> "(1) Save where otherwise provided, in any matter in which an application is necessary for any purpose, including—
>
> > (a) . . .
> >
> > (b) the obtaining of directions from the Court,
> >
> > such application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief and shall set out an address within 25 kilometres from the office of the Registrar stating the physical and postal address with facsimile, telephone numbers and an e-mail address, where available, at which he or she will accept notice and service of all documents in the proceedings".

[8] Act 8 of 1959.

[9] According to the applicant the policy and guidelines, in terms of which he is entitled to be considered for placement on parole, are those that make him eligible after having served a period of between 10 years but not more than 15 years in detention.

Correctional Services (Commissioner), the Chairperson of the National Council for Correctional Services, the Chairperson of the Correctional Supervision and Parole Board of the Pretoria Central Correctional Centre and the Chairperson of the Case Management Committee of the Pretoria Central Correctional Centre. They oppose both the applications for leave to appeal and direct access. By the directions issued by the Chief Justice, the National Director of Public Prosecutions was joined as a respondent to these proceedings.

Factual background

[5] The applicant, Mr Van Vuren, is an offender serving a sentence of life incarceration at the Pretoria Central Correctional Centre. He was convicted on 13 November 1992 on counts of murder, robbery with aggravating circumstances, and theft and possession of an unlicensed firearm and ammunition. On the counts of murder and robbery, the death sentence was imposed. For the counts of theft and possession of an unlicensed firearm and ammunition, Mr Van Vuren was sentenced to five years' and three years' incarceration, respectively.

[6] On 20 September 2000, following *S v Makwanyane and Another*,[10] the Full Court[11] commuted the death sentences to life incarceration. The sentence of life incarceration was antedated to 13 November 1992 in terms of section 1(11) of the Criminal Law

[10] [1995] ZACC 3; 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) declared the death penalty unconstitutional.

[11] *Paul van Vuren and Others v The State* under Case No. A682/2000 North Gauteng High Court, Pretoria, 20 September 2000, unreported.

Amendment Act, 1997[12] (CLAA). The determinate sentences were to run concurrently with the life sentences.[13] The Full Court further ordered that the transcript of the evidence of the witness, Dr Verster, be placed before the Correctional Services authorities for determination of any parole conditions that may be applicable to Mr Van Vuren.[14] It is common cause that, at the time of launching the application in the High Court, Mr Van Vuren had served more than 15 years of his sentence.

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[12] Act 105 of 1997. Section 1(11) of this Act provides:

> "A sentence of imprisonment substituted for the sentence of death in terms of this section, may be antedated by the court to a specific date, which shall not be earlier than the date on which the sentence of death was imposed."

Section 282 of the Criminal Procedure Act 51 of 1977 (CPA), as substituted by section 36 of the Criminal Law Amendment Act 105 of 1997, provides:

> "Whenever any sentence of imprisonment, imposed on any person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified."

[13] Section 39(2)(a)(ii) of the Act repealed section 32(2) of the Old Act. Section 39(2)(a)(ii) provides:

> "(2)(a) 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—
>
> (i) . . .
>
> (ii) 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 . . . ".

[14] Paragraph 6 of the order reads:

> "In die geval van S v Paul F van Vuren word gelas dat 'n transkripsie van die getuienis van die psigiater, dr Verster, gemaak word en dié aan die Korrektiewe Dienste owerhede voorgelê word vir oorweging van enige parool voorwaardes wat aan dié appellant toegestaan mag word."

[7] During 2004 Mr Van Vuren approached Lawyers for Human Rights (LHR) for assistance regarding his consideration for parole. On 18 February 2004, LHR, following its correspondence with the Provincial Commissioner of Correctional Services, advised Mr Van Vuren that he had to serve 20 years of his sentence, in terms of the departmental policy, before he could be considered for parole; that amnesties and credits would not play any role in the assessment process and that, from 1959 to 1994, "lifers" could be considered for parole after having served 10 years of their sentences. The letter drew Mr Van Vuren's attention to the judgment in *Plank v Minister of Correctional Services and Others*,[15] and informed him that Mr Plank had been considered for parole in October 2003 after serving 13 years in terms of the criteria and policies and statutes that applied in 1990.[16]

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[15] *Dean Lloyd Plank v Minister of Correctional Services and Others* Case No. 05/14313 South Gauteng High Court, Johannesburg, [no date], unreported. Mr Plank was sentenced to death, on 6 March 1990, on counts of murder and fraud. The death sentence was commuted to life incarceration on 7 August 2003. On 17 February 2004, in terms of an out of court settlement, the respondents offered to consider him for placement on parole. Mr Plank was considered for placement on parole by the National Council for Correctional Services (the National Council) on 19 and 20 July 2004. The National Council submitted a report to the Minister advising him that Mr Plank was not to be considered for placement on parole at that stage. The Minister approved the National Council's recommendation on the basis that Mr Plank must first serve the requisite 20 years in terms of section 136(3)(a). Aggrieved by the decision, Mr Plank launched another application in the High Court not challenging the decision of the Minister but persisting with his claim that he should be considered for placement on parole because he had completed 15 years of his sentence.

[16] For the sake of completeness, the letter reads:

> "Re: VBK status/Parool
>
> Die bostaande aangeleentheid verwys.
>
> Vind aangeheg korrespondensie gerig aan die Provinsiale Kommissaris met betrekking tot jou navrae. Die inhoud spreek vanself.
>
> In die algemeen bring ons die volgende onder u aandag.
>
> AD LEWENSLANGE GEVANGENISSTRAF
>
> Die posisie volgens die departmente in ander soortgelyke aangeleenthede sien soos volg daarna uit;
>
> dat 'n persoon 20 jaar van sy vonnis moet uitdien alvorens hy/sy kwalifiseer vir parool oorweging

[8] On 23 February 2004 Mr Van Vuren addressed a letter to the Head of Prison, Medium-A Zonderwater, enquiring about the criteria relevant to consideration for parole.[17] When no response was forthcoming, Mr Van Vuren addressed another letter to the same Head of Prison, on 26 March 2004, complaining about this. Mr Van Vuren enquired further about "Factors for Consideration" and security classification. He threatened to institute legal proceedings if no response was received by 3 April 2004. There was no response to his letters.

> Amnesties en krediete speel nie per se 'n rol in die oorwegins proses nie.
>
> Die posisie vanaf 1959 tot 1994 was dat 'lifers' na 10 jaar oorweeg kon word.
>
> Lifers is vir die eerste keer opgeneem in Wetgewing in 1998 wat aanbetref hoe lank hul moet uitdien alvorens hul vir parool oorweeg kan word.
>
> Voorheen was daar nie 'n minimum tydperk van aanhouding in wetgewing opgeneem nie.
>
> Ons het gister 'n bevel gekry in die Johannesburg Hooggeregshof in die saak van Dean Plank v Minister van Korrektiewe Dienste en 4 Ander dat hulle inter alia vir Dean moet oorweeg ingevolge die kriteria en Wetgewing soos wat dit gewees het gedurende 1990. Hulle het hom reeds oorweeg vir parool [g]edurende Oktober 2003 nadat hy sowat 13 jaar uitgedien het. Sodra ek 'n afsk[rif] van die bevel tot my beskiking het sal ek di[t] aan jou beskikbaar stel."

[17] For the sake of completeness and ease of reference, the letter reads:

> "Re: Parole
>
> I would like to pose the following questions to you as H.O.P concerning the parole of a 'lifer' and what a 'lifer' prisoner qualify for when it comes to amnesties and credits.
>
> 1) How long must a 'lifer' do before he qualify for parole?
> 2) Does amnesties received during his time of imprisonment count in favour of the 'lifer' when calculations are made for his parole?
> 3) How does amnesties influence the calculations consideration date, for parole on a 'lifer'?
> 4) If you calculate for a 'lifer' to be considered for parole, do you bring credits into the calculations also?
> 5) How does credits influence the parole process?
>
> I hope and trust that your office would be able to furnish me with the answers on my questions.
>
> I thank you in advance . . . ."

[9] On 21 January 2005 Mr Van Vuren's attorney, Alna Jordaan, addressed a letter to the Head of Correctional Services, Pretoria Central Prison, in an attempt to solicit a response. The attorney repeated the questions in the letter of 23 February 2004, and informed the recipient that Mr Van Vuren had already served a period of 13 years and that he had been a model sentenced offender throughout this period. The attorney requested a response within 14 days of receipt of the letter and threatened to launch an urgent application in the High Court if no response was in the offing.

[10] On 20 February 2006 Mr Van Vuren addressed a letter to the Head of the Prison requesting to be considered for placement on parole in terms of the provisions of the Old Act. Mr Van Vuren had, at this stage, served 13 years and four months of his sentence. Notably, in a circular dated 20 June 2006, the Department requested a complete report of offenders sentenced to life incarceration whose names were listed in that circular and who had already served 10 years. Mr Van Vuren's name appears on that list. On 26 September 2006, the Director: Pre-Release Settlement of the Department of Correctional Services, Ms S J Kunene, sent an urgent request to all regional commissioners asking for profile reports to be compiled in respect of offenders serving life incarceration. That report was in respect of offenders who would have completed at least 15 years of their sentences by 31 December 2006. The report, according to the letter, was to follow the normal route via the "CMC [Case Management Committee] and Parole Board".[18]

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[18] The request further stated that:

[11] A request for possible parole was lodged in January 2008, by Professor van der Hoven. At the time, an application by Mr Van Vuren was pending before the High Court.[19] In that case Mr Van Vuren also challenged the constitutional validity of section 136(3)(a). It is noteworthy that, in the letter dated 25 April 2008, the State Attorney, Pretoria, offered to settle that matter on the basis that Mr Van Vuren would be considered for placement on parole in terms of the policy that was in existence as at 13 November 1992.[20] Thereafter, Mr Van Vuren filed a notice withdrawing the proceedings under that case.

> "It must be made very clear to the offender during the consideration and recommendation phase that the process is not directed at their possible release and that no expectations in this regard must be created.
>
> Profile reports already submitted to the Head Office but on which decisions are still outstanding must be reflected on the name list with an indication of the date on which it was submitted".

[19] *P F van Vuren v Minister of Correctional Services and Others* Case No. 5311/08. This application was withdrawn on 11 August 2008.

[20] The letter, for completeness, reads:

> "Re: P F VAN VUREN / MINISTER OF CORRECTIONAL SERVICES AND OTHERS (CASE NO 5311/08)
>
> . . .
>
> We confirm that we have instructions to settle the above matter on the following basis:
>
> 2.1) That the National Council for Correctional Services shall, for purposes of a recommendation to the [the Minister], consider the Applicant for placement on parole at its next sitting;
>
> 2.2) That the Applicant shall be considered for placement on parole in terms of the policy that was in existence on 13 November 1992 with regard to the placement on parole of prisoners serving life imprisonment;
>
> 2.3) That the Correctional Supervision and Parole Board shall submit an updated report on the National Council for Correctional Services for purposes of its recommendation referred to in paragraph 2.1 above;
>
> 2.4) That the [Minister] shall, for purposes of his decision pursuant to the National Council for Correctional Services, consider the Applicant for placement on parole in terms of the policy referred to in paragraph 2.2 above;

Litigation history

[12] Mr Van Vuren's unsuccessful attempts, as illustrated above, culminated in a chain of court proceedings,[21] the most recent of which was the urgent application launched in the High Court, on 4 August 2008. This is the application that is the subject of the present matter.[22] The application was opposed by the Minister, the Commissioner and the Chairperson of the National Council for Correctional Services. For ease of reference,

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> 2.5) That the [Minister] shall make his decision within 14 (fourteen) days of receiving the recommendation of the National Council for Correctional Services with regard to the placement of the Applicant on parole;
>
> 2.6) Each party shall bear its own costs of the application;
>
> In our view, the aforegoing settlement proposals render the relief sought by the Applicant moot insofar as the constitutionality or otherwise of Section 136(3)(a) of [the Act] pertains to him as an individual.
>
> . . .
>
> We await your further advices as to the aforegoing settlement proposal at your earliest convenience. In this regard, we confirm having proposed that a 'round-table meeting' be held with a view to the settlement of the matter."

[21] It is not necessary to embark on a thorough consideration of the litigation history preceding the urgent application in the High Court. It suffices to mention that, during September 2006, in *Paul F van Vuren v Minister of Correctional Services and Others*, Case No. 31596/06, 10 May 2007, unreported, Mr Van Vuren unsuccessfully sought an order, inter alia, directing the Chairperson of the Parole Board to consider him for recommendation for placement on parole in terms of the parole policies that were applicable on 13 November 1992. Molopo J dismissed the application on the basis that section 136(3)(a) applied squarely to him and that he had to serve 20 years of his sentence before he could be considered for parole. In that matter, Mr Van Vuren had not challenged section 136(3)(a), despite the fact that he had averred, in his founding papers, that the wording of section 136(3)(a) is unconstitutional. The basis for that averment was that it negates the rights previously bestowed in expecting to be considered for parole after serving 10 years but not more than 15 years of the sentence.

In 2007, in *Van Vuren v Minister of Justice and Constitutional Development and Another* [2007] ZACC 11; 2007 (8) BCLR 903 (CC), Mr Van Vuren sought direct access to obtain an order declaring section 136(3)(a) unconstitutional. The application was dismissed on the basis that it had not been shown that it would be in the interests of justice to grant direct access.

[22] This application was launched after Mr Van Vuren had terminated the mandate of the legal team that had been appointed by the Law Society of South Africa (LSSA) to assist him. He was disgruntled by the delay allegedly caused by the LSSA in reacting to this Court's judgment and in lodging the application, which application he subsequently purported to withdraw so that he could represent himself. This explains Mr Van Vuren's withdrawal notice filed on 11 August 2008 in the matter of Case No. 5311/2008.

