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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 10719/18P

In the matter between:

THULEBONA MZIZI	1ST APPLICANT
SANDILE ZIKODE	2ND APPLICANT
THOKOZANI SIBISI	3RD APPLICANT
MZAMO ZUMA	4TH APPLICANT

and

THE MINISTER OF CORRECTIONAL SERVICES	1ST RESPONDENT
THE NATIONAL COUNCIL OF CORRECTIONAL SERVICES	2ND RESPONDENT
THE CORRECTIONAL SUPERVISION AND PAROLE BOARD	3RD RESPONDENT
THE PIETERMARITZBURG CORRECTIONAL CENTRE	4TH RESPONDENT
THE CASE MANAGEMENT COMMITTEE, PIETERMARIZBURG	5TH RESPONDENT

ORDER

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1. The application succeeds.

2. It is declared that, since each of the four applicants were arrested and detained before 1 October 2004, the four (4) applicants are eligible to be considered for release and placement under community corrections in terms of the law, policy and guidelines that were applicable immediately prior to 1 October 2004, calculating the minimum period to be served, in case of each applicant, for purposes of eligibility for release under community corrections, from the date each applicant was sentenced.

3. There is no order as to costs.

JUDGMENT

Delivered on:

MNGADI J

[1] The question in this application is which parole regime governs the eligibility for placement on parole of offenders sentenced to life imprisonment on or after 1 October 2004, for offences which were committed prior to 1 October 2004, and for which they were arrested and detained prior to 1 October 2004.

[2] The significance of the posed question is illustrated by comparing the position prior to 1 October 2004 with the position post 1 October 2004. In *Van Wyk v Minister of Correctional Services & others* 2012 (1) SACR 159 (GNP) it was held that for offenders sentenced immediately prior to 1 October 2004 , in terms of s 64 of the Correctional Services Act 8 of 1959 ('the Old Act'), read with s 22A of the Correctional Services Act 8 of 1959 ('the old Act'), subject to the earning of full credits, such offenders qualify for

consideration for release on parole after serving thirteen (13) years four (4) months. The said decision is based on the provisions of s 136 of the Act which provides:

'136 Transitional provisions: -

(1) 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 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 sentenced offender who is serving a determinate sentence of incarceration as contemplated in subsection (1), such sentenced offender 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 sentenced offender serving a sentence of life incarceration 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 offender contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the offender under day parole or parole.

(c) If the recommendation of the National Council is favourable, the Minister may order that the offender 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.'

[3] On the other hand, the following relevant provisions of s 73 of the Act regulates the position from 1 October 2004, which provides:

'73. Length and form of sentences. -

(1) Subject to the provisions of this Act-

(a) a sentenced offender remains in a correctional centre for the full period of sentence; and

(b) an offender sentenced to life incarceration remains in a correctional centre for the rest of his or her life.

(2) . . . .

(3) . . . .
(4) In accordance with the provisions of this Chapter a sentenced offender may be placed under correctional supervision, day parole, parole or medical parole before the expiration of his or her term of incarceration.
(5) (a) A sentenced offender may be placed under correctional supervision, on a day parole, parole or medical parole-
(i) on a date determined by the Correctional Supervision and Parole Board; or
(ii) in the case of an offender sentenced to life incarceration, on a date to be determined by the Minister.
(b) Such placement is subject to the provisions of Chapter VI and such offender accepting the conditions for placement.
(6) (a) Subject to the provisions of paragraph (b), 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, but day parole or parole must be considered whenever a sentenced offender has served 25 years of a sentence or cumulative sentences.
(aA) Subject to the provisions of paragraph (b), an offender serving a determinate sentence or cumulative sentences of not more than 24 months may not be placed on parole or day parole until such offender has served either the stipulated non-parole period, or if no non-parole period was stipulated, a quarter of the sentence.
(b) A person who has been sentenced to-
(i) . . . .
(ii) . . . .
(iii) . . . .
(iv) life incarceration, may not be placed on day parole or parole until he or she has served at least 25 years of the sentence;
. . . .'

