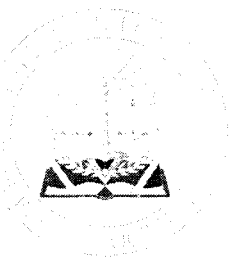


HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

15 July 2016

Not reportable

Not of interest to other Judges

CASE NO: 97778/2015

In the matter between:

ABEDNIGO THEMBA ZONDO	Applicant
and	
MINISTER OF JUSTICE & CORRECTIONAL SERVICES	First Respondent
AREA COMMISSIONER OF CORRECTIONAL SERVICES	Second Respondent
HEAD OF GROENPUNT CORRECTIONAL CENTRE	Third Respondent
CHAIRMAN OF THE PAROLE BOARD	Fourth Respondent
CHAIRPERSON OF THE CMC	Fifth Respondent

J U D G M E N T

MAKGOKA, J

[1] The applicant, Mr Abednigo Themba Zondo (Mr Zondo) who appeared in person, seeks, in the main, a declaratory order that he is eligible to be considered for parole or day parole in terms of s 65(4)(a) of the Correctional Services Act 8 of 1959 (the 1959 Act) and not in terms of the Correctional Services Act 111 of 1998 (the 1998 Act).

[2] He also seeks ancillary, wide-ranging relief against the respondents, which is set out in the notice of motion as follows:

1. That normal rules pertaining to the application be dispensed with and that the application be disposed in accordance with the provisions of the above Honourable Court;

2. That non-compliance with the provision of the rules [sic] pertaining to service be condoned;

3. That the respondents be called upon to appear and show cause, if any, to the above Honourable Court why prayers 4,5,5,7,8,9 and 11 should not be granted and made an order of this Honourable Court;

4. That the respondents be ordered to consider that the Correctional Services Act 8 of 1959 as the principle Act [sic] applicable to the applicant's application;

5. That the respondents be ordered to consider the applicant on parole or day parole in accordance with section 22A(1)(a) and section 65(4)(a) of the Correctional Services Act 8 of 1959;

6. That the respondents be ordered to consider that the applicant has served 13 (thirteen) years and 4 (four) months of his sentence, due to the fact that the applicant was supposed to be on parole or day parole in terms of the Correctional Services Act 8 of 1959;

7. The respondents be ordered to consider the applicant on parole or day parole within 14 (fourteen) days;

8. That the respondents be ordered to consider that the applicant has earned maximum number of credits in terms of section 22A of the Correctional Services Act 8 of 1959;

9. That the respondents be ordered to consider that the number of days and months earned by the applicant as credit may be taken into account in determining the date of the applicant on parole or day parole;

10. That the respondents be ordered to consider the applicant's remission in terms of section 66 and 70;

11. That the respondent be ordered to restore the applicant rights [sic] to just administrative action forth with [sic];

12. That the declaratory order be made declaring the meaning of the concept for placement on parole or day parole;

13. Declaring that the respondents should pay the costs of this application and severally [sic] only in the event of this being opposed;

14. Such further and/or alternative relief as the Honourable Court deem [sic] fit.

[3] Mr Zondo avers in his founding affidavit that the application has been served on all the respondents through the office of State Attorney. The return of service states that the application was served in terms of rule 4(9) on the State Attorney, who 'accepted service on behalf of the Minister of Justice and Correctional Services'. In this regard I bear in mind the provisions of rule 4(9) of the Uniform Rules of Court, which read as follows:

'In every proceeding in which the State, the administration of a province or Minister, Deputy Minister or administrator in his official capacity is the defendant or respondent, the summons or notice instituting such proceeding may be served at the office of State Attorney situated in the area of jurisdiction of the court from which such summons or notice has been issued.'

[4] Ordinarily, therefore, in terms of the above rule, the only respondent who can competently be served through the office of the State Attorney is the first respondent, the Minister of Justice and Correctional Services. Technically, therefore, there has not been proper service on the rest of the respondents, although such respondents would ultimately be represented by the State Attorney where proceedings had been served on them in the normal course. I also take into account that essentially, the respondent is generally the department of Justice and Correctional Services, although in these matters, the applicants always cite all the authorities involved and associated with the department, in particular the correctional services side of it. On these considerations, I am satisfied that there has been proper service.

[5] Mr Zondo is an inmate at Groenpunt Maximum Correctional Centre in Vereeniging, where he is serving a sentence of imprisonment for life and other prison terms, imposed on him on 23 March 2001 by the Free State High Court, after being convicted of murder, fraud, forgery and defeating the ends of justice. As stated earlier, Mr Zondo appeared in person, and the papers were apparently drawn by him. As can be expected, the papers are not drafted with the clarity and lucidity expected of a legal practitioner.

[6] The striking feature of the founding affidavit, which comprises effectively two pages, is the paucity of facts giving rise to the application. The only facts which appear from the founding affidavit are contained in paragraph 5, in which Mr Zondo states that he is currently serving a sentence of life imprisonment and other prison sentences for the offences referred to earlier. From there onwards, the affidavit is replete with elaborate reference to the provisions of the Correctional Services Act 8 of 1959 (the 1959 Act) and the Correctional Services Act 111of 1998 (the 1998 Act).