I refer to them as the respondents in the High Court. In that case, Mr Van Vuren sought the following relief:

> "(a) That this application be deemed urgent.
> (b) That due to the urgency of the application the form and services provided for in the Rules be dispensed with in terms of Rule 6(12)(a).
> (c) That section 136, subsection (3)(a) of [the Act] be declared inconsistent with the Constitution . . . and invalid to the extent of its inconsistency.
> (d) That the matter be referred to the Constitutional Court for confirmation of the order of invalidity in terms of section 172, subsection (2)(a) of the Constitution read with section 8, subsection (1)(a) of the Constitutional Court Complementary Act, 1995 (Act No. 13 of 1995) as amended.
> (e) That interim relief be granted in the form of a *mandamus* ordering the Respondents to consider the Applicant for possible placement on parole within 30 calendar days of the date of the granting of this order.
> (f) That such consideration must comply with the provisions relating to placement on parole of in terms of [the Old Act] . . . and also in terms of the policy and guidelines in existence at 13 November 1992.
> (g) Further and/or alternative relief
> (h) Costs of this application."

The relief sought was premised, among others things, on the contention that the impugned provisions infringed Mr Van Vuren's right to fair administrative action in terms of section 33(1) of the Constitution.[23]

[13] The matter was placed on the urgent roll before Ellis AJ. Mr Van Vuren contended that the words "policy and guidelines" as applied by the former Parole Boards

[23] Section 33(1) of the Constitution provides:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

prior to the commencement of those chapters must be construed as referring to policy and guidelines operative at the time when he was originally sentenced in 1992. He argued that the policy and guidelines, applicable at that time, made him eligible for consideration for placement on parole after serving 10 years but not more than15 years of his sentence.

[14] The respondents in the High Court contended that the declaratory order sought raised an academic issue because section 136(1) of the Act had not been challenged. They contended that section 136(1), read with the applicable policies, required offenders sentenced to life incarceration to serve 20 years before becoming eligible for parole and that a declaration of unconstitutionality of section 136(3)(a) would not affect the validity of section 136(1).

[15] The High Court,[24] per Ellis AJ, refrained from expressing an opinion on the merits but assumed, on the one hand, that if the respondents were correct, section 136(3)(a) merely reiterates the legal position applicable in terms of section 136(1). On the other hand, the High Court, assuming Mr Van Vuren's interpretation was correct, stated that section 136(3)(a) overrides section 136(1) and the policy and guidelines referred to therein. Invoking the principle that a special law derogates from a general rule, *generi per speciem derogatur*,[25] in order to avoid a finding that section 136(3)(a) is superfluous, the High Court interpreted section 136(1) as being inapplicable to offenders sentenced to

[24] *Van Vuren v Minister of Correctional Services and Others* Case No. 37771/08, 11 September 2008, unreported.

[25] According to Hiemstra and Gonin *Trilingual Legal Dictionary* 3 ed (Juta en Kie, BPK, Cape Town, 1992) at 195, this Latin maxim is translated as "a general rule is derogated from by a special (law)."

life incarceration who, it held, are dealt with under section 136(3)(a). Ellis AJ held that—

> "the only meaning which can be ascribed to section 136(1), interpreted in the light of section 136(3)(a), is that section 136(1) deals with all prison sentences except life imprisonment for which specific provision was made in the other enactment."[26]

Ellis AJ postponed the application at the request of the respondents.[27]

[16] Another application under case number 46062/08[28] had been pending before the High Court. In that matter the disgruntled litigants challenged the constitutionality of section 136(3)(a).[29] When Mr Van Vuren's application[30] resumed in the High Court, it was considered together with that application because of their interrelatedness. At the hearing of the two applications, before Bertelsmann J, the respondents in the High Court

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[26] Above n 24 at para 16.

[27] The order reads:

> "1. The legal points raised by the respondents in their notice in terms of Rule 6(5)(d)(iii) [of the Uniform Rules] are dismissed;
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> 2. The application is postponed sine die;
>
> 3. The respondents are directed to file their answering affidavits within twenty (20) days of this order;
>
> 4. The applicant may file any replying affidavits within fifteen (15) days of service of the answering affidavit upon him;
>
> 5. The application may then be enrolled again for hearing in terms of Rule 6(5)(f) provided that the applicant may, if so advised, approach the Deputy Judge President for the allocation of a preferential date for the hearing of this application;
>
> 6. Costs are reserved for later determination."

[28] Above n 1.

[29] As is evident from the judgment of the High Court, the applicants in that matter have, however, shown no further interest in those proceedings.

[30] That is the application under Case No. 37771/08.

sought, and were granted, a postponement pending the finalisation of *Derby-Lewis v Minister of Correctional Services and Others*,[31] (*Derby-Lewis*) in which the Full Court dealt with the constitutional attack on section 136(1). Mr Van Vuren unsuccessfully opposed the postponement.

[17] On 19 March 2009, and after the judgment in *Derby-Lewis*, Mr Van Vuren supplemented his written submissions and contended that due to the impact of that judgment on him, section 136(3)(a) should not be declared unconstitutional as that would place him in a worse position. Although Mr Van Vuren abandoned that attack, he persisted with the relief sought in paragraphs (e) and (f) of the notice of motion. The relief sought in those paragraphs was in the form of a *mandamus* ordering the respondents in the High Court to consider him for possible placement on parole and entitling him to be considered in terms of the policy and guidelines as at 13 November 1992. The respondents in the High Court contended, among other things, that Mr Van Vuren was not yet eligible for consideration for placement on parole.

[31] 2009 (6) SA 205 (GNP). Mr Derby-Lewis was sentenced to death in October 1993. In November 2000 his sentence was commuted to life incarceration, which was antedated to 15 October 1993; the original date of sentencing. He launched an application in the High Court challenging, inter alia, the constitutional validity of sections 136(1) and 136(3)(a) of the Act. The attack regarding the constitutional validity of the latter provision fell away because it was common cause on the papers that the applicant, Mr Derby-Lewis, was eligible for parole having served 15 years' incarceration as a minimum and having reached the age of 65. The Full Court of the High Court, per Shongwe DJP, Seriti and Van der Merwe JJ, unanimously held that section 136(1) refers to any person serving a sentence of incarceration before the commencement of Chapters IV, VI and VII of the Act. Mr Derby-Lewis was found to fall squarely under section 136(1).

[18] The applications were postponed pending the "authoritative decision of the [Full Court]"[32] in *Derby-Lewis* which, the High Court held, raised the same question of the constitutionality of section 136. In *Derby-Lewis,* the Full Court held that—

> "only the provisions of section 136 of [the Act] are applicable to lifers sentenced pre October 2004. All the provisions of the [Old Act] regarding parole for lifers have been repealed and the provisions of section 136(1) do not keep those provisions alive in spite of their repeal in terms of Proclamation R38, 2004.
>
> Only the policy and guidelines applied by the former Parole Boards prior to the repeal of the provisions of the [Old Act] dealing with parole remained intact and had to be applied by the Board."[33]

[19] After the delivery of *Derby-Lewis* on 17 March 2009, the High Court heard Mr Van Vuren's application and delivered judgment on 3 July 2009. The High Court held that from a simple reading of section 136, it is clear that "if [the section] does apply to the applicants those of the applicants who [had] not yet served 20 years of their life sentence [were] not entitled to be considered for parole." Quoting *Derby-Lewis*, the High Court held:

> "On a mere reading of section 136(1) it is clear that it refers to any person serving a sentence of imprisonment before the commencement of chapters IV, VI and VII of the 1998 Act. The applicant [Derby-Lewis] falls squarely under the provisions of section 136(1) because chapter IV came into operation on 31 July 2004 and chapters VI and VII on 31 October 2004, in terms of proclamation R38/2004.

[32] Above n 1.

[33] Above n 31 at 216C-D.

> . . .
>
> I agree with the respondents' submission that only the provisions of section 136 of the 1998 Act are applicable to lifers sentenced pre-October 2004. All the provisions of the 1995 Act regarding parole for lifers have been repealed and the provisions of section 136(1) do not keep those provisions alive in spite of their repeal in terms of proclamation R38/2004."

The High Court then held that the Full Court in *Derby-Lewis* had "authoritatively laid down that section 136(1) applies to all persons serving life sentences including the applicants" and that it was, thus, bound by that judgment.

[20] Mr Van Vuren, unsuccessfully, lodged an application in the High Court for leave to appeal to the Supreme Court of Appeal. He then applied for leave to appeal to the Supreme Court of Appeal, which application was dismissed. In the latter application, he sought to appeal against the dismissal of an application for a *mandamus* ordering the respondents to consider him for possible placement on parole in terms of the provisions of the Old Act. The Supreme Court of Appeal dismissed the application on 17 December 2009.

In this Court

[21] Aggrieved by the dismissal of his application, Mr Van Vuren lodged an application for leave to appeal to this Court[34] against the dismissal of his application by the High

[34] In terms of rule 19 of the Constitutional Court Rules.

Court, alternatively, for direct access. The relief sought in the notice of motion dated 27 January 2010 reads:

> "1. That condonation be granted for non-compliance of the Constitutional Court Rules, i.e. late filing of this application and the 25 kilometre requirement;
> 2. That the Applicant be granted leave to appeal to the Constitutional Court, leave to appeal having been denied by the Supreme Court of Appeal on the decision of the North Gauteng High Court in an application for an order declaring section 136(3)(a) of [the Act] unconstitutional;
> 3. Further or alternative relief."

[22] The grounds relied upon by Mr Van Vuren are that the High Court incorrectly relied upon *Derby-Lewis* and, additionally, erred in finding that—

(a) Mr Van Vuren had no entitlement to be considered for parole prior to serving 20 years;

(b) Mr Van Vuren could not rely on section 136(1) even though the section makes provision for offenders serving sentences immediately prior to commencement of the Act to be subject to the provisions of the Old Act; and

(c) the Old Act had been repealed and as such was not available to him even though section 136 requires the application of the Old Act.[35]

[35] A further ground of appeal relied upon section 35(3)(n) of the Constitution. As to this ground Mr Van Vuren asserted that he was entitled to the least severe of the penalties applicable. Reliance on section 35(3)(n) was, however, abandoned by the parties prior to the hearing in this Court.

Issues

[23] The issues that emerge entail—

(a) whether—

(i) condonation should be granted;

(ii) leave to appeal should be granted; and, if not

(iii) direct access should be granted;

(b) the proper interpretation of section 136;

(c) the eligibility of Mr Van Vuren for consideration for placement on parole;

(d) the appropriate relief; and

(e) costs.

Before I consider these issues, it is necessary to set out the legislative framework and departmental policies relevant to parole.

Legislative framework and polices relevant to parole

[24] Prison administration, more specifically community corrections[36] in South Africa, is presently conducted within the framework of the Act and, where applicable, the Old Act together with relevant policies and guidelines under these Acts. The Act is being

[36] In terms of the Act, "community corrections" is defined as "all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department".

gradually brought into operation with the simultaneous abolition and repeal of the corresponding parts of the Old Act.[37]

[25] Prior to the enactment of the Act, the National Advisory Council of Correctional Services (National Advisory Council) submitted a provisional memorandum to the Minister.[38] The National Advisory Council advised the Minister on general policy considerations, including the placement of sentenced offenders on parole.[39] The final report recommended, in the case of offenders sentenced to life incarceration, that offenders sentenced to life should serve 20 years in prison, with life incarceration being equated with a determinate sentence of 40 years. The report also stated that an offender sentenced to life incarceration, upon reaching 65 years of age, should be entitled to be considered for parole provided that he or she should have served 15 years of the sentence. The National Advisory Council recommended further that any decision by the Parole

[37] Section 137 of the Act, read with the Schedule, provides for the repeal of the law. It makes provision for the repeal or amendment of the Old Act to the extent set out in the Schedule. The Short Title in section 138, makes provision for the commencement of the Act. Importantly, it makes the commencement of the repeal of the Old Act subject to proclamation. It provides that the Act shall come into operation on different dates fixed by the President by proclamation in the Government Gazette. The Short Title also provides that different dates, fixed by the President, may be proclaimed in the Government Gazette for the repeal of different provisions of the Old Act. As a result, a number of sections of the 1998 Act were brought into operation and a number of sections in the 1959 Act were repealed, with effect from 19 February 1999, in terms of Proclamation R20, 1999, published in Government Gazette number 19778 dated 19 February 1999. The sections of the Act that came into operation include that of section 136. Those sections of the Old Act that were repealed include sections 61 and 64.

[38] The National Advisory Council's memorandum followed the report of the Commission of Inquiry into Unrest in Prisons, headed by Justice Kriegler, which likewise dealt, inter alia, with the system on parole.

[39] In terms of section 64 of the Old Act, which is set out in full below n 45.

Board[40] recommending parole in the case of a person sentenced to life incarceration should be brought before it for a final decision.

[26] Section 42 of the Act, prior to its amendment by the Correctional Services Amendment Act, 2008,[41] establishes a Case Management Committee (CMC) in each prison. The function of a CMC is to submit a report to the Correctional Supervision and Parole Board, which replaces the Parole Board, regarding the possible placement of an offender on parole and the proposed conditions for said parole.[42] The Minister has the

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[40] Section 4 of the Correctional Services Amendment Act 68 of 1993, which came into operation on 1 August 1993, inserted into the Old Act, section 5C which, read with section 1 of the Old Act, created the definition of "parole boards". In terms of section 5C of Act 68 of 1993, the parole board was defined as follows—

> "(1) The Commissioner shall appoint one or more boards, to be styled parole boards, to perform the functions and duties entrusted to or imposed upon a parole board by or under this Act.
>
> (2) A parole board shall consist of so many members, who may be members or non-members of the Department, as the Commissioner may determine and of whom—
>
> (a) one shall be designated by the Commissioner as chairman of that board; and
>
> (b) at least one shall in respect of each prisoner who appears before such board, be a member of the institutional committee at the prison where the prisoner in question is being detained.
>
> (3) A member of a parole board shall hold office for such period and on such conditions as the Commissioner may determine.
>
> (4) The members of a parole board who are not in the full-time service of the State, may receive such remuneration and allowances as the Minister may, on the recommendation of the Commission for Administration, determine with the concurrence of the Minister of State Expenditure.
>
> (5) Any member of a correctional board may attend any meeting of the parole board at the prison where such correctional board is appointed, but may not vote on a matter before the parole board."

