REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 72348/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

PRINCEDOM MABANDLA NOBATANA	1st Applicant
SYLVANUS MOREOTSILE MADIBE	2nd Applicant

And

THE HEAD OF ROOIGROND CORRECTIONAL CENTRE	1st Respondent
THE DEPUTY HEAD OF ROOIGROND CORRECTIONAL CENTRE	2nd Respondent
THE CHAIRPERSON OF THE PAROLE BOARD	3rd Respondent
CHAIRPERSON OF THE CASE MANAGEMENT COMMITTEE	4th Respondent
THE MINISTER OF CORRECTIONAL SERVICES	5th Respondent

J U D G M E N T

MASHILE, J:

[1] This is an application by two inmates currently serving their imprisonment term at the Rooigrond Correctional Centre in Mafikeng, North West Province. They approached this court seeking relief that:

1.1 They forthwith be considered for placement on parole;

1.2 They be awarded maximum credits under section 22A of the Correctional Services Act No. 8 of 1959 (hereinafter "Act 8 of 1959");

1.3 It be declared that notwithstanding the sentence imposed, all offenders are qualified to be placed on parole on completion of one third of their sentences.

[2] The Respondents made it plain that they oppose the granting of the relief sought in paragraphs 1.1 and 1.3 above. Equally the Respondents made it clear that they do not oppose the granting of the relief that the Applicants be awarded maximum credits under section 22A of Act No. 8 of 1959.

[3] The First Applicant has been in custody since 25 June 1999 and was

convicted on two counts of murder and one of attempted robbery. On 2 February 2001, the court imposed a sentence of two life terms and fifteen years direct imprisonment respectively. The sentence were ordered to run concurrently. At the time of the hearing of this matter on 5 August 2013, the First Applicant had accordingly served 12 years 5 months of his sentence.

[4] The Second Applicant was arrested on 18 October 1998 and was convicted and sentenced on 28 September 2000 to life imprisonment for one count of murder and a further 20 years for one count of robbery. Like in the case of the First Applicant, his sentences were decreed to run parallel. The Second Applicant had, by the time this matter was heard on 5 August 2013, therefore served 12 years 9 months of his sentence.

[5] For their contention that they be considered for placement on parole forthwith as they have served ten years of their sentences, the Applicants rely on *Van Vuuren v Minister of Correctional Services & Others 2010 (12) BCLR 1233 (CC).* In this regard, the Applicants aver that:

> 5.1 "*the court found that under the old Correctional Services Act, Act No 8 of 1959, Van Vuren and other inmates who were sentenced to life imprisonment before the 1st October 2004 qualified for consideration for placement on parole* after serving ten years imprisonment on their sentences";
>
> 5.2 "*a Court Order was issued ordering the minister to consider, with immediate effect all inmates who had already served ten years of their sentences and who were sentenced before 1 October 2004 to life imprisonment, for possible placement on parole*".

[6] The Respondents assert that the Applicants' approach on the Van Vuuren case SUPRA is completely misguided. A proper perspective of the facts in Van Vuuren is that Van Vuren was sentenced to death on 13 November 1992. After the death penalty was declared unconstitutional, his death sentence was converted in September 2000 to life imprisonment which was antedated to the date of his original sentence, 13 November 1992.

[7] The policy which applied on 13 November 1992 (to which date Van Vuuren's sentence of life incarceration was backdated) was that offenders serving life sentences were required to serve ten years of their sentence prior to consideration for placement on parole but that placement on parole would occur only in exceptional cases before fifteen years of the sentence had been served.

[8] Van Vuuren who fell under section 136(1) of the Correctional Services Act No. 111 of 1998 (hereinafter "Act No. 111 of 1998"), argued that he was entitled to be considered for parole in terms of the policies and guidelines which applied at the date of his original sentencing on 13 November 1992 and the court agreed.

[9] The Respondents concession that they are prepared to entertain the Applicants on the issue of the award of maximum points leaves only two questions to be determined by this court. Those issues are that:

9.1 That the Applicants at once be considered for placement on parole; and

9.2 It be declared that notwithstanding the sentence imposed, all offenders are qualified to be placed on parole on completion of one third of their sentences.