[4] The first applicant is Thulebona Petros Mzizi registration number 207138398. He is serving a sentence of 20 years imprisonment and life imprisonment respectively at the Pietermaritzburg Correctional Centre, after he was convicted and sentenced by the

KwaZulu-Natal High Court on 2 March 2007 on two counts of murder which were committed on 22 October 2003. He was arrested on 25 October 2003.

[5] The second applicant is Sandile Sanele Zikode registration number 206141053. He is serving a sentence of life imprisonment, a sentence of fifteen (15) years imprisonment, and a sentence of five (5) years imprisonment. He was convicted and sentenced by the KwaZulu-Natal High Court on 16 November 2006 for one count of murder, one count of robbery with aggravating circumstances, and one count of the unlawful possession of a firearm and the unlawful possession of ammunition. The offences were committed on 31 August 2002. He was arrested on 31 August 2002.

[6] The third applicant is Thokozani Rawlf Sibisi registration number 211535101. He is serving a sentence of life imprisonment at the Pietermaritzburg Correctional Centre, having been convicted and sentenced by the KwaZulu-Natal High Court on 11 October 2011 for two counts of murder and two counts of attempted murder, and sentenced to two terms of life imprisonment and two terms of ten (10) years imprisonment. The offences were committed on 14 December 2002. He was arrested 14 December 2002

[7] The fourth applicant is Mzamo Zuma registration number 203539215. He is serving a sentence at the Pietermaritzburg Correctional Centre. He was convicted and sentenced by the KwaZulu-Natal High Court on 12 November 2004 on six (6) counts of murder and sentenced to life imprisonment in respect of each count; two counts of kidnapping and sentenced to ten (10) years imprisonment for both counts; two counts of robbery with aggravating circumstances and sentenced to fifteen (15) years imprisonment in respect of each count; four counts of rape and sentenced to life imprisonment in respect of each count; the unlawful possession of a firearm and ammunition and sentenced to five (5) years imprisonment for both counts; four counts of indecent assault and sentenced to eight (8) years imprisonment in respect of each count, and to one count of assault for which he was sentenced to six (6) months imprisonment. The crimes were committed on 26 and 27 July 2003. He was arrested on 26 July 2003.

[8] The respondents are the Minister for Correctional Services who is also the Minister of Justice and Constitutional Development ('the Minister'), the National Council for Correctional Services ('the Council'), the Correctional Supervision and Parole Board of the Pietermaritzburg Correctional Centre ('the Parole Board'), the Pietermaritzburg Correctional Centre, and the Case Management Committee of the Pietermaritzburg Correctional Centre ('the CMC').

[9] The National Council on Correctional Services submits reports advising the Minster on general policy including recommendations relating to the placement of sentenced offenders on parole. The Council receives reports from the Parole Board. The Case Management Committee in each Correctional Centre submits reports to the Correctional Supervision and Parole Board regarding the possible placement of an offender on parole and the proposed conditions for the said parole.

[10] The four applicants are lay litigants. The application is not as properly prepared as desired. The notice of motion does not clearly set out the relief sought. Likewise, the supporting affidavit does not set out in a clear sequence the steps taken by the applicants to resolve the matter with the respondents. However, being lay litigants, their pleadings must be construed generously in favour of the applicants. Regard must be had to the purpose of the pleading as gathered from the content of the pleading and the context in which the pleading is prepared. Further, we are concerned with liberty, which is a component of freedom of a sentenced offender for whom the date on which he will become eligible to be considered for release under community corrections is of primary importance, with the apparent uncertainty not of his own creation. The notice of motion, supported by the supporting affidavit together with the answering affidavit, in my view, set out the applicants' case effectively and the respondents have responded to that case without any complaints relating to procedural irregularities (see *Xinwa & others v Volkswagen SA (Pty) Ltd* [2003] ZACC 7; 2003 (6) BCLR 575; 2003 (4) SA 390 (CC) para 13).