[41] Act 25 of 2008. This Act came into operation on 1 October 2009.

[42] Section 42(2)(a) and (d)(vii), as it stood prior to its amendment in Act 25 of 2008 provides that:

> "(2) The Case Management Committee must—
>
> (a) ensure that each sentenced offender has been assessed, and that for sentenced prisoners serving more than twelve months there is a plan specified in section 38(2);
>
> . . .
>
> (d) submit a report, together with the relevant documents, to the Correctional Supervision and Parole Board regarding—

power to establish a Correctional Supervision and Parole Board.[43] A Correctional Supervision and Parole Board makes a recommendation to the court on the granting of parole in respect of an offender serving life incarceration. However, in terms of the amendment in Act 25 of 2008, the Correctional Supervision and Parole Board makes a recommendation to the Minister.[44]

[27] Section 64 of the Old Act, as amended,[45] empowered the Minister to authorise the release of an offender sentenced to life incarceration on parole after having been advised

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. . .

(vii) the possible placement of such prisoner on day parole or on parole, and the conditions for such placement".

[43] Section 74 of the Act.

[44] Section 75 of the Act as amended by section 51 of Act 25 of 2008. The relevant parts of this section provide:

"(1) A Correctional Supervision and Parole Board, having considered the report on any sentenced offender serving a determinate sentence of more than 24 months submitted to it by the Case Management Committee in terms of section 42 and in the light of any other information or argument, may—

(a) subject to the provisions of paragraphs (b) and (c) and subsection (1A) place a sentenced offender under correctional supervision or day parole or grant parole and, subject to the provisions of section 52, set the conditions of community corrections imposed on the sentenced offender;

(b) in respect of any sentenced offender having been declared a dangerous criminal in terms of section 286A of the Criminal Procedure Act, make recommendations to the court on the granting of the placement under correctional supervision or day parole or parole and on the period for and, subject to the provisions of section 52, the conditions of community corrections imposed on the sentenced offender; and

(c) in respect of any sentenced offender serving a sentence of life incarceration, make recommendations to the Minister on granting of day parole or parole, and, subject to the provisions of section 52, the conditions of community corrections to be imposed on such an offender."

[45] 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, 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,

by the National Advisory Council,[46] the latter having considered the report of an institutional committee.[47]

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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 authorize 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."

[46] The National Advisory Council was established in terms of section 1, read with section 7 of Act 122 of 1991. Section 7 details as follows:

"(1) There shall be a Council to be styled the National Advisory Council on Correctional Services and consisting of—

(a) a judge of the Supreme Court of South Africa;

(b) a magistrate of a regional division;

(c) an attorney-general or deputy attorney-general;

(d) a member of the South African Police of or above the rank of brigadier;

(e) a member of the Department of or above the rank of brigadier;

(f) an official of a social welfare authority who holds the rank of director or an equivalent or higher rank and who has been designated by the Minister of National Health;

(g) two or more persons who are not in the full-time service of the State and who, in the opinion of the Minister, have special knowledge or experience of matters connected with the powers, functions and duties of the Department; and

(h) one or more persons designated by the Minister, who may be co-opted for any special purpose as members in specific cases or in general,

to exercise or perform the powers, functions and duties which are conferred upon or assigned to that Council under this Act.

(2) The Minister shall appoint each member of the National Advisory Council referred to in subsection (1)(a) to (h), and such a member shall hold office during the pleasure of the Minister.

(3) (a) The Minister shall for each member of the National Advisory Council contemplated in subsection (1)(a) to (f) designate an alternate who has the same qualification as the member for whom he is the alternate.

(b) An alternate contemplated in paragraph (a) shall, in the absence of the member for whom he is the alternate from any meeting of the National Advisory Council, have all the powers and duties of that member at such a meeting.

(4) The majority of the member of the National Advisory Council shall constitute a quorum for a meeting of that Council.

(5) The member of the National Advisory Council contemplated in subsection (1)(a) shall be the chairman of that Council and one of the members contemplated in subsection (1)(b) to (g) shall be designated by the Minister as the vice-chairman.

[28] As of 1 August 1993, in terms of section 21 of the Correctional Services Amendment Act, 1993[48] the whole of Chapter VI of the Old Act was replaced with the result being that sections 61 to 65 and, in particular, sections 63 and 65 of the Old Act, as amended, now became relevant to prisoners who formerly fell to be governed in terms of the former section 64. Section 65 related to the release of prisoners and the placement of prisoners on parole. A prisoner was entitled to be released upon the expiration of the term of his incarceration, in terms of section 65(1). Section 65(5) dealt with the possibility of a prisoner being placed on parole by the Minister upon recommendation by the Parole Board,[49] and after having regard to the interests of the community. In terms of

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(6) A decision of the majority of the member present at a meeting of the National Advisory Council, shall be the decision of that Council, and in the event of an equality of votes on any matter, the member presiding at the meeting concerned shall, in addition to his deliberative vote, have a casting vote.

(7) A member of the National Advisory Council who is not in the full-time service of the State may receive such allowances as may be determined by the Minister with the consent of the Minister of Finance."

[47] The institutional committee was established in terms of section 1, read with section 3 of the Prisons Amendment Act 22 of 1980. Section 3 details as follows:

"(1) The Commissioner shall appoint one or more committees, to be styled institutional committees, to perform the functions and duties entrusted to or imposed upon an institutional committee by or under this Act.

(2) An institutional committee shall consist of so many members of the Prisons Service as the Commissioner may find fit and of whom one shall be designated by the Commissioner as chairman of the committee.

(3) A member of an institutional committee shall hold office for such period and on such conditions as the Commissioner may determine."

[48] Act 68 of 1993. This Act came into operation on 1 August 1993.

[49] This is the Parole Board as defined in section 4 of Act 68 of 1993, which came into operation on 1 August 1993, see above n 40 for the text of section 4.

section 65(5) of the Old Act, the National Advisory Council made recommendations to the Minister regarding the parole of prisoners sentenced to life.[50]

[29] It is noteworthy that neither subsections (5) nor (6) of that section made reference to any period after which a prisoner serving life incarceration could be considered for placement on parole. However, as will be pointed out later, the departmental release and placement policy entitled offenders sentenced to life incarceration to be considered for release after various minimum detention periods.[51]

[30] Section 73 of the Act deals with correctional supervision and prisoners out on day parole or parole. Section 73(6)(b)(iv) provides that an offender sentenced to life incarceration may not be placed on parole until he or she has served at least 25 years of the sentence but, upon reaching 65 years, that offender may be placed on parole if he or she has served at least 15 years.

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[50] Section 65(5) provides:

> "Upon receipt of a report from a parole board regarding a prisoner who has been sentenced to life imprisonment, the Minister shall refer the matter to the National Advisory Council, which, after considering the report of the parole board, and having regard to the interests of the community, shall make a recommendation to the Minister regarding the placement of a prisoner on parole."

[51] These sections were amended by the Parole and Correctional Supervision Amendment Act 87 of 1997 (1997 Act) which came into operation on 1 October 2004. The scheme of the 1997 Act was to empower the Parole Board, in respect of offenders sentenced to life incarceration, to submit, to a court which sentenced the prisoner, a report with recommendations on the possible placement of the prisoner concerned on parole or on day parole. Act 25 of 2008 amends section 78 of the Act, in terms of which the power to place a prisoner on parole is no longer exercised by a court but is once again exercised by the Minister.

[31] Before the Act came into operation, certain transitional provisions, including section 136, were enacted and brought into force from 19 February 1999. In 2001, section 136 of the Act was amended.[52] Section 136 provides:

> "(1) *Any person* serving a sentence of imprisonment *immediately before* the commencement of Chapters IV, VI and VII is subject to the provisions of [the Old Act], 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 Board *prior to the commencement* of those Chapters.
>
> (2) 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 [Old Act].
>
> (3) (a) 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.
>
> (b) The case of a prisoner contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the prisoner under day parole or parole.
>
> (c) If the recommendation of the National Council is favourable, the Minister may order that the prisoner be placed under day parole or parole, as the case may be.
>
> (4) If a person is sentenced to life imprisonment after the commencement of Chapters IV, VI and VII while serving a life sentence imposed prior to the commencement, the matter must, after the prisoner has served 25 years accumulatively, be referred

[52] Section 42 of the Correctional Services Amendment Act 32 of 2001, which came into operation on 14 December 2001.

> to the court which imposed the last sentence of life imprisonment for consideration of placement under day parole or parole."[53] (Emphasis added.)

The provisions of Chapter IV, referred to in section 136, above, came into operation on 31 July 2004, while the provisions of Chapters VI and VII, referred to in section 136, above, came into operation on 1 October 2004. Section 136, in the amended form it appears, above, came into operation on 14 December 2001. These chapters deal with sentenced offenders, community corrections and release from a correctional centre, and placement under correctional supervision as well as on day parole and parole, respectively.

[32] It is common cause that prior to the commencement of the above transitional provision, placement on parole of offenders serving life incarceration was governed by the departmental policy.[54] The departmental release and placement policy applicable to those prisoners, as amended from time to time, was, and remains, that prisoners serving life incarceration are not considered for release on parole prior to having served a minimum period. In terms of the release and placement policy reflected in the departmental circular distributed to all Provincial Commissioners of Correctional Services, on 26 July 1995, the minimum detention period varied.[55]

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[53] Section 136(3)(a) has its origin in the recommendation of the National Council for Correctional Services.

[54] Section 64 of the Old Act.

[55] For example, from August 1987 to March 1994, prisoners sentenced to life incarceration had to serve a minimum of 10 years prior to consideration but placement on parole could take place only in exceptional circumstances before completion of 15 years; from March 1994 to April 1995, the minimum detention period prior to consideration was 20 years. Since 3 April 1995, the minimum detention period prior to consideration has been 20 years provided that in exceptional circumstances placement could occur earlier. The exceptional circumstances relate to a situation

[33] I now turn to deal with the questions that arise.

Should condonation be granted?

[34] This application was lodged on 27 January 2010, after the dismissal of the application for leave to appeal by the Supreme Court of Appeal on 17 December 2009. Rule 19 of the Rules of this Court requires that an application for leave to appeal must be filed within 15 days of the order against which the appeal is sought. The application is late by approximately 15 days, for which Mr Van Vuren seeks condonation. He also seeks an order condoning his non-compliance with rule 11(1)(b) of the Rules of this Court. This rule requires that an address for service be provided within 25 kilometres of the office of the Registrar. Mr Van Vuren explains that his incarceration impedes compliance with rule 11.

[35] In my view, the delay in lodging this application is not excessive, particularly when regard is had to the fact that Mr Van Vuren, a lay litigant, prepared his own application. The respondents do not oppose the application. In addition, they will not be prejudiced. In the circumstances, I am satisfied that the interests of justice require that

where (a) the physical condition of a prisoner has deteriorated to such an extent that he or she will not repeat the same type of crime; (b) a prisoner, due to his or her high age, will not be able to repeat the same type of crime; (c) the President or a high profile person specifically requests that the case of a specified prisoner must be considered and (d) where a court orders that such case must be considered. It would appear, from a reading of the record that administrative decisions of the Parole Board regarding placement on parole, called B Orders, also made it possible for offenders serving life incarceration to be considered for placement on parole after serving 10 years of their sentences.

condonation should be granted.[56] The next issue for determination is whether leave to appeal should be granted.

Should leave to appeal be granted?

[36] There can be no doubt that this matter raises constitutional issues. As mentioned above, the attack on section 136(3)(a) had been abandoned before the hearing of the matter resumed in the High Court. It is not clear from the judgments of the High Court what was contended by the respondents. However, what is clear from the respondents' papers is their contention that Mr Van Vuren is not precluded from being considered for placement on parole. The High Court did not address itself to the questions raised by the notice of motion.[57] *Derby-Lewis*, relied upon by the High Court, dealt with the interpretation of section 136(1) and held that section 136(3)(a) was not applicable to Mr Derby-Lewis. The Full Court did not consider which policies and guidelines would be appropriate under section 136(1). In the circumstances, the interests of justice would not be served by the granting of leave to appeal in a matter in which there is no considered judgment of the court a quo regarding the issues raised. Therefore, the application for leave to appeal should, in my view, be dismissed.

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[56] *Brummer v Gorfil Brothers Investment* [2000] ZACC 3; 2000 (5) BCLR 465 (CC); 2000(2) SA 837 (CC) at para 3.

[57] Above at [12].

[37] Having found that Mr Van Vuren had abandoned the constitutional challenge, and having concluded that the application for leave to appeal should be dismissed, I now consider whether direct access should be granted.

Should direct access be granted?

[38] This is Mr Van Vuren's second attempt to approach this Court directly.[58] In the written submissions filed of record in the present application, Mr Van Vuren requests this Court to grant direct access as an alternative to his application for leave to appeal, if it were to be found that the constitutional challenge to section 136(3)(a) had been abandoned. The respondents oppose the granting of direct access on the basis that Mr Van Vuren approaches this Court as a court of first and last instance.