[7] The thrust of such reference is this: in terms of s 65(4) of the 1959 Act, he, as a prisoner serving a sentence of life imprisonment, is eligible to be considered for placement on parole or day parole after having served 13 (thirteen) years and 4 (four months) of his or her term of imprisonment. He says that his parole consideration should not be in terms of the 1998 Act, in terms of which he would have to serve at least 20 years of his term before he becomes eligible for parole consideration.

[8] Section 65(4)(a) of the 1959 Act entitled inmates serving a determinate sentence to be considered for placement on parole when they have served half of their terms of imprisonment. It, however, makes provision for acceleration of the date on which such inmates may be considered for parole on the basis of the credits earned by them. The 1998 Act repealed the 1959 Act in whole with effect from the 1 October 2004. The 1998 Act, however, subjects inmates serving custodial sentences as at the 1 October 2004, to the parole regime of the 1959 Act. Section 136(1) of the 1998 Act, which makes provision for transitional periods, reads as follows:

'Any person serving a sentence of incarceration 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.'

[9] In *Van Vuren v Minister of Correctional Services and others* 2012 (1) SACR 103 (CC) the Constitutional Court held that s 136(1) refers to any person serving a term of imprisonment, including that serving life imprisonment.

[10] Section 136(2) provides that when considering the release and placement of a prisoner serving a 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 8 of 1959). Section 22A created a system for the allocation of credits to offenders for their compliance with the rules of the correctional institution and their active participation in programmes aimed at their treatment, training and rehabilitation. It provided:

> '(1) A prisoner may earn credits to be awarded by an institutional committee, 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 that–
> (*a*) a prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served;
>
> . . .
>
> (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 a prisoner on parole.

[11] Section 22 (and various provisions of the 1959 Act) was, however, repealed by the Parole and Correctional Supervision Amendment Act 87 of 1997 which came into force on 1 October 2004. The 1998 Act created a new system for the early release of offenders in Chapters IV, VI and VII. In terms of the new dispensation, 'a sentenced offender serving a determinate sentence or cumulative sentences of more than 24 months may not be placed on day parole or parole until such sentenced offender has served either the stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence' (s 73(6)*(a)* of the 1998 Act). There is no provision for any kind of a credit system except in s 136, referred to above.

[10] In *Minister of Correctional Services and others v Seganoe* 2016 (1) SACR 221 (SCA) the Supreme Court of Appeal neatly summed up the position thus at para 13:

'The position of sentenced offenders serving determinate sentences at the commencement of Chapter VII of the 1998 Act, ie on 1 October 2004, is clear from a plain reading of the above provisions. In *Van Vuren*, the Constitutional Court held that the phrase 'any person' in s 136(1) refers to any person serving a sentence of incarceration and that the provisions relate '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'. Section 136(1) therefore preserves the parole policy and guidelines that applied before the commencement of the 1998 Act, in 2004, in relation to this particular class of offenders. Their eligibility for placement on parole must, therefore, be assessed in terms of the 1959 Act. They are entitled to receive the maximum number of credits in terms of s 22A thereof. Obviously, the legislature's intention was to obviate prejudice to offenders sentenced under the old dispensation by the retrospective application of the new provisions which take away the credit system available when they were sentenced.'

(footnotes omitted)

[12] In *Van Wyk v Minister of Correctional Services & Others* 2012 (1) SACR 159 (GNP), this court held that offenders who were serving sentences of life incarceration immediately before 1 October 2004 are entitled to have the date on which they may be considered for parole advanced by credits earned in terms of section 22A of the Correctional Services Act 8 of 1959, subject to the applicable criteria for the allocation of credits.

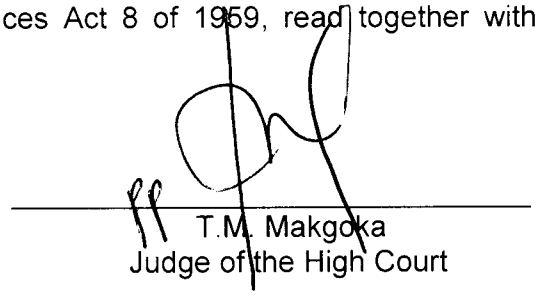
[13] Following *Van Wyk*, the then Department of Correctional Services adopted an implementation plan in terms of which prisoners serving life term sentenced before 1 October 2004 are granted maximum credits under section 22A of Act No. 8 of 1959. In terms of the implementation plan, the minimum detention period for prisoners serving life imprisonment sentenced 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.

[14] Mr Zondo was sentenced on 23 March 2001. As at the date of the application on 5 January 2016, he had served at least over 14 (fourteen years) of his term, and

thus qualifies for consideration to be released on parole. That, of course, is subject to the other requirements of the respondents. It does not appear from the papers, however, that Mr Zondo ever made an application to be released on parole in terms of the provisions of s 65(4) of the 1959 Act, read with s 22A of that Act. For that reason, I am only inclined to make a declaratory order that the applicable legislation in terms of which his parole application is to be considered, is the 1959 Act, together with an order facilitating such parole consideration.

[15] In the result the following order is made:

1. It is declared that the Correctional Services Act 8 of 1959 is the principal Act applicable to the applicant's consideration for placement on parole or day parole;
2. Subject to any other requirements, procedures and policy considerations of the first, fourth and fifth respondents, the respondents are ordered to consider the placement of the applicant on parole in terms of section 65(4)(a) of the Correctional Services Act 8 of 1959, read together with section 22A(1)(a) of the same Act.



T.M. Makgoka
Judge of the High Court