[11] The applicants seek an order declaring that, although they were sentenced after 1 October 2004, they are entitled to be considered for release on parole in terms of the parole regime in place immediately prior to 1 October 2004 since they were arrested prior to 1 October 2004, and convicted and sentenced for offences committed prior to 1 October 2004. They argue that subjecting them to a parole regime introduced on 1 October 2004 which is far more onerous, is tantamount to imposing on them a sentence far more severe than the sentence in place at the date of the commission of the crimes, and that this amounts to a retrospective application of the change introduced with effect from 1 October 2004.

[12] The respondents oppose the application. They argue that as the applicants were sentenced after 1 October 2004, they shall only be eligible to be considered for placement on parole after serving 25 years imprisonment. They state that an offender need not apply to be considered for release on parole. Approximately six months before an offender completes the minimum prescribed period, the CMC will initiate the process by compiling a parole profile. A meeting is held with the offender, and he or she is informed of the recommendations of the CMC. The CMC's recommendation is forwarded for consideration to the Parole Board which considers the application and together with its recommendation, sends it to the Minister for a decision. Each offender is managed according to a sentencing plan which is periodically reviewed. A sentencing plan has been implemented in respect of each applicant. The respondents state that the first applicant's parole profile report is due on 1 June 2031, that of the second applicant on 15 February 2031, that of the third applicant on 10 January 2036, and that of the fourth applicant on 11 February 2029.

[13] The minimum period which an offender had to serve in respect of life imprisonment before an offender could be placed on parole used to be:

'. . . 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 competition 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. . .'
(see *Van Vuren v Minister of Correctional Services & others* [2010] ZACC 17; 2010 (12) BCLR 1233; 2012 (1) SACR 103 (CC) fn 55).

[14] The applicants argue, which argument is not countered by the respondents, that they were not responsible for the delay relating to their trials. The State was responsible for setting down the trials and to attend to all the logistics around the commencement of the trials. It is the State who arranged that the trials be held only after 1 October 2004, without any consultation or agreement with the applicants. It is unfair, they argue, that the State, by choosing to try them after 1 October 2004 will, to the applicants' prejudice, benefit by having more severe sentences imposed on them, and by having time spent in custody at the instance of the State by the applicants as awaiting trial prisoners, not considered in favour of the applicants in determining the appropriate sentences. The first and second applicants waited for five years from the dates of their arrest before they were tried, the third applicant ten years, and the fourth applicant one year.

[15] The respondents cannot answer the applicants' case which is based on a constitutional right by referring to the provisions of the Act. The Constitution of the Republic of South Africa, 1996 ('the Constitution'), not the Act is the supreme law (s 8 of the Constitution). The Act is subject to the Constitution (see *Department of Transport & others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC) paras 78 - 79). The Act may not restrict a constitutional provision; it may only enforce it. This is a fundamental principle of constitutional democracy. Section 8(1) of the Constitution makes the Bill of Rights as highest law to all law, namely: statute law, common law and customary law. When interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights. When interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It is for the court to decide whether the Constitution has been breached and if so, to order compliance.

[16] The court in the *Minister of Correctional Services & others v Seganoe* [2015] ZASCA 148; 2016 (1) SACR 221 (SCA) accepted, as stated in *Mchunu & another v S* [2013] ZASCA 126 para 5, that it was a basic principle 'of our common law that the liability for a penalty arises when the crime is committed and not when a person is either convicted or sentenced' but held that in that case the offender in question fell in a category of offenders envisaged in the provisions of the Act. The court did not grapple with the question of whether or not the said provisions of the Act were in conformity with the provisions of the Constitution. In *S v Dodo* 2001 (3) SA 382 (CC) the Constitutional Court pointed out the inextricable link between the criminal act and the punishment for that criminal act.