[39] As I have already mentioned, Mr Van Vuren abandoned the attack on the constitutionality of section 136(3)(a). Direct access to this Court may be granted in exceptional circumstances only.[59] The application for direct access should be brought on notice of motion, supported by an affidavit setting forth the facts upon which the applicant relies for relief. This Court will grant direct access only if it considers it to be in the interests of justice to do so. This Court has, repeatedly, emphasised that

[58] See above n 21.

[59] See rule 18 read with section 167(6)(a) of the Constitution.

compelling reasons are required in order to justify the exercise of its discretion in favour of granting direct access and in sitting as a court of first and last instance.[60]

[40] Although the application in this matter has not been properly prepared, as direct access is not directly sought in the notice of motion, the failure to do so should not, in the circumstances of this case, be fatal to the application itself. This is so because what the applicant is seeking is clear from the record. Besides, the applicant is a lay litigant. This Court, in *Xinwa and Others v Volkswagen SA (Pty) Ltd*,[61] has stressed, with regard to the standard of pleading in this Court, that:

> "Pleadings prepared by lay persons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance." (Footnote omitted.)

[41] Mr Van Vuren seeks to revive the attack regarding section 136(3)(a). There is sufficient urgency, need for finality, public interest and promotion of the ends of justice to justify granting direct access. In addition, the history of the litigation regarding the constitutional validity of the impugned provisions, and the desire by Mr Van Vuren and

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[60] See *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (4) BCLR 415 (CC); 1998 (2) SA 1143 (CC) at paras 7-8 and *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government & Housing in the Province of Gauteng and Others* [2004] ZACC 9; 2005 (2) BCLR 150 (CC); 2005 (1) SA 530 (CC) at para 11 (*Mkontwana*).

[61] [2003] ZACC 7; 2003 (6) BCLR 575 (CC); 2003 (4) SA 390 (CC) at para 13.

other offenders similarly placed to have these complex issues decided, cannot be overlooked. After all, it is more than three years since this Court dismissed Mr Van Vuren's previous direct access application.

[42] Additionally, although Mr Van Vuren abandoned the issue sought to be raised here, the circumstance under which he abandoned the challenge cannot be disregarded. The essential issue when the urgent application was launched was the constitutionality of section 136(3)(a). The abandonment happened, at an advanced stage of the proceedings, when the case was postponed pending the decision in *Derby-Lewis*; a case that turns on entirely different facts and, yet, was considered "authoritative" by the High Court. Thus, in my view, Mr Van Vuren abandoned the constitutional challenge regarding the validity of section 136(3)(a) because he, seemingly, misunderstood the implications of *Derby-Lewis* for his claim. No blame should be attached to him.

[43] The interests of justice must be determined by reference to all the relevant considerations including: the nature of the relief sought, the extent and cause of the delay and its effect on the administration of justice.[62] As illustrated, above, Mr Van Vuren has made several attempts to seek redress in various courts, including this Court. There has been a delay of several years since he started to challenge the constitutionality of the impugned provisions. Any further delay, if direct access is refused, might render moot

[62] Above n 56.

the important issues raised. Moreover, the enormous costs incurred, and those likely to be incurred by the state if there is further delay, should not be overlooked.

[44] In my view, a final decision on this complex and important issue, which clearly affects many other cases, will have practical benefit for many offenders similarly placed. This Court is better placed to deal with the matter because it has all the facts and all the parties before it. Furthermore, sight should not be lost of the fact that, in this instance, we are concerned with the liberty, a component of freedom,[63] of a sentenced offender for whom the goal posts of his consideration date for release under community corrections have been shifted back as a result of the change in the departmental release and placement policy.

[45] All these considerations, although not individually decisive, constitute, in my view, the exceptional circumstances that weigh heavily in favour of granting direct access. On a proper consideration of the application, taking into account the interests of the administration of justice, the achievement of finality and the curtailment of costs, direct access should be granted.

[63] *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) at paras 19-20.

[46] The next issue relates to the interpretation of section 136, in particular, whether subsections (1) and (3)(a) of section 136 can reasonably be interpreted in a manner that will render them constitutionally compliant.

Proper interpretation of section 136

[47] The proper approach when construing legislation, in the light of the injunction in section 39(2) of the Constitution, is reflected in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[64] where Ngcobo J held that "the Constitution, as the supreme law, is the starting point in interpreting any legislation."[65] Section 39(2) of the Constitution, he stated, "commands every court, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights."[66] Ngcobo J went on to hold that:

> "Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights 'is a cornerstone of [our constitutional] democracy'. It 'affirms the democratic values of human dignity, equality and freedom'.
>
> . . .

[64] [2004] ZACC 15; 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC) (*Bato Star*). See also *Mkontwana* above n 60 at para 27 and *Mateis v Ngwathe Plaaslike Munisipaliteit en andere* 2003 (4) SA 361 (SCA).

[65] *Bato Star* above n 64 at para 72.

[66] Id. Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights . . . ."

> South Africa is a country in transition . . . . The preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental human rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms."[67] (Footnotes omitted.)

[48] It is important, for the purposes of interpreting section 136, to highlight the purpose of the Act. The Act seeks to abolish and repeal the corresponding parts of the Old Act, which is the product of an outdated dispensation. The Act, in stark contrast to the Old Act, as is apparent from its preamble,[68] seeks to provide for a constitutionally-sound correctional system. It is designed to break with the past.

[49] The remarks, by Gubbay CJ, below, in *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & Others*,[69] quoted with approval by the Supreme Court of Appeal

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[67] Above n 64 at para 73.

[68] The Preamble of the Act reads:

> "With the object of changing the law governing the correctional system and giving effect to the Bill of Rights in the Constitution, 1996, and in particular its provisions with regard to prisoners;
>
> Recognising—
>
> > international principles on correctional matters;
>
> Regulating—
>
> > the release of prisoners and the system of community corrections;
> >
> > in general, the activities of the Department of Correctional Services; and
>
> Providing—
>
> > for independent mechanisms to investigate and scrutinise the activities of the Department of Correctional Services".

[69] 1992 (2) SA 56 (ZS).

in *Minister of Correctional Services and Others v Kwakwa and Another*[70] *(Kwakwa)* find resonance in this case:

> "Traditionally, Courts in many jurisdictions have adopted a broad 'hands-off' attitude towards matters of prison administration. This stems from a healthy sense of realism that prison administrators are responsible for securing their institutions against escape or unauthorised entry, for the preservation of internal order and discipline, and for rehabilitating, as far as is humanly possible, the inmates placed in their custody. The proper discharge of these duties is often beset with obstacles. It requires expertise, *comprehensive planning* and a commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-equipped to deal with such problems. *But a policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection. Fortunately the view no longer obtains that in consequence of his crime a prisoner forfeits not only his liberty but all his personal rights, except those which the law in its humanity grants him. For while prison officials must be accorded latitude and understanding in the administration of prison affairs, and prisoners are necessarily subject to appropriate rules and regulations, it remains the continuing responsibility of Courts to enforce the constitutional rights of all persons, prisoners included.*"[71] (Emphasis added.)

[50] The Act enables sentenced offenders to anticipate consideration for some form of non-custodial supervision. In this case, Mr Van Vuren, an offender serving life incarceration, has been left in the dark despite repeated enquiries as to factors relevant to the determination of his consideration date.

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[70] 2002 (4) SA 455 (SCA) at para 24.

[71] Above n 69 at pages 60G–61A.

[51] Restorative justice, in our jurisprudence, is linked to the foundational value or norm of *Ubuntu-Botho*.[72] It is a value that recognises, in the context of this case, that to rehabilitate an offender sentenced to life incarceration to a position where he or she is repossessed of the fuller scope of his or her rights, is to recognise the inherent human dignity of the individual offender. Evidently from the departmental release and placement policy, parole has a restorative justice aim. It is aimed at the eventual rehabilitation and reconciliation processes of the offender; themes that underpin restorative justice. Importantly, all these interests must be balanced against those of the community, which include the right to be protected against crime.

[52] In addition to the above considerations, a proper interpretation of section 136 needs to be done in the light of the rule of law and the Constitution. Our democratic state is founded on various values, including the "supremacy of the Constitution and the rule of law".[73] In *Pharmaceutical Manufacturers Association of South Africa and Others; In Re: Ex Parte Application of the President of the RSA and Others*[74] this Court stated that—

> "the rule of law embraces some internal qualities of all public law: that it should be certain, that it is, ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation."[75]

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[72] *Dikoko v Mokhatla* [2006] ZACC 10; 2007 (1) BCLR 1 (CC); 2006 (6) SA 235 (CC) at paras 113-5.

[73] Section 1(a) and (c) of the Constitution.

[74] [2000] ZACC 1; 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC).

[75] Id at 39. See also *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* [2005] ZACC 22; 2007 (9) BCLR 929 (CC); 2007 (3) SA 210 (CC) at para 26 (*Veldman*).

Hence, it is important when interpreting legislation to have regard to the general presumption against retrospectivity "unless the statute provides otherwise or its language clearly shows such a meaning."[76]

[53] It is against this background that section 136 must be understood in order to guide its interpretation.

[54] Mr Van Vuren argues that the provisions of subsection (3)(a) do not apply in his case because of the specific policy and guidelines referred to in subsection (1). He contends that if subsection (3)(a) were to take precedence over subsection (1), the former would be superfluous insofar as it refers to offenders sentenced to life incarceration since subsection (1) already includes that particular group. The respondents argue that the challenge to the validity of section 136(3)(a) based on its contended superfluity is misplaced.

[55] To determine the meaning of the impugned provision, the provisions of section 136 must be read as a whole.[77] Upon a proper reading of the section, its meaning becomes obvious. In what follows I discuss two questions, namely (a) the difference

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[76] *Veldman* above n 75.

[77] The full text of section 136 is set out at above at [31].

between section 136(1) and section 136(3)(a), and, later, (b) whether section 136(1) preserves the policies and guidelines applied before 1 October 2004.

[56] Subsection (1) has a purpose distinct from that of subsection (3)(a). On a plain reading of section 136(1) the phrase "any person" refers, as the Full Court in *Derby-Lewis* correctly found, to *any* person serving a sentence of incarceration.[78] Thus the phrase refers to offenders serving determinate and indeterminate (including life) sentences. Ellis AJ was, in my view, not correct in holding that—

> "the only meaning which can be ascribed to section 136(1) . . . is that section 136(1) deals with all prison sentences except life imprisonment".[79]

He ascribed this meaning to section 136(1) to avoid a finding that section 136(3)(a) is superfluous. In subsection (3)(a) the phrase "any sentenced offender serving a *sentence of life imprisonment"* is used. Clearly, it covers those serving a sentence of life incarceration.

[57] But an important pointer to the congruence of the two subsections lies in the two phrases "immediately before" and "prior to" used in subsection (1). The adverbial phrase of time "immediately before" refers to the category of persons serving custodial sentences. The phrase "prior to" refers to the applicable policy and guidelines. "Prior to"

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[78] Above n 31 at 215C.

[79] High Court judgment per Ellis AJ, above n 24 at para 16.

has a broader meaning than "immediately before". "Prior to" refers to the policy and guidelines applicable at any time before 2004, when Chapters IV, VI and VII referred to in section 136 came into effect. By contrast, "immediately before" must mean directly before commencement. This conclusion is strengthened by section 136(4), which refers to life sentences imposed "prior to the commencement". This clearly embraces life sentences imposed at any time before the commencement of the Chapters, in contradistinction to the instant of time "immediately before". The meaning of prior to in subsections (1) and (4) must be consistent. This leads to the conclusion that "prior to" in section 136 means *at any time before.*

[58] Section 136(1) relates to an offender's placement under community corrections and his or her consideration for "such release and placement in terms of the policy and guidelines applied by the former Parole Boards *prior to*" 2004, the year when the Chapters referred to in section 136 came into operation. It follows from the proper construction of subsection (1) that the subsection preserves the policy and guidelines that applied at any time before 2004. By contrast, subsection (3)(a), in creating a new mandatory non-parole period in the form of a new statutory entitlement, does not preserve the past policies and guidelines. It creates a statutory entitlement "to be considered for day parole or parole". Notably, subsection (1) does not. Additionally, subsection (1), in contrast to subsection (3)(a), does not specifically make reference to any period after which a sentenced offender serving incarceration should be considered for placement on parole.

[59] In the light of these considerations, subsection (3)(a) can be given a coherent and sensible meaning alongside subsection (1). This can be done by examining the position of individual offenders during three distinct periods. The first is those sentenced to life incarceration after the commencement of the Act. Section 73(6), which subjects all offenders sentenced to life incarceration to 25 years before parole, applies to all life sentences imposed after the commencement of the Act. For those sentenced to life incarceration during the period of 1 March 1994 or 3 April 1995, when the 20-year pre-parole minimum was introduced, to the commencement of the Act, section 136(3)(a) preserves an entitlement to be considered after 20 years. Section 136(1), by contrast, preserves the position of those sentenced to life incarceration even further back – before 1 March 1994 or 3 April 1995 – for example, Mr Van Vuren.

[60] In the context of correctional law, deprivation may occur in the retroactive application of a change in parole policy, as is the case in the instant matter.[80] Deprivation of a person's liberty in that manner does not conform to the principles of the rule of law.[81] The construction contended for by the respondents effectively renders the new mandatory non-parole period of 20 years retrospective in operation. This would offend

[80] JJ Moses "Parole: Is it a Right or a Privilege?" (2003) 19 *SAJHR* 263 at 269. This article refers to the Canadian decision in *R v Gamble* [1988] 2 S.C.R 595 (1988) and states that—

> " . . . [the] retrospective application of transitional provisions on inmates where it amounts to a greater punishment, [*R v Gamble*] is authority for the fact that a person has a liberty interest in having his or her parole eligibility determined in accordance with the law at the time of the commission of the offence."