[10] The legal position regarding the above two issues is regulated by Section 136(1) of Act No. 111 of 1998 (hereinafter "Act No. 111 of 1998"), which provides as follows:

> "***136. Transitional provisions –***
>
> *(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 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.*"

[11] Chapter IV of Act 111 of 1998 came into operation on 31 July 2004 whilst Chapters VI and VII came into operation on 1 October 2004. The operative date for purposes of section 136(1) of Act No. 111 of 1998 is therefore 1 October 2004. Offenders who were sentenced before this date are considered for placement on parole in terms of the policy and guidelines applied by the former Parole Boards.

[12] The policy applied by Parole Boards with regard to the consideration of offenders who are serving life imprisonment for placement on parole has been inconsistent. Thus, the applicable policy at the time of the sentencing of each of the Applicants required inmates serving life sentence to serve twenty years imprisonment prior to consideration for placement on parole subject to certain specified exceptions, which do not apply in this case.

[13] When one contrasts the above with that which applied in the Van Vuuren case which required a period of ten years to have been served, it is apparent that in consequence of the different policies that applied at various stages, not all prisoners who fell under Act No. 111 of 1998 would qualify without exception. The ultimate determining factor is the policy that found application at that pertinent period hence the distinction between 1992 on the one hand and 2000 and 2001 on the other. The error the Applicants make is to apply the Act indiscriminately without any reference to the relevant policies and guidelines.

[14] The constitutional court held in van Vuuren case supra that Section 136(1):

14.1 Refers to any person serving a term of incarceration, including lifers;

14.2 the phrase "*prior to*" in section 136(1) (in the context of an offender being considered for placement on parole in terms of the policy and guidelines applied "*prior to*" 1 October 2004) encompasses the policies and guidelines in existence at any time before 1 October 2004 (by way of preserving all the policies and guidelines that applied before 1 October 2004);

14.3 the argument (as argued by the Department of Correctional Services) that Van Vuuren could only be considered for parole after having served 20 years of his sentence would render the policy and guidelines that applied at the time of his having been sentenced retrospective in effect;

14.4 deprivation of a person's liberty in the retrospective application of a change in parole policy does not conform to the principles of the rule of law;

14.5 given that his sentence of life incarceration had been antedated to 13 November 1992, Van Vuren was eligible to be considered for placement on parole in terms of the policy and guidelines that existed on 13 November 1992.

[15] A proper application of what the Constitutional Court held in the Van Vuuren case *supra* is that one must consider the policy and guidelines that applied at the time of the sentencing when about to place inmates on parole.

To say that the Applicants in this case have served a third of their life imprisonment term or more than half would be importing a policy that does not apply to their particular situation at all. According to the policy that was applicable at the time when each of them was sentenced, each must serve twenty years before he can be considered for placement on parole.

[16] While the Respondents have made it clear that they do not oppose the crediting of maximum points to the Applicants that applies under Act 8 of 1959, I deem it necessary for the sake of completion to discuss it anyway. The need to do so comes to the fore as a result of this judgment being handed down well after the Applicants have served a period of thirteen years and eight months, which appears to be the required number of years that they were suppose to serve prior to consideration for placement on parole. The 'credits system' which applies in terms of section 22A of Act No. 8 of 1959 provides that :

> " ***22A. Allocation of credits***
>
> *(1) A prisoner may earn credits, , by observing the rules which apply in the prison and by actively taking part in the programmes which are aimed at his treatment training and rehabilitation ... Provided further that –*
>
> *(a) a prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served;*
>
> *(b) ...*
>
> *(c) ...*
>
> *(2) The number of days and months earned by a prisoner as credits may be taken into account in determining the date on which a parole board may consider the placement of such prisoner on parole.*"

[17] It was held in the case of *Van Wyk v Minister of Correctional Services & Others 2012 (1) SACR 159 (gnp),* that prisoners serving life imprisonment term before 1 October 2004 were at liberty to have the date on which they may be considered for parole brought forward by credits. This could be done by way of Correctional Services Order BVI (1A)(22)(d), which subsequent to the amendment thereof did away with the awarding of credits to prisoners serving a life term, being declared inconsistent with the Constitution as it involved the retrospective application of a change in parole policy which had previously applied to life term prisoners.

[18] To give effect to the *Van Wyk* case *supra*, the Department of Correctional Services adopted an implementation plan in terms of which prisoners serving life term sentenced before 1 October 2004 are granted maximum credits under section 22A of Act No. 8 of 1959.