[17] The litany of the litigation by offenders relating to the applicability of parole shows that parole directly determines the actual sentence served by the offender in prison. It is a substantial part of the actual period of imprisonment to be served or being served. Parole is as old as the advent of the sentence of imprisonment. Its basis is founded in that imprisonment entails serving the sentence day and night, twenty-four hours a day which fact is compensated in the granting of parole, based on the good behaviour of the offender and who displayed an unlikelihood to reoffend. The granting of parole is an integral part of the sentence, it is not a mere benefit extended to the offender. In s 276B of the Criminal Procedure Act 51 of 1977('the CPA'), the legislature authorizes the sentencing court at the time of sentencing to determine a period of sentence of imprisonment before which the offender shall not be considered for release on parole. Therefore, eligibility for release on parole is, in my view, an undeniable integral part of the sentence. I am aware that in *Broodryk and Others v Minster of Correctional Services and Others* 2014(1) SACR 471 (GJ) and in *Makaba v Minister of Correctional Services [2012] ZAFSHC 157* a contrary view was expressed. The Full Court in *Phaahla v Minister of Justice and Correctional Services and Another* 2018(1) SACR 217 (GP), came to the same outcome although it found that eligibility for parole is not part of the sentence, at par 42 it held: 'It does not necessarily follow, however, that because parole is not any part of the power of sentencing, it forms no part of the regime of punishment that applies to the commission of an offence. If a crime carries a life sentence and the provisions of the Act

provide that eligibility for parole accrues after 25 years, then the possibility of parole would seem to be an attribute of the regime of punishment. It forms part of that regime, not because it flows from the judicial power to sentence, but rather because it flows from the executive competence to shorten sentences, and thus affect the burden of punishment.'

[18] The respondents argue that the applicants' plight is the responsibility of the sentencing court which could have antedated the applicants' sentences and taken into consideration the period spent in custody as an awaiting trial prisoner. In my view, the argument is misplaced. Firstly, there is no provision in law authorizing the sentencing court to antedate the sentence to a date prior the date of the sentence. The provisions of s 282 of the CPA are only applicable to the powers of the appeal or the review court. Similarly, in my view, this court has no power to antedate the sentences of the applicants to dates prior to the dates on which they were sentenced by the sentencing courts. Further, sentences of life imprisonment which is the most severe sentence that can be imposed, were imposed on the applicants. Therefore, the periods spent as awaiting trial prisoners had no impact on the sentences imposed. There was no reviewable material irregularity, and there were no grounds for the appeal courts to interfere with the sentences imposed. It is not argued, and on the face of it does not appear, that the sentences imposed were vitiated by any material irregularity, or that they were so severe that they induced a sense of shock, or that they were in any way disturbingly inappropriate. In any case, it is for the applicants to pursue whatever remedy appears available to them.

[19] The applicants have not sought to review and set aside any decision of the respondents. There is no decision that has been taken. Therefore, the applicants have not, and were not required to follow the procedure set out in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), nor to establish the review grounds stated in PAJA. It is not for the respondents to decide under which parole regime the applicants fall; they have no discretion in that regard. The law regulates which category of offenders fall under which parole regime. As far as the respondents are concerned, although unfair to the applicants, the Act provides that the applicants fall under the

parole regime in place from 1 October 2004 since their sentences were imposed after 1 October 2004. The respondents argue that the eligibility to be considered for release on parole has nothing to do with the sentence in place at the date of the commission of the crimes. The questions raised by the applicants, it is argued, are the questions that should have been raised with the sentencing court.