[81] *Ferreira v Levin NO and Others* [1996] ZACC 13; 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) at para 72.

the foundational values of constitutional supremacy and the rule of law,[82] which, this Court should not countenance.

[61] Accordingly, I conclude that section 136(3)(a) is not superfluous and does not nullify section 136(1). It is constitutionally compliant. Next for determination is whether Mr Van Vuren is eligible for consideration for placement on parole.

Mr Van Vuren's eligibility for possible placement on parole

[62] Mr Van Vuren's complaint is that he has been eligible for consideration for placement on parole in November 2002[83] and November 2007.[84] He maintains that he would have been considered for placement on parole had he been treated in accordance with the Old Act and the policy and guidelines applicable as at 13 November 1992.

[63] The respondents argue that subsection (1) makes no reference to policies which were in effect at the time of sentencing. They maintain that the policy and guidelines in existence when the death penalty was abolished required offenders serving life incarceration to serve 20 years prior to consideration for parole. They argue that there must be a distinction between offenders who, from inception, were sentenced to life

[82] Section 1(c) of the Constitution. See also in this regard the case of the United States' Supreme Court in *Weaver v Graham Governor of Florida* 450 US 24 (1980) 30, also cited in *Veldman* above n 75.

[83] When he completed 10 years of his sentence.

[84] When he completed 15 years of his sentence.

incarceration prior to the death penalty being abolished, and those sentenced to death but whose death sentences were subsequently converted to life incarceration.

[64] The respondents are correct that the policy and guidelines that were in existence in 2000, when Mr Van Vuren's death sentence was commuted to life incarceration, required offenders serving life incarceration to complete 20 years before they could be released on parole. However, the fact that the Full Court backdated Mr Van Vuren's sentence to 13 November 1992 cannot be disregarded. In backdating the sentence, the Full Court must have taken into account the part of the sentence that Mr Van Vuren had already served. Therefore, the Full Court, in my view, assigned an advantage to him that may not be taken away arbitrarily. The Full Court could have decided not to backdate the sentence imposed. It did not do so.

[65] The argument that a distinction must be drawn between offenders sentenced to life incarceration from inception and those whose death sentences were commuted to life incarceration has no merit. We cannot live in the past by differentiating, in a manner that may amount to unfair discrimination, between persons sentenced to life incarceration purely by reasons of the crime they had committed and the sentence imposed upon them. More importantly, in our constitutional democracy, the state should not refuse to consider an offender who is eligible for consideration for placement either under community corrections or on parole for reasons that are not reasonable and justifiable. As correctly pointed out by the Supreme Court of Appeal in quoting Gubbay CJ—

> "the view no longer obtains that in consequence of his crime a prisoner forfeits not only his liberty but all his personal rights, except those which the law in its humanity grants him. For . . . prisoners are necessarily subject to appropriate rules and regulations".[85]

[66] Implicit from the order antedating the sentence, the Full Court afforded Mr Van Vuren the privilege of being considered in terms of the policy and guidelines applicable in November 1992. As mentioned earlier, the policy and guidelines in existence in 1992 required offenders sentenced to life incarceration to serve 10 years before they could be considered for placement on parole, though placement before 15 years occurred only in exceptional circumstances.

[67] The respondents contend further that a balance should be struck between Mr Van Vuren's interests and the interests of society in securing itself against the possible perpetuation of crime as a result of his early release. There can be no doubt that the interests of the victims in our society, where violent crimes are prevalent, indeed, have particular cogency. However, the liberty of a sentenced offender, measured from the perspective of his or her eligibility to be considered for release on parole when that offender has reached a consideration date, should not be ignored.

[68] Mr Van Vuren has served more than 15 years of his sentence. The respondents contend that section 136(3)(a), read with the departmental revised "interim" policy, does

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[85] *Kwakwa* above n 70.

not preclude him from being considered for parole before serving 20 years' incarceration. They maintain, however, that Mr Van Vuren is not yet eligible for consideration for placement on parole. Surprisingly, the respondents did not explain the circumstances under which Mr Van Vuren was offered to be considered for placement on parole in terms of the policy and guidelines applicable in 1992. Also, they did not advance any reasons for offering and considering Mr Plank[86] for placement on parole after he had served only 13 years of his sentence.

[69] As pointed out above, Mr Van Vuren's repeated attempts to enquire from the prison authorities, about the criteria relevant to the applicable non-parole period, came to naught. Indeed, the lack of a definite release date constitutes the most difficult adjustment to confinement for all prisoners, particularly offenders sentenced to life incarceration. The failure to inform Mr Van Vuren of the exact date of his consideration for parole has resulted in uncertainty[87] and indeed anguish.

[70] I conclude that Mr Van Vuren has made out a case for his eligibility for consideration for release and placement under community correction in terms of section 136(1) of the Act.

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[86] Above n 15.

[87] In *Sebe v Minister of Correctional Services and Others* 1999 (1) SACR 244 (Ck) at 251G the Court correctly held that—

> "the prisoner, not to mention the prison authorities as well as the family of the prisoner [must] know, with a degree of certainty, that subject to continued good behavior [a sentenced offender] will be released on a given date."

Sadly, this has not been the case in respect of Mr Van Vuren.

[71] There is another matter. In the founding papers, Mr Van Vuren alleged that his right to fair administrative action that is lawful, reasonable and procedurally fair in terms of section 33(1) of the Constitution,[88] has been infringed. This assertion was not persisted with. It is, therefore, not necessary to deal with this contention.

[72] In the light of the conclusion I have reached, it is not necessary to consider the further arguments whether section 136(3)(a) involves an infringement of any legitimate expectation to be considered for placement on parole in terms of the policy applicable in 1992 and whether, section 136(3)(a) unfairly discriminates against offenders serving indeterminate sentences as opposed to those serving determinate sentences. The next issue relates to an appropriate remedy.

Remedy

[73] Section 172 of the Constitution empowers a court when deciding a constitutional matter within its power to make any order that is just and equitable. An appropriate remedy will, in essence, be the relief that is required to protect and enforce the values in the Constitution.[89] A court has a discretion to decide what, in a particular case, the

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[88] Above n 23.

[89] Section 1 of the Constitution.

appropriate remedy should be. This Court, in *Fose v Minister of Safety and Security*,[90] considered the various constitutional remedies a court may grant. It held:

> "Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to ensure the protection and enforcement of these all important rights."[91]

[74] Having found that section 136(1) is applicable it follows, in the light of the construction given to section 136, that the policy and guidelines applicable to Mr Van Vuren are those that were in existence on 13 November 1992, which require him to serve at least 10 years but not more than 15 years of his sentence. Mr Van Vuren has served considerably more than 15 years. In my view he is, therefore, eligible to be considered without delay, for release and placement under correctional supervision in terms of section 136(1) of the Act.

[75] The construction of section 136(1) that embraces offenders, like the applicant, requires that some consideration be given to the construction to be placed upon the institutional mechanisms mentioned in the provision, namely, the Correctional Supervision and Parole Board, and the former Parole Boards. This requires us to consider both which authority, on the wording of section 136(1), would have been

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[90] [1997] ZACC 6; 1997 (7) BCLR 851 (CC); 1997 (3) SA 786 (CC).

[91] Id at para 19.

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.[92] 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. Although section 136(1) refers to the former Parole Boards,[93] the nomenclature under Act 122 of 1991[94] does not. Thus, the logical interpretation of the words "former Parole Boards" in section 136 would be an adoption of a generic understanding of the phrase as referring to whichever authority would have been in charge of the parole regime at a particular time. 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.[95]

[76] A positive action must, therefore, be taken by the Department of Correctional Services, in particular, the CMC[96] and the Correctional Supervision and Parole Board as well as the Minister.[97] An effective remedy, in the circumstances of this case, would be

[92] Above at [27].

[93] As mentioned, "parole boards" were only created and defined in Act 68 of 1993 which came into operation on 1 August 1993. See above n 48.

[94] Above n 45.

[95] Above at [26].

[96] In terms of its function as set out in section 42 of the Act.

[97] In terms of his or her functions as set out in section 75 of the Act.

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. This consideration must be carried out in terms of the policy and guidelines in existence as at 13 November 1992.

Costs

[77] Neither Mr Van Vuren nor the respondents seek an order as to costs. Counsel who represented Mr Van Vuren in this Court, Mr Muller and Mr J Roux were nominated by the Chairperson of the General Council of the Bar to prepare written submissions and appear on behalf of Mr Van Vuren at the instance of the Court. They were instructed by Van Schalkwyk Attorneys. This Court is indebted to counsel and the attorneys for the assistance rendered. In the circumstances, although Mr Van Vuren has been successful, no order as to costs should be made.

Order

[78] In the result, the following order is made:

a) The application for condonation for the late filing of the application for leave to appeal is granted.
b) The application for condonation for non-compliance with the 25 kilometre requirement in terms of rule 11(1)(b) of the Rules of the Constitutional Court is granted.

c) The application for leave to appeal is dismissed.

d) Direct access is granted.

e) The application for an order declaring section 136(3)(a) of the Correctional Service Act 111 of 1998 to be inconsistent with the Constitution is dismissed.

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 the with the provisions of the Correctional Services, 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.

i) There is no order as to costs.

Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J and Skweyiya J concur in the judgment of Nkabinde J.

YACOOB J:

[79] This case represents part of a protracted quest by the applicant to have himself considered for release on parole before he has served 20 years incarceration pursuant to the life sentence that had been imposed upon him. The judgment of my colleague Nkabinde J (majority judgment) concludes that he is entitled to be considered for parole because he has served more than 15 years. Regrettably, I conclude that the applicant is not so entitled. Hence this judgment.

[80] The applicant's effort to be considered for parole in this Court takes the form of an application for leave to appeal against the judgment of the North Gauteng High Court (High Court) dismissing his application for an order, in effect, compelling the respondents to consider him for release on parole. Both the High Court and the Supreme Court of Appeal declined leave to appeal against the High Court judgment. There is also an application for direct access by which the applicant seeks to resurrect an application which he made and subsequently abandoned in the High Court, aimed at declaring a provision in certain parole legislation[1] inconsistent with the Constitution.

Background

[81] Virtually all the facts and circumstances concerning the position of the applicant are common cause. The applicant was sentenced to death on 13 November 1992

[1] Section 136(3)(a) of the Correctional Services Act 111 of 1998 which is discussed later.

consequent upon his conviction of murder and robbery with aggravating circumstances. In 1995 this Court in the *Makwanyane*[2] case set aside the death penalty as being inconsistent with certain provisions of the Bill of Rights contained in the interim Constitution. As a result, on 20 September 2000, the High Court replaced the death sentence[3] that had been imposed upon the applicant with one of life incarceration. The sentence was to run from 13 November 1992.[4]

[82] The applicant contended that, because his sentence was backdated to 1992, the parole regime that should apply to him is that which was applicable to offenders who applied for parole in 1992. If this submission were correct, he would have the right to be considered for parole now that he has served more than 15 years of the life term that had been imposed upon him. The effort by the applicant to achieve this result has involved the contention, at different times either that:

a. The law requiring the parole application to be made after he has served 20 years incarceration is invalid and inconsistent with the Constitution; or
b. The law can be interpreted so that the regime applicable to him is that which applied in 1992.

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[2] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[3] *David Ntsere and Others v S*, Case No A682/2000, Transvaal Provincial Division, 20 September 2000, unreported.

[4] In terms of section 1(11) of the Criminal Law Amendment Act 105 of 1997.

[83] The majority holds that the law concerned is reasonably capable of the construction contended for by the applicant.[5] I am of the view that it is not. The majority refuses the application for leave to appeal and grants the application for direct access. I propose the reverse.

[84] I agree with the majority that the condonation required by the applicant should be granted. It will be useful, at the outset, to summarise the differences between the majority judgment and this one:

a. The majority judgment finds statutory warrant for a discrete category of offender sentenced to life imprisonment, namely, offenders that were sentenced before March 1994 for special treatment. This judgment cannot find any justification for this approach.

b. The majority judgment is premised on the hypothesis that this limited category of offender must be considered for parole in terms of the policies, guidelines and procedures applicable at the date on which they were sentenced. I conclude that this approach is not without difficulty and that offenders would ordinarily be considered for parole in terms of the policies, guidelines and procedures applicable at the date of parole consideration.

I begin to move to the substantive issues by placing the law in issue in context.

The relevant law in context

[5] As described in [82b].

[85] The law that is the subject of evaluation in this case is section 136 of the Correctional Services Act 111 of 1998 (Act). It is a transitional provision, its purpose being to act as a bridge to regulate parole in circumstances where parole provisions in terms of the Correctional Services Act, 1959[6] (old parole regime) were replaced by detailed parole provisions in the Act (new parole regime). The understanding of this bridge can only be enhanced by a brief comparison of the old parole regime with the new one.

[86] The old parole regime, to the extent relevant to this case, was prescribed by sections 63 and 65 of the 1959 Act. They remained in force in the same form[7] from 1993 until 1 October 2004.[8] Section 63 obliged[9] a parole board[10] (old board) to "submit a report" (section 63(1) report) to the Minister for Correctional Services (Minister) or to the Commissioner of Correctional Services (Commissioner), as the case may be, on the "conduct, adaptation, training, aptitude, industry and physical and mental state of such [offender] and the possibility of his relapse into crime".[11] The old board was also obliged

[6] Act 8 of 1959 (1959 Act).

[7] Sections 63 and 65 were inserted into the 1959 Act by section 21 of the Correctional Services Amendment Act 68 of 1993.

[8] When they were repealed by Proclamation R38 of 2004 in terms of GN R8023 GG 26626, 30 July 2004.

[9] Denoted by the use of the word "shall" in section 63(1) of the 1959 Act.