[19] The minimum detention period for prisoners serving life term sentenced after 1 March 1994 when the twenty year policy was introduced, and before 1 October 2004 is accordingly thirteen years and eight months. This accords with the provision in Section 22a of Act No. 8 of 1959 that an offender may not earn credits amounting to more than half of the period of incarceration, which he has served.

[20] It is against that background that each of the Applicants was required to serve at least thirteen years eight months of his sentence prior to being considered for placement on parole. At the time of the hearing of this case

neither the First nor the Second Applicant had served thirteen years eight months of his sentence. In the premises, neither one was eligible for consideration for placement on parole. However, now that they have served more than thirteen years eight months, they do qualify provided of course that they meet the other requirements in terms of Section 22a(1) of Act No. 8 of 1959.

[21] The Applicants invoked Section 65(4)(a) of Act No. 8 of 1959 and placed reliance thereon for the declaratory order that they seek being that offenders are entitled to be considered for placement on parole on completion of one third of their sentences regardless of the sentence imposed. The Respondents contend that such reliance on the section is wrong.

[22] Section 65(4)(a) of Act No. 8 of 1959 applies in respect of determinate sentences only by providing that an offender serving a determinate sentence shall not be considered for placement on parole before having served half of the term of incarceration. This is subject to the proviso that the date on which consideration may be given to placement of the offender on parole may be brought forward by the number of credits earned. It is common cause that the Applicants are serving an indeterminate sentence of life incarceration. Section 65(4)(a) cannot for that reason apply to their situation.

[23] The Applicants' contention that they are entitled to be considered for placement on parole after serving one third of their sentences flies directly in the face of the Van Vuren case supra in terms of which prisoners serving life

term are to be considered for placement on parole in accordance with the policy and guidelines that existed at the time of the imposition of their sentences.

[24] I completely agree with Counsel for the Respondents that a sentence of life incarceration means exactly what the words imply - for the duration of the offender's natural life. It would not matter that the sentence is served within a correctional centre, or outside of a correctional centre whilst under community corrections. Given that one does not know for how long one will live, section 65(4)(a) of Act 8 of 1959 (by way of calculating half of the sentence) cannot be applied to prisoners serving a life term.

[25] Further to the above, a fundamental flaw in the Applicants' contention that they are eligible for consideration for placement on parole after serving one third of their sentences is to equate a sentence of life incarceration to a sentence of twenty years incarceration.

[26] This is completely fallacious as a sentence of life incarceration is not a sentence of twenty years. The correct position is that since 1 March 1994 the period of twenty years is the minimum detention period to be served prior to a prisoner serving a life term can be considered for placement on parole. The Applicants' contention that they are permitted to be considered for placement on parole after service of one third of twenty years is therefore wrong and must be rejected.

[27] The Applicants also advanced the argument that they have, by way of presidential granted amnesties, earned remissions amounting to twelve months. They argue that in addition to their period being remitted, the presidential amnesties entitle them to be considered for placement on parole earlier than was planned.

[28] It is trite that the upshot of remission of sentence is to reduce the effective sentence by the period of remission granted to an offender. Accordingly, if an offender serving a determinate sentence of incarceration is granted remission of sentence, his consideration date for placement on parole will equally be brought forward.

[29] Accepting that the aforesaid is correct, I agree with the contention of the Respondents that the granting of remission of sentence does not, as a matter of logic, not advance the consideration date for placement on parole of prisoners serving life term incarceration. This must be so because one does not know how long one will live. For that reason, remission of sentence cannot naturally reduce the effective sentence of a prisoner serving a life term incarceration by advancing the consideration date for his placement on parole as in the case of an offender serving a determinate sentence.

[30] While the Applicants have raised further arguments in support of their early placement on parole, there are no parallel reliefs sought in their notice of motion. Accordingly, the court cannot consider those as they are not before

it.

[31] In the premises, I make the following order:

1. The Respondents are ordered to consider the placement of the Applicants on parole in terms of Section 22a of Act No. 8 of 1959.

2. No order as to costs.

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B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANTS: In Person

INSTRUCTED BY: In Person

COUNSEL FOR THE RESPONDENTS: ADV. TWG Bester

INSTRUCTED BY: The State Attorney

DATE OF HEARING: 5 August 2013

DATE OF JUDGMENT: 6 February 2015