[20] The applicants seek a declaratory order to the effect that they fall under the parole regime in place immediately prior to 1 October 2004. In Cilliers et al, *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5 ed (2009) at 1428 it is stated 'a declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. The right or obligation can be existing, prospective or contingent and no specific consequential relief need be claimed.' (see also *Naptosa & others v Minister of Education, Western Cape, & others* 2001 (2) SA 112 (C)) Section 21(1)(c) of the Superior Courts Act 10 of 2013 allows a high court 'in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.' Section 38 of the Constitution provides that when an infringement of or a threat to a right in the Bill of Rights is alleged, application may be made to a competent court of law for appropriate relief, which may include a declaration of rights.

[21] The applicants are serving sentences of life imprisonment. It is important to them to know under which parole regime they fall. That enables offenders to start preparing themselves to be found suitable when the time comes to be considered for release on parole, and to remind the respondents when it is time for the applicants to be considered for release on parole. It had also come to the attention of the applicants that they were not *ad idem* with the respondents as to which parole regime is applicable to them, which is confirmed by the attitude of the respondents to this application. The issue then became justiciable, and not of mere academic interest.

[22] Although the issues relating to prison administration, including exercising control over offenders may be within the preserve of the prison administration authorities, the issue of eligibility to be considered for release on parole falls outside that preserve, any complaint relating thereto may be referred for resolution to the court. (see *Minister of Correctional Services & others v Kwakwa & another* 2002 (4) SA 455 (SCA) para 24). This is done by looking at the applicable legislation which must interpreted in the light of the Constitution, and the rule of law and bearing in mind the principle of a general presumption against retrospectivity 'unless the statute provides otherwise or its language shows such meaning' (see *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (9) BCLR 929; 2007 (3) SA 210 (CC) para 26).

[23] The applicants argue that for them to fall under the parole regime in place immediately prior to 1 October 2004, which is the parole regime in place at the date of the commission of the crimes, their sentences should be antedated to the dates of their arrest. In my view, as said above, there is no authority for antedating a sentence to a date of the choosing of the sentencing court. I am also of the view that there is no authority for this court to antedate the sentences of the applicants to any date prior to the dates on which they were sentenced for them to enjoy certain rights or fall under a more favourable parole regime. The reliance by the applicants on s 282 of the CPA is misplaced. The said section provides:

'282. Antedating sentence of imprisonment. -

'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.'

[24] Further, the second applicant seeks removal from the sentence imposed on him, the following stipulation made by the sentencing court: 'It is directed that the accused not be eligible for parole until he has served twenty-five (25) years of the sentence'. Section 276B of the CPA provides:

'(1) (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1) (b), fix the non-parole-period in respect of the effective period of imprisonment.'

This court cannot exercise any powers of the appeal court. However, the issue raised relates to the issues before this court. The sentencing court did not specify that it was relying on the provisions of s 276B of the CPA. But it may be accepted that it is the only provision the court could have relied on. Section 276B is a general provision, but once a sentence of life incarceration is imposed alone or together with other sentences, the general provisions of s 276B do not apply because there are specific provisions that apply. In any case, it is not known what a period is that is two thirds of life imprisonment. Consequently, it cannot be determined whether 25 years is longer or shorter than two thirds of life imprisonment, which indicates that s 276B is not applicable.

[25] I have found that the parole regime under which the offender falls is an integral part of the sentence imposed on the offender. In numerous instances the legislature prescribes sentences to be imposed for certain crimes. Likewise, the parole regime applicable to certain category of offenders is prescribed by the legislations as prescribed in the Act. The legislature is bound when legislating to observe and comply with the provisions of the Constitution, including that the rights in the Bill of Rights are not infringed, except in compliance with the Constitution. The transitional provisions in

the Act, in my view, do not provide for the category of offenders in the position of the applicants. It has not and it could not be argued that the failure to provide for the category of offenders in the position of the applicants is a law of general application to the extent that it limits the applicants' constitutional rights, is a reasonable limitation, justifiable in an open and democratic society based on human dignity, equality and freedom as envisaged in s 36(1) of the Constitution.