[10] Constituted in terms of section 63 of the 1959 Act.

[11] Section 63(1)(a).

to make recommendations to the Commissioner on the release of certain people on parole[12] (section 63(1) recommendation).

[87] Section 65 of the 1959 Act was more directly concerned with the release of the person serving a sentence of incarceration on parole. Pertinently, the section provided differently for the process by which and the time at which a person sentenced to life incarceration on the one hand, and the people sentenced to more determinate periods of incarceration on the other, could have been considered for and released on parole.

[88] These processes are described briefly. The old board was obliged to send a section 63(1) report on offenders subject to life incarceration to the Minister who, upon receipt of it, was obliged to refer the report to the National Advisory Council for Correctional Services[13] (Advisory Council). The Advisory Council had to consider the report and, having regard to the interests of the community, make a recommendation to the Minister on whether the offender concerned should be released on parole.[14] It is the Minister who was empowered to make the final decision in relation to release on parole.[15] An aspect of this procedure must be stressed. It was the Advisory Council and not the old board that made the recommendation on the release of the offender concerned. The only duty

[12] Section 63(1)(b).

[13] Established by section 7 of the Correctional Services and Supervision Matters Amendment Act 122 of 1991 which substituted section 5B of the 1959 Act.

[14] Section 65(5) of the 1959 Act.

[15] Section 65(6) of the 1959 Act.

imposed on the old board concerning a person serving a sentence of life incarceration was to submit a section 63(1) report to the Minister.

[89] The 1959 Act made no provision for the timing of consideration of parole in relation to people serving life incarceration. The minimum period of incarceration that had to be served, at the time of parole consideration, was governed by ministerial policy from time to time. It is common cause that offenders sentenced to life incarceration could, according to the policy and guidelines applied by the relevant authorities from time to time, be considered for parole[16] only after the expiry of certain minimum periods, depending on when parole was being considered. Different minimum periods were applicable at different times. From 1987 to 1994, parole was considered for offenders who had, at the relevant time, served 10 years in a correctional centre but offenders could, absent exceptional circumstances, only be released after the expiry of 15 years. Then, in March 1994, the minimum period was increased to 20 years. Accordingly from March 1994 to 2004 applications were considered from offenders who had served at least 20 years incarceration.

[90] The parole procedure for people sentenced to more determinate terms of incarceration, and not to life,[17] was different. The Commissioner, instead of the Minister,

[16] I consider the relevant legislation and policies in some detail later.

[17] The old board had no power to release on parole offenders declared dangerous criminals in terms of section 286A of the Criminal Procedure Act 51 of 1977. Section 63(2) of the 1959 Act obliged it to report to the court in terms of section 286B of the Criminal Procedure Act.

made the decision whether to release the offender concerned.[18] That office did so on the basis of a section 63(1) report and a section 63(1) recommendation where a person had been declared a habitual criminal;[19] after considering a report by the old board in the case of a person sentenced to a determinate period of incarceration, to incarceration for corrective training or for the prevention of crime;[20] or without any report or recommendation from any person or body where the person had been sentenced to incarceration for less than six months.[21] The provision in relation to this category of offender was also different in that the minimum period of incarceration that had to be served before parole consideration for different categories of offenders in correctional centres is expressly set out in the section.[22]

[91] We look now at the new parole regime introduced by the Act effective 1 October 2004.

[92] Two parole procedures for offenders serving life incarceration came about. The first existed from 1 October 2004[23] while the second was promulgated exactly five years later.[24] In the first scenario, the new Correctional Supervision and Parole Board[25] (board)

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[18] Section 65(8) of the 1959 Act.

[19] Section 65(7) of the 1959 Act.

[20] Section 65(8) of the 1959 Act.

[21] Section 65(9) of the 1959 Act.

[22] Section 65(4) of the 1959 Act.

[23] When chapters VI and VII of the Act came into force.

[24] When the Act was amended by the Correctional Services Amendment Act 25 of 2008 (Act 25 of 2008).

was to make recommendations[26] to the court.[27] And it was the court that was empowered to release the offender on parole subject to certain conditions, after considering the record of proceedings of the board and its recommendations.[28] That has now changed.[29] Just as in the old parole regime, the board will make recommendations to the Minister.[30] These recommendations, together with the record of the proceedings of the board will be passed on to the National Council for Correctional Services[31] (National Council). The National Council may recommend that the Minister grant parole and the Minister may do so. This procedure is the same as the old one, except that the National Council has replaced the Advisory Council. The minimum incarceration that must be served before parole consideration is now no longer the product of ministerial policy. In terms of either procedure, the offender would have to serve 25 years incarceration to qualify for parole consideration.[32]

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[25] Established by section 74 of the Act.

[26] The version of the process that involved the courts never came into operation in practice, because, as will be pointed out later, the new parole regime becomes operational in practice only in the year 2029, at the time when an offender sentenced to life after 1 October 2004 will be entitled to parole consideration.

[27] Section 75(1)(c) of the Act prior to its amendment by Act 25 of 2008.

[28] Section 78(1) prior to its amendment by Act 25 of 2008.

[29] By virtue of the provisions of Act 25 of 2008.

[30] Section 75(1)(c) as amended by Act 25 of 2008.

[31] Established under section 83 of the Act.

[32] Section 73(6)(b)(iv) of the Act.

[93] As in the 1959 Act, the parole process prescribed by the Act for offenders serving more determinate sentences is[33] different from that for offenders sentenced to life incarceration. In so far as sentences other than life incarceration are concerned, parole to offenders serving a determinate sentence of more than 24 months incarceration is now granted by the board and not by the Commissioner.[34] The board is empowered to grant parole after considering a report of the Case Management Committee.[35] The National Commissioner[36] has the power to place on parole any person sentenced to a term of incarceration of 24 months or less.[37] The timing of parole consideration for offenders sentenced to determinate terms of incarceration is carefully defined. The basic principle is that an offender serving a determinate sentence "may not be placed on parole" until the person concerned has served the non-parole period stipulated in the Act or, in the absence of any stipulation, half the sentence. But any offender who has served 25 years of a sentence or cumulative sentences is entitled to parole consideration.[38] These periods are significantly different from those in the 1959 Act.

[94] This brief comparison of the situation under the old and new parole regimes shows the following:

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[33] It will be convenient to use the present tense in this section of the analysis, even though some of the provisions will become operational in practice only in the future.

[34] In terms of section 75(1)(b) of the Act the board, like the old board, has no power to grant parole in respect of any offender declared a dangerous criminal but is empowered to make recommendations on parole to the relevant court.

[35] In terms of section 75 of the Act. The Committee is established by section 42 of the Act.

[36] Who is referred to as the Commissioner in the 1959 Act.

[37] Section 75(7).

[38] Section 73(6)(a).

a. Neither the old board nor the board has been empowered by the old parole regime or by either procedure in the new parole regime to grant parole to offenders sentenced to life incarceration. The board did have the power to make a recommendation to a court and now has the power to make a recommendation to the Minister. The old board under the 1959 Act did not even have the power to recommend parole for people serving life sentences.

b. The Advisory Council under the 1959 Act had the power to recommend to the Minister that an offender serving life incarceration be placed on parole. The National Council would have had no power to do this during the period 1 October 2004 until the end of September 2009. The board simply made recommendations to a court. But the National Council is now empowered to make recommendations to the Minister concerning the release of offenders sentenced to life incarceration.

c. The Minister had the power to parole offenders sentenced to life in the old parole regime. The power would have been transferred to the court for the first five years of the new parole regime and was restored to the Minister for the future before the courts had the opportunity to exercise the power.

d. The parole procedure for offenders serving life incarceration was the same before October 2004 as it is now except that an institution called the National Council has succeeded the Advisory Council provided for in the 1959 Act.

e. The old board in terms of the 1959 Act had no power to make a final decision in respect of the release of any offender. The old board had the power simply to make recommendations to the Commissioner in relation to offenders serving determinate sentences. On the other hand, the board under the new parole regime does have the power to release offenders serving sentences more determinate than life sentences.

f. The National Commissioner's power to release offenders has been increased in the new parole regime. The Commissioner in the old parole regime could effect a release on parole of offenders serving an incarceration term of six months or less, but the National Commissioner can now do so if the term is 24 months or less.

g. The circumstances and timing concerning the release on parole of offenders serving sentences more determinate than life differ between the old and new parole regimes.

[95] It is now time to present section 136. It provides:

> "(1) 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.

(2) 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).

(3) (a) 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.

(b) The case of a prisoner contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the prisoner under day parole or parole.

(c) If the recommendation of the National Council is favourable, the Minister may order that the prisoner be placed under day parole or parole, as the case may be.

(4) If a person is sentenced to life incarceration after the commencement of Chapters IV, VI and VII while serving a life sentence imposed prior to the commencement, the matter must be referred to the Minister who must, in consultation with the National Council, consider him or her for placement under day parole or parole."[39]

[96] Although section 136 commenced on 14 December 2001,[40] the terms of section 136(1) and section 136(3) have the necessary consequence that section 136 came into force, in practice, on 1 October 2004. This is because section 136 applied to offenders serving sentences immediately before chapters IV, VI and VII of the Act came into operation. Chapter IV commenced on 31 July 2004 while chapters VI and VII on 1 October 2004.

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[39] Section 136(4) in the form in which it appeared before the High Court made use of the term "imprisonment" as opposed to incarceration. I have chosen to quote the new terminology as it appears from Act 25 of 2008.

[40] In terms of GN 1358 of 2001 GG 22930, 14 December 2001.

[97] Section 136, though a transitional measure, will endure long in its effect on offenders sentenced to life incarceration. This is so because it applies to all people who were serving sentences of life incarceration immediately before 1 October 2004, the date of the commencement of chapters VI and VII. This means that offenders serving sentences of life incarceration immediately before 1 October 2004 will not be affected by the new parole regime and will be covered by section 136. The new parole regime will become applicable in practice in respect of offenders who start serving terms of life incarceration on 1 October 2004 and will begin to be applied to them ordinarily only on 1 October 2029, that is, after the minimum period of 25 years that must now elapse before parole applications can be countenanced in terms of the new parole regime. It must be borne in mind therefore that the transitional provisions contained in section 136 will be applied between the date on which they came into existence until at least 30 September 2024.[41]

[98] This concludes the description of the legislative setting and we can return to the applications before us. I have already said that the applicant requires leave to appeal against the judgment of the High Court, or direct access to this Court to enable him to revive his abandoned challenge to the constitutional validity of section 136(3)(a). It is

[41] It is difficult to know whether offenders who are not granted parole on the first occasion fall to be considered in terms of the new parole regime or the transitional provision but this does not matter.

therefore first necessary to decide whether the application for leave to appeal should be granted. The issues that arise can more appropriately be determined after that.

The application for leave to appeal

[99] We start with a short account of the applicant's journey to this Court. The applicant began with an urgent application in the High Court asking for an order, in effect, that he be considered for parole. He contended that section 136(3)(a) applied to him and would require him to serve 20 years incarceration before he was to be considered for parole. The applicant sought to remove this obstacle by having section 136(3)(a) declared to be inconsistent with the Constitution. His case went further than that, if section 136(3)(a) were to be declared inconsistent with the Constitution, section 136(1) would become applicable to him. On his construction of section 136(1), the applicant would be entitled to parole consideration in terms of the guidelines that were applicable in 1992.

[100] It was contended on behalf of the respondents that whether section 136(3)(a) was inconsistent with the Constitution was immaterial. This is because, even if there were inconsistency, section 136(1) would in any event have required the applicant to serve 20 years incarceration before he became entitled to parole consideration. This, on the basis that section 136(1) required parole to be considered at the same time and in the same way as it would have been "prior to" 1 October 2004. That policy, which had been applicable for a period of 10 years before 1 October 2004, entitled the applicant to parole

consideration only after 20 years had been served. The issue of the constitutionality of the provision would therefore, on the respondents' submission, not arise.

[101] Judgment in the urgent application was delivered by Ellis AJ.[42] He refrained from deciding whether, if section 136(1) was applicable to him, the applicant would become entitled to parole consideration after serving 20 years or 15 years incarceration. The Court held that section 136(3)(a) was applicable to the applicant[43] and that the constitutional challenge was not academic.[44] Ellis AJ accordingly postponed the application so that affidavits could be filed in relation to the merits of the constitutionality of section 136(3)(a).[45]

[102] Before affidavits were filed, the parties came to know that the constitutionality of section 136(3)(a) was to be considered by the Full Court of the High Court in the case of *Derby-Lewis*.[46] The applicant's case was postponed until after the *Derby-Lewis* case had been decided.

[103] Although it is true that the *Derby-Lewis* case was to consider the constitutionality of section 136(1) and 136(3)(a), the basis for the unconstitutionality relied upon in that

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[42] *Van Vuren v Minister of Correctional Services and Others*, Case No 37771/08, North Gauteng High Court, Pretoria, 11 September 2008, unreported.

[43] Id at para 16.

[44] Id at para 19.

[45] Id at paras 20-2.

[46] *Derby-Lewis v Minister of Correctional Services and Others* 2009 (2) SACR 522 (GNP).

case had nothing to do with the nature of the applicant's case. We must remind ourselves that the applicant wished to have section 136(3)(a) declared unconstitutional so as to open the way to his contention that he was entitled to parole consideration within 15 years on his construction of section 136(1) of the Act. It is plain from the *Derby-Lewis* case that the declaration of invalidity there was aimed at ensuring that Mr Derby-Lewis's application for parole was considered, not by the board, in terms of section 136(1), nor by the Minister on the recommendation of the National Council in terms of section 136(3)(b), but by a court. Indeed, the timing of Mr Derby-Lewis's application was not in dispute. It was common cause in that case that Mr Derby-Lewis would have the right to parole consideration in terms of the relevant policy after 15 years incarceration. This was based upon the respondents' contention that the relevant policy, applicable before 1 October 1994 should apply to him. This policy entitled Mr Derby-Lewis to parole consideration ordinarily after 20 years incarceration, but after 15 years only because he was more than 65 years old.

[104] The issue of the constitutionality of section 136(3) on the basis contended for by Mr Derby-Lewis was nonetheless relevant to his case because he did not want his parole application to be considered by the Minister. On this issue, the Full Court held that the whole of section 136(3) was not relevant to Mr Derby-Lewis and that he was covered by

section 136(1) of the Act.[47] In coming to this conclusion the Full Court held that Ellis AJ was wrong in finding that section 136(3) applied to the applicant.

[105] The Full Court had to and did pronounce on whether section 136(3) was applicable to Mr Derby-Lewis, a person in the position of the applicant.[48] That Court did not have to decide and did not decide what the consequences of the applicability of section 136(1) were to people in the position of the applicant. That, as I have already said, was common cause. The *Derby-Lewis* judgment is therefore not authority for the proposition that the application of section 136(1) to offenders in the position of the applicant meant that all offenders in that position will have to serve 20 years incarceration before parole consideration, unless they have reached the age of 65 when the service period reduces to 15 years.

[106] The judgment does mean, however, in my view, that the whole of section 136(3) is not applicable to people in the position of Mr Derby-Lewis. It also means that only that part of section 136 represented by subsection (1) is applicable to Mr Derby-Lewis. It follows from this that, on the *Derby-Lewis* judgment, section 136(3) (not only section 136(3)(a)) is not applicable to people in the position of the applicant. Section 136(1) is the only part of section 136 applicable to him.

[47] Id at 531E-F.

[48] Save for the fact that the applicant is not yet 65 years old.

[107] It will be recalled that the applicant had, until the delivery of the *Derby-Lewis* judgment, contended that section 136(3)(a) did apply to him. Consequently, the unconstitutionality of the section was a prerequisite to the achievement of his end namely, to be considered for parole after serving 15 years incarceration. The delivery of the *Derby-Lewis* judgment understandably changed all that because, if section 136(3)(a) was not applicable to him, his constitutional attack would become irrelevant. He therefore made an about turn in supplementary heads of argument. The applicant contended that that he was covered by section 136(1), that a proper interpretation of section 136(1) would have the consequence that the policy applicable to offenders who were considered for parole during 1992 would be applicable to him, entitled him to apply for parole. He also put up another argument (which had been relied upon by the State) that section 136(3)(a) created an entitlement to apply for parole and was therefore different from the policies which would have been applicable before 1 October 2004 in that the policies gave him no entitlement to apply for parole.

[108] The High Court adjudicated the applicant's case[49] on the basis that it was about the constitutionality of the whole of section 136[50] and interpreted the judgment of the Full Court, by which it was bound,[51] to mean that "section 136 is constitutionally compatible and that it does apply to the applicants."[52] Elsewhere, the Full Court judgment is

[49] Which was heard together with another application involving seven other applicants.

[50] *J L van Vuuren* above n 1 at 3.

[51] Id at 6.

[52] Id at 5.

interpreted as having "authoritatively laid down that section 136(1) applies to all persons serving life sentences including the applicants."[53] The supplementary argument proffered by the applicants was not considered by Bertelsmann J who dismissed the applicants' claim without more.

In this Court

[109] In his application for leave to appeal the applicant complains that "the Court *a quo*" erred in finding that "I had no entitlement to be considered for parole prior to serving twenty years" and that the High Court erred in holding that "I could not rely on section 136(1) whereas the section makes provision for prisoners serving sentences immediately prior to the commencement of the Act to be subject to the provisions of the Correctional Services Act 8 of 1959". The application for leave to appeal contends for the construction that section 136(1) applies to him, that is, for the construction which the *Derby-Lewis* judgment placed on section 136. The application for leave to appeal has not been abandoned. It is still before us and we have an obligation to consider it.

[110] Ellis AJ interpreted section 136 to mean that the applicant was caught by the provisions of section 136(3)(a). The *Derby-Lewis* judgment's construction of section 136 led to the conclusion that section 136(3) does not apply to people in the position of the applicant as they are entitled to proceed in terms of section 136(1). The applicant went this way and that on this issue but, relied on the *Derby-Lewis* judgment in the High Court

[53] Id at 6.

and by implication in the application for leave to appeal to this Court. He squarely raised the issue whether he was entitled to have his parole considered in terms of section 136(1). The High Court, by dismissing the applicant's case, implied that section 136(3)(a) was applicable to the applicant.

[111] The question to be decided in the application for leave to appeal therefore is whether the applicant is subject to the provisions of section 136(1). If this question is decided in his favour, the application for direct access falls away. If it is not, in the sense that he is subject to the provisions of section 136(3), then the question of the constitutionality of section 136(3), raised in the application for direct access, will have to be decided. The application for leave to appeal must therefore be decided before the application for direct access is considered. Ordinarily, we should not reach the issue of the constitutionality of a law unless we have to.[54]

[112] The interpretation of section 136 in order to determine whether subsection (3)(a) is applicable to the applicant and other people in his position is a constitutional matter of importance. The constitutionality of section 136(3)(a) is also of considerable importance, but becomes relevant only if it is held that section 136(3)(a) is applicable to the applicant.

[54] *Nyathi v MEC for the Department of Health, Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 149; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21; *Zantsi v Council of State, Ciskei, and Others* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at paras 2-5 and *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59.

[113] There are many people in the position of the applicant. Indeed all the people who were sentenced to life incarceration during the period 1989 until 1994 would want to know whether subsection (3) applies to them.[55] It is therefore in the interests of justice that the application for leave to appeal should be granted and that the interpretation of section 136 as a whole should be considered before discussing the question whether the application for direct access should be granted. I would therefore propose that the application for leave to appeal be granted.

Section 136 interpreted

[114] I assume, without deciding, that the construction of section 136 which renders subsection (3)(a) applicable to the applicant and all the people in his position would, at the very least, limit some of their rights in the Constitution. I would accordingly proceed on the basis that, if the provision could be reasonably interpreted to mean that the applicant falls within the purview of section 136(1), I should adopt that construction.[56] We must also bear in mind that the purpose of section 136 is to provide a bridge between the old parole regime which operated until 2004 and the new one.

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[55] Offenders sentenced in 1988 or before would be entitled to parole because they would have served the 20 year term while those who began their sentences after March 1994 will, in any event, be subject to the 20 year term.

[56] *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) at para 119; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72; *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 22; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* above n 54 at paras 23-4 and *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85.

[115] The wording of section 136(1) is wide enough to include all prisoners including those who are serving life sentences. But its meaning must be gathered not just from its language but also from the context in which it occurs. This means it must be construed in the context of section 136 as a whole. The applicable principles of interpretation are those set out in *Bato Star*[57] where this Court said that:

> "It is no doubt true that it is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning. But it is also a well-known rule of construction that words in a statute should be construed in the light of their context."[58]

In this regard we referred to Schreiner JA's oft-quoted passage[59] where he said that:

> "Certainly no less important than the oft-repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together."

[57] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* above n 56.

[58] Id at para 89.

[59] In his dissenting judgment in *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 662G-663A. Quoted in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* above n 56 at para 89.

[116] We also relied on the following passage—

> ". . . the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene."[60]

We emphasised that:

> "The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous."[61]

We also referred to the *Thoroughbred Breeders'* case[62] where the Supreme Court of Appeal held that:

> "The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914D-E:
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>> 'I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'"[63]

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[60] *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* above n 59 at 664H. Quoted in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* above n 56 at para 89.

[61] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* above n 56 at para 90.

[62] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA).

[63] Id at 600F-G. Quoted with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* above n 56 at para 90.

[117] While the wording of section 136(1) may be wide enough to include offenders sentenced to life, its meaning must be determined in the light of the provisions of section 136 as a whole: in particular, section 136(2) which deals with those sentenced to determinate sentences and section 136(3) which is concerned with offenders sentenced to life. These subsections provide the context within which subsection (1) must be construed and thus contribute to revealing its meaning. Thus subsection (2) tells us that "a prisoner who is serving a determinate sentence of imprisonment as contemplated in subsection (1). . . must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959". (Emphasis added.) The underlined portion makes it plain that one of the groups of offenders that subsection (1) has in mind are those serving a determinate sentence and tells us how their credits are to be calculated.

[118] Then we have subsection (3). In the first place it refers to offenders sentenced to life. In the second place it does not, as subsection (2) does, refer back to subsection (1). Instead it treats these offenders as though they are not contemplated in that subsection. And, in the third place, it prescribes how to manage the parole of this group of offenders: the National Council must make recommendations to the Minister who will then decide the question of parole.

[119] Section 136 is a transitional provision. It recognises that prior to October 2004, offenders were subject to different release and parole periods that changed from time to

time. More importantly, it takes account of the reality that the statutory bodies that may have been responsible for making recommendations or decisions may no longer exist or the decision may now be in the hands of a different authority. The decision whether to release an offender on parole was, for example, that of the Minister, then that of the courts and then back to the Minister. To address this situation a decision was taken that all those sentenced to life will be dealt with by the National Council which makes the recommendation to the Minister who decides whether the prisoner is to be released on parole. In this way, the provision avoids a situation where the parole must be recommended by a statutory body that no longer exists or be decided by an authority that no longer has the power to do so. This is necessary to ensure uniformity in decisions regarding parole.

[120] Construed and understood in the context of section 136 as a whole, subsections (1) and (2) concern offenders who are serving determinate sentences while subsections (3) and (4) with those offenders who are serving life sentences. Therefore subsection (3) qualifies subsection (1) by limiting its application to those who are not serving life.

[121] In addition there are textual differences between subsections (1) and (2) on the one hand and subsection (3) on the other hand, that lend support to this construction of section 136. The former refers to consideration for "release and placement" while the latter uses the phrase "to be considered for day parole and parole". This language

suggests that subsection (1) is about those offenders who are serving determinate sentences and not those who are serving life sentences.

[122] The conclusion that section 136(3)(a) does not apply to people in the position of the applicant has its foundation in the premise that section 136(1) does indeed apply to them. This premise must therefore be tested. It is true that, standing alone, the words "[a]ny person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII" could convey the impression that the section applies to all offenders regardless of whether they serve determinate or indeterminate incarceration. But the words do not stand alone. It is therefore necessary to see whether the rest of section 136(1) supports this interpretation or runs counter to it.

[123] If section 136(1) applies to people sentenced to life incarceration, then, in the words of the subsection they are "to be considered (for parole) by the Correctional Supervision and Parole Board". This is a reference to the board appointed in terms of the Act and not the old board.

[124] The implication is that no other entity is involved in the consideration of parole and that the board would make the final decision whether parole should be granted for this category of offender. This provision makes sense if it is applicable to offenders who have been sentenced to more determinate sentences of incarceration than life. This is because this category of offender could be considered for parole by the Commissioner on

the recommendation of the old board in terms of the old parole regime, and by the board in the new. That the board would be the final arbiter on parole for offenders sentenced to life incarceration is more difficult to comprehend if we recall that the Minister was the final arbiter of parole in the old parole regime; the sentencing court decided this finally in the regime that existed during the period 2004 to 2009; and the Minister is again the final arbiter today.

[125] The difficulty is compounded if we bear in mind that the old board had no power in the parole consideration process of people sentenced to life incarceration in the old parole regime and that the board, the final arbiter of parole in the transition, has no power today except a reporting one. To make matters worse, on the construction that subsection (1) applies to people sentenced to life incarceration, the National Council, which makes recommendations to the Minister on parole releases today, would have no role at all in the parole process of this category of offender in the transitional provision. The National Council is the successor to the Advisory Council which had the same recommending role in the old parole regime. And if we understand that the transitional regime will remain in force until 2024, the notion that the legislature purported to keep the Minister, the final parole arbiter, out of the process in the transition, is unthinkable.

[126] The next requirement of section 136(1) that is material provides that the board must consider parole "in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters." Again, the transitional scheme is

coherent if section 136(1) is applicable to offenders serving determinate sentences. The old board had a recommending role and would have applied certain policy and guidelines in relation to this category of offender and, presumably, the board would have access to the policy and guidelines as well as to the 1959 Act. This information would enable the board to satisfy the requirements of section 136(1). But the old board had a reporting function and no other role to play in the granting of parole to offenders serving life incarceration. The old board would have applied neither policy nor guidelines in connection with the release of these offenders because it had no role in the process. It is bizarre to require the old board to find and take into account non-existent policy and guidelines. The legislature could never have contemplated introducing this impossibility into the statute book.

[127] It has been pointed out that, if section 136(1) is applicable to all sentenced offenders including offenders sentenced to life, it must follow that no other entity has any role in the process. This would mean that the parole procedure for all sentenced offenders would be identical. The question that must be asked is whether this consequence could be consistent with the legislative purpose. The old parole regime and the new one set out different parole procedures and mechanisms for offenders sentenced to life and those sentenced to more determinate sentences. The Advisory Council and the Minister were involved in the process for offenders sentenced to life in the old parole regime, while the National Council and the Minister will be integral to the process at the end of the transitional period. Lesser offenders were considered for parole by the

Commissioner on the recommendation of the old board in the old parole regime and by the board or the National Commissioner in the new. There are obvious cogent reasons to differentiate between parole processes in the light of the seriousness of offences. But I can think of no reason, cogent or otherwise, for abolishing the differentiation for the transitional period and reinstating it at the end of the transition.