[26] The Act drastically changed the parole regime by replacing it with a more onerous parole regime with effect from 1 October 2004. The disparity between the two parole regimes was exacerbated by the decision in *Van Wyk*. The disparity required that existing rights not be taken away or be curtailed by the legislation effecting the change. The plight of the applicants shows that for the category of the offenders under which the applicants fall, was not properly catered for in the transitional provisions of the legislation. The basic principle that the applicable sentence to be imposed on the offender is the sentence prescribed for that crime at the date of the commission of the crime, as well as the constitutional prescript that where there is a change between the sentence in place at the date of the commission of the crime and that in place at the date of sentencing, the applicable sentence is the sentence in place at the date of the commission of the crime, were not catered for in the Act in the case of the offenders in the category of the applicants.

[27] Once it is found that the parole regime is an integral part of the sentence as I have found, the following remarks made by the Constitutional Court in *Van Vuren* para 60 become apposite:

'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. Deprivation of a person's liberty in that manner does not conform to the principles of the rule of law. The construction contended for by the respondents effectively renders the new mandatory non-parole period of 20 years retrospective in operation. This would offend against the foundational values of constitutional supremacy and the rule of law, which this court should not countenance.'

[28] The failure to cater for the said category resulted in the applicants not knowing under which parole regime they fall or falling under the more onerous parole regime. Further, it resulted in that category of offenders being unfairly treated in that the period spent in custody as an awaiting trial prisoner, which could be a substantial period, was not taken into consideration. It resulted in the infringement of a host of other constitutional rights of the offenders in that category. The applicants have argued, which argument is not denied by the respondents, that they were not responsible for the delays in their trials. It was the responsibility of the State to set down their trials for hearing and it is unfair to let the State benefit to their prejudice in delaying their trials.

[29] In *Van Vuren* para 59 it was said:

'In the light of these considerations, ss (3) (a) can be given a coherent and sensible meaning alongside ss (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 commencement of the Act, s 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.'

The court reemphasized the correct approach in the interpretation of such provisions, including the applicable principles that the interpretation is required to be consistent with the provisions and the values of the Constitution, and bear in mind principles relating to retrospectivity. The Court did not address the category of offenders in the position of the applicants simple because it was not an issue before it. (See *Van Vuren* para 60).

[30] The applicants are entitled to the protection of the law. They are entitled to a fair trial which includes the right to be sentenced in accordance with the provisions of the Constitution, the law, and in a fair and just manner. It is the constitutional duty of the court to ensure that the protection the applicants are entitled to in terms of the Constitution, is not rendered illusory which will not only not address the plight of the

applicants but will undermine the Constitution itself. The applicants accept, for purposes of this application, that the sentences (including the parole regimes in place at the date of arrest of each applicant) is the same as that in place at the date of the commission of the crimes. Different considerations may apply if there was a disparity in that regard. Section 2 of the Constitution states that obligations imposed by the Constitution must be fulfilled. It is the duty of the court to provide a fair and just remedy to ensure that the infringement is stopped or avoided. I find that although the applicants were sentenced after 1 October 2004, they are subject to the parole regime in place immediately prior to 1 October 2004.

[31] In *Van Vuren* para 73 it was said that '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.' In *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (CC) para 19, it was held that '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 secure the protection and enforcement of these all-important rights.'

[32] I find that the applicants are entitled, in law for all intents and purposes, to be subjected to the parole regime in place immediately prior to 1 October 2004 for offenders sentenced to life incarceration, except that in their case the minimum period required to be served shall be calculated from the date of their sentence.

[33] I, accordingly, make the following order:

1. The application succeeds.

APPEARANCES

Case Number	:	10719/18P
For the Applicants	:	In person
Instructed by	:	Not applicable.
For the respondents	:	Adv. Ranjiv Nirghin
Instructed by	:	State Attorney KwaZulu-Natal Durban
Matter argued on	:	18 April 2019
Date Judgement delivered	:	30 APRIL 2019
Judgement delivered on	:	30 APRIL 2019