[128] The majority judgment appears to recognise the difficulties attendant upon the board being the only final arbiter and the exclusion of at least the Minister from the process of parole consideration of offenders sentenced to life incarceration. Instead of concluding that this points away from section 136(1) being applicable to offenders other than those serving determinate sentences, the majority is driven to interpret the words "former Parole Boards" to mean "whichever authority would have been in charge of the parole regime at a particular time."[64] The majority judgment then concludes that the parole application by Mr Van Vuren should be considered by the "CMC, the National Correctional Supervision and Parole Board and the Minister."[65]

[129] There are three difficulties with this approach. The first is that section 136(1) does not require the former parole boards to consider parole applications made in that section. Section 136(1) requires parole in terms of that section to be considered by the "Correctional Supervision and Parole Board in terms of the policy and guidelines applied

[64] See [75].

[65] Id.

by the former Parole Boards". It is therefore not enough to find equivalents for the former parole boards though this is indeed necessary to identify the policies and guidelines that are to be applied. The majority judgment needs to go further and determine the entity that is to consider the parole application. That judgment would have to equate the "Correctional Supervision and Parole Board" which is required to consider section 136(1) parole applications on the one hand with the "CMC, the Correctional Supervision and Parole Board and the Minister" on the other; the former would have to be interpreted to mean the latter. With respect, I can find no justification for this.

[130] Secondly, the majority judgment brings the Case Management Committees into the picture on the basis that they, like the Institutional Committee of old, is empowered to submit a report to the National Council. But the Case Management Committee has no role in relation to offenders serving life sentences. Its role is strictly limited to offenders serving determinate sentences of more than 24 months.[66] This in my view comes close to

[66] Section 75(1) of the Act provides:

> "(1) A Correctional Supervision and Parole Board, having considered the report on any sentenced offender serving a determinate sentence of more than 24 months submitted to it by the Case Management Committee in terms of section 42 and in the light of any other information or argument, may—
>
> (a) subject to the provisions of paragraphs (b) and (c), place a prisoner under correctional supervision or day parole or grant parole and, subject to the provisions of section 52, set the conditions of community corrections imposed on the sentenced offender;
>
> (b) in respect of any prisoner having been declared a dangerous criminal in terms of section 286A of the Criminal Procedure Act, make recommendations to the court on the granting of the placement under correctional supervision or day parole or parole and on the period for and, subject to the provisions of section 52, the conditions of community corrections imposed on the sentenced offender; and
>
> (c) in respect of any sentenced offender serving a sentence of life incarceration, make recommendations to the Minister on granting of day parole or parole, and, subject to

rewriting the legislation and hence confers upon legislative bodies powers and duties those bodies do not have.

[131] The third problem with the remedial approach adopted is that the National Council is left out of the process altogether when it is an integral part of the process in terms of the Act. As I have already pointed out, the board makes recommendations to the Minister. These are forwarded to the National Council who must in turn make a recommendation to the Minister.

[132] Regard must now be had to the rest of section 136. Subsection (2), in my view, makes it even more plain that subsection (1) of section 136 is restricted in its application to offenders serving determinate sentences. The subsection talks about "a prisoner who is serving a determinate sentence of imprisonment as contemplated in subsection (1)".

[133] The next hurdle in the way of the contention that section 136(3) does not apply to the applicant in the circumstances, is that, if that were to be so, subsection (3) would serve no rational or reasonably identifiable purpose. It has been suggested that section 136(3) creates some kind of new entitlement to parole consideration for offenders serving life incarceration, a right that was never available to this kind of offender before. Indeed, the respondents put forward the interesting thesis that section 136(1) creates no

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the provisions of section 52, the conditions of community corrections to be imposed on such an offender."

entitlement to parole consideration, and that consideration in terms of subsection (1) is somehow discretionary. As I understood the argument, considerable reliance was placed on the circumstance that subsection (3)(a) expressly embraces the concept of entitlement while section 136(1) does not.

[134] The fact that the word "entitled" appears in subsection (3) but not in subsection (1) is not significant. An examination of subsection (1) leaves no doubt that the category of offender contemplated by that subsection would also be entitled to parole consideration. Any person encompassed by subsection (1) "is to be considered for" release on parole by the board in terms of the policy and guidelines applied by the old board. I do not understand how and why it can be said that these words do not create an entitlement to parole consideration. Indeed, the majority comes to the conclusion that section 136(1) entitles the applicant to parole consideration, for there can be no other basis for the order in the applicant's favour. If the applicant was not entitled to parole consideration, he would not be entitled to an order.

[135] Let us assume for one moment that section 136(1) creates no entitlement. What does the entitlement created by section 136(3) mean in practice? Does it mean, for example, that an offender has an entitlement to parole consideration after 20 years in terms of subsection (3), even if that offender had been considered for parole in terms of subsection (1), say, three months earlier?

[136] The interpretation of section 136 must therefore be approached on the basis that section 136(1) does entitle a person covered by that subsection to parole consideration. Once this is so, it must be accepted that section 136(3) would be superfluous if offenders sentenced to life incarceration fall within section 136(1). This is another reason why the construction that section 136(1) applies to offenders sentenced to life incarceration is difficult to endorse. The conclusion of the Full Court that section 136(1) applies to a person in the position of the applicant[67] is unmotivated, and supported only by the statement that Ellis AJ had not been referred to the legislation and its history in the detail in which the Full Court had been. The conclusion of Ellis AJ was undoubtedly correct.

[137] The approach of the majority judgment to this dilemma is to hold that section 136(3) applies only to offenders sentenced after March 1994 and that section 136(1) applies to all offenders serving determinate sentences and to a discrete category of offenders serving life imprisonment namely to those offenders who were sentenced to life imprisonment before March 1994.[68] This distinction is not apparent on any reading of section 136. Subsection (3) is broad in its operation. It applies to "[a]ny prisoner serving a sentence of life imprisonment immediately before the commencement of Chapters IV, VI and VII". The proposition involves replacing the words "any prisoner" in this subsection with the words "any prisoner sentenced after March 1994".

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[67] *Derby-Lewis* above n 46.

[68] See [59].

[138] Section 136(1) is likewise broad in its operation referring to "[a]ny person serving a sentence of imprisonment". If not for the provisions of section 136(3), the section would apply to every offender serving a sentence of incarceration. There is no warrant for limiting the section to "any person serving a sentence of imprisonment, excluding prisoners sentenced to life imprisonment after March 1994". The majority judgment appears, on this score, to find favour with the judgment of the Full Court in the *Derby-Lewis* case.[69] But that judgment was to the effect that section 136(1) covers the field in that it applied to all offenders whether serving determinate sentences or not. The *Derby-Lewis* judgment makes no distinction between those offenders sentenced after March 1994 and those sentenced before March 1994. The distinction is novel and, in my view, inconsistent with the judgment in *Derby-Lewis*. I would respectfully suggest that there is a difficulty in, on the one hand, accepting the correctness of the *Derby-Lewis* judgment and, on the other hand, postulating that section 136(1) makes the distinction between offenders sentenced before March 1994 and those sentenced after March 1994.

[139] Leaving aside the issue of the period that the applicant would have had to serve before he would have been entitled to parole consideration in terms of the legislation, I have considerable difficulty with the proposition that the policy, guidelines and procedures to be determined would apply to offenders sentenced during the period when they are applicable. This would mean, if correct, that the policy, guidelines and procedures determined in March 1994 would become applicable only after March 2014

[69] See [56].

because they should apply only to those sentenced after March 1994. It would also mean for example, that the provisions of the Act applicable between 2004 and 2009 to the effect that the court would determine parole on the basis of a report provided by the board would be applicable only to those sentenced to life incarceration during the period 2004 to 2009. On the basis that parole applications would be considered only after 25 years, courts would have to consider parole applications by offenders sentenced during the period 2004 to 2009 during the years 2029 to 2034. I would suggest that procedures determined in 1994 would necessarily apply to all applications for parole in 1994 irrespective of when the offenders were sentenced. The idea that a person sentenced in 1974 must be considered for parole in 1994 in terms of the policies applicable in 1974 cannot be accepted. Indeed the policies and guidelines must be determined in terms of societal conditions at the time that parole applications are considered, not at the time that the offenders concerned were sentenced.

[140] I conclude that section 136, read as a whole, constructs an acceptable bridge between the old and new parole regimes. Offenders sentenced to life incarceration, whose parole was considered by the Minister on the recommendation of the Advisory Council in the old parole regime and by the Minister on the recommendation of the National Council in the new parole regime, will be considered for parole during the transition by the Minister, on the recommendation of the National Council. Parole consideration for offenders sentenced to more determinate terms, who were considered for parole by the Commissioner on the recommendation of the old board in the old parole

regime and by the board in the new parole regime, will be entitled to parole consideration by the board during the transition. This scheme makes sense.

[141] The assumption in favour of the applicant that section 136 would be less constitutionally compliant if subsection (3) were applicable to the applicant and other offenders in his position does not assist. The section is not reasonably capable of an interpretation that would place the applicant and other people in his position within the scope of section 136(1). The conclusion that offenders sentenced to life incarceration fall to be considered for parole in terms of section 136(3), not in terms of section 136(1), is inevitable.

Direct access

[142] The finding that section 136(3) applies to the applicant and other offenders in his position means that the applicant has no alternative but to try to have section 136(3) declared to be inconsistent with a provision of the Bill of Rights in our Constitution. Absent the declaration of invalidity, the applicant is precluded from parole consideration until he has served 20 years incarceration. It is therefore necessary to decide the application for direct access which the applicant has made in order to secure an order that section 136(3) is constitutionally invalid.

[143] This Court must grant direct access if it is in the interests of justice to do so.[70] And it will be in the interests of justice to grant direct access if there are exceptional circumstances.[71] The requirement of exceptional circumstances increases in importance in a case like this one in which this Court will be the court of first and last instance in evaluating the constitutionality of the impugned law.[72]

[144] A factor that is against the granting of direct access is that the applicant deliberately abandoned his case on unconstitutionality because of his perception that it would be to his advantage to do so in the light of the judgment of the Full Court. But we must also not forget that the applicant was not legally represented when he made the decision to abandon. The applicant was, however, legally represented when he tried to resurrect his unconstitutionality bid in this Court. Yet there was no affidavit explaining why the constitutional attack on section 136(3) was abandoned. The truth of the matter is that the applicant's written argument in support of direct access gives no indication of

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[70] Section 167(6)(a) of the Constitution.

[71] *Moloi and Others v Minister for Justice and Constitutional Development and Others* [2010] ZACC 2; 2010 (2) SACR 78 (CC); 2010 (5) BCLR 497 (CC) at para 31; *Van Vuren v Minister of Justice and Constitutional Development and Another* [2007] ZACC 11; 2007 (8) BCLR 903 (CC) at para 11; *Mnguni v Minister of Correctional Services and Others* [2005] ZACC 13; 2005 (12) BCLR 1187 (CC) at para 6; *De Kock v Minister of Water Affairs and Forestry and Others* [2005] ZACC 12; 2005 (12) BCLR 1183 (CC) at para 3; *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 and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 11 and *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 9.

[72] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* [2010] ZACC 3; 2010 (5) BCLR 422 (CC) at para 21; *Lane and Fey NNO v Dabelstein and Others* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 5; *National Gambling Board v Premier, KwaZulu-Natal, and Others* [2001] ZACC 8; 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 29 and *Bruce and Another v Fleecytex Johannesburg CC and Others* above n 71 at paras 7-8.

why the attack on the validity of the section was abandoned and does not even make the concession that abandonment had occurred. Somewhat disingenuously, in my view, the argument is to the effect that direct access is sought if this Court holds that the constitutional attack had been abandoned.

[145] There are, however, more weighty considerations against granting direct access. The first of these is that the issues that arise for determination are far from straight-forward. To succeed in his attack on section 136(3), the applicant will need to demonstrate that he will suffer a substantial disadvantage consequent on the applicability of section 136(3) to him.

[146] The State contended that the consequences for the applicant will remain materially the same whether parole consideration for him is determined by subsection (1) or subsection (3). The applicant will, in either event, says the State, be entitled to parole consideration only after he has served 20 years incarceration. The argument cannot be said to be completely without substance. There is no doubt that, because the applicant's sentence was to run from November 1992, he must be placed in the same position as all other offenders who were sentenced to life incarceration at that time. That is arguably fundamentally different from the notion that he must be placed in the same position as those offenders who were entitled to parole consideration in November 1992. The argument that the applicant has not been materially disadvantaged needs to be carefully

addressed. Absent a material disadvantage, it would be difficult to establish that any of the rights in the Bill of Rights were limited.

[147] The question whether the applicability of the changed policy to the applicant is constitutionally objectionable is complex. I say no more about this at this stage except that foreign jurisprudence reflects a difference of opinion on this question. The complexities are, for example, reflected in two foreign judgments.[73]

[148] Even if the applicant overcame these obstacles and established the limitation of a constitutional right, the issue of justification is itself not uncomplicated. The State has proffered evidence to the effect that the policy was changed because it was anticipated that, if the death penalty were to be set aside as being inconsistent with the Constitution, offenders under life incarceration would have been guilty of more serious offences than offenders already serving life incarceration.

[149] It is therefore not in the interests of justice to consider the application for direct access though I have grave doubts as to whether it would succeed.

[150] This being a minority judgment, there is no point in proposing an order.

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[73] *Garner, Former Chairman of the State Board of Pardons and Paroles of Georgia, et al. v Jones* 529 US 244, 256-7 (2000) and *Kafkaris v Cyprus* 21906/04 [2008] ECHR 143 at para 151.

Ngcobo CJ concurs in the judgment of Yacoob J.

For the Applicant:	Advocate GC Muller SC and Advocate J Roux instructed by Van Schalkwyk.
For the First and Second Respondents:	Advocate MTK Moerane SC, Advocate BR Tokota SC, Advocate TWG Bester and Advocate DWM Broughton instructed by the State Attorney, Pretoria.