THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 20507/2014

In the matter between:

MINISTER OF CORRECTIONAL SERVICES **First Appellant**
NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES **Second Appellant**

REGIONAL COMMISSIONER **Third Appellant**

AREA COMMISSIONER JOHANNESBURG CORRECTIONAL SERVICES **Fourth Appellant**

CHAIRPERSON OF CORRECTIONAL SUPERVISION AND PAROLE BOARD/JOHANNESBURG CORRECTIONAL SERVICES **Fifth Appellant**

CHAIRPERSON OF THE CASE MANAGEMENT COMMITTEE, JOHANNESBURG MEDIUM B CENTRE **Sixth Appellant**

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Seventh Appellant**

and

TONY PHAKISO SEGANOE **Respondent**

Neutral citation: *Minister of Correctional Services and others v Seganoe* (20507/2014) [2015] ZASCA 148 (01 October 2015)

Coram: Maya ADP, Leach, Pillay, Zondi, Mathopo JJA

Heard: 25 August 2015

Delivered: 01 October 2015

Summary: Correctional Services Acts 8 of 1959 and 111 of 1998 – Parole – whether the eligibility for placement on parole of a sentenced offender who committed offences during the operation of the 1959 Act but was sentenced after the 1998 Act came into force should be determined in terms of the parole regime applicable at the time of the commission of such offences under the 1959 Act or the different regime applicable at time of sentencing under the 1998 Act.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Kolbe AJ sitting as court of first instance)

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

Maya JA (**Leach, Pillay, Zondi and Mathopo JJA concurring**):

[1] The crisp question in this appeal is which statutory regime governs the eligibility for placement on parole of sentenced offenders convicted of offences committed during the existence and operation of the Correctional Services Act 8 of 1959 (the 1959 Act) but sentenced after the commencement of the Correctional Services Act 111

of 1998 which repealed it.[1] The Gauteng Local Division, Johannesburg (the high court) held that it is the statutory regime in force at the time of the commission of the offences that is applicable. The Minister of Correctional Services (the Minister) appeals against that judgment with the leave of this court.

[2] The respondent is a sentenced offender currently serving two determinate sentences of 15 and 7 years imprisonment, resulting in a cumulative sentence of 22 years imprisonment, consequent upon conviction in respect of two separate offences. The first offence was committed on 29 April 2002. The matter proceeded in the Soweto Regional Court and he pleaded to the charge on 14 February 2003. He was convicted on 1 June 2004 and sentenced to 20 years imprisonment on 13 January 2005. This sentence was subsequently reduced on appeal by the high court on 8 September 2008, antedated to run with effect from the original date of sentence, 13 January 2005. The second offence was committed on 21 July 2001. The respondent was charged and entered a plea of not guilty in the Johannesburg Regional Court on 23 September 2003. He was convicted and sentenced to 7 years imprisonment on 10 November 2005. A subsequent appeal against such sentence was unsuccessful.

[3] In March, and again in May 2012, after completing one third of his sentence,[2] the respondent applied to the sixth appellant, the Chairperson of Case Management of the Johannesburg Medium B Correctional Center where he is being held. He sought consideration for placement on parole. His applications were rejected in both instances. They were dismissed on the ground that he did not qualify for consideration for placement on parole in terms of the relevant provisions of the 1959 Act but in terms

[1] By s 137 of the 1998 Act, except for ss 29, 84F, 97 and Schedules 1 and 2 which were repealed by s 99(1) of the Child Justice Act 75 of 2008 with effect from 1 April 2010.

[2] He would have served half of his sentence on 12 October 2015 taking into account a six month special remission period granted to offenders on 28 May 2005. And after a further six months special remission granted on 27 April 2012 he would have served one third of his sentence on 12 September 2011 and half thereof on 12 April 2015.

Chapter VII of the 1998 Act[3] which came into effect on 1 October 2004, because he was sentenced in respect of both offences in January and November 2005 respectively, after the commencement of the latter Act. (The date of commencement of the 1998 Act was 31 July 2004 and Chapter VII thereof came into effect on 1 October 2004.)[4]

[4] These decisions prompted the respondent to launch an application in the high court. In essence, he sought consideration for placement on parole, and the date thereof accelerated, under the credit system envisaged in s 22A of the 1959 Act, by the application of the credits he had earned by undergoing various treatment, training and rehabilitation programmes during his incarceration. His main contention was that his application should be determined in accordance with the policies and guidelines governing parole placement applicable in terms of the 1959 Act because the offences for which he was convicted were committed during its operation.

[5] The high court agreed with the respondent, in contrast to previous high court decisions which held that in terms of the law, the date of sentencing was the operative date for purposes of determining eligibility for placement on parole.[5] The court found that although the transitional provisions in s 136 of the 1998 Act, which retained the credit system in respect of certain classes of offenders, did not avail the respondent, he was nonetheless entitled to have his case determined under the old parole regime. On

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[3] Chapter VII of the 1998 Act deals with the release of offenders from correctional centres and placement under correctional supervision and on parole and day parole.

[4] Commencement of the Correctional Services Act 111 of 1998 and Repeal of the Correctional Services Act 8 of 1959, GN R38, *GG 26626*, 30 July 2004.

[5] *Makaba v Minister of Correctional Services & others* (5369/2011) [2012] ZAFSHC 157 (16 August 2012) (Free State High Court); *Elton Wayne Ackers v Minister of Correctional Services & others* (11746/2012) (15 April 2013) (Gauteng Local Division, Johannesburg); *Broodryk v Minister of Correctional Services & others* (69585/11) [2013] ZAGPPHC 280 (9 September 2013)*;* 2014 (1) SACR 471 (GJ).

the authority of various decisions,[6] the court invoked the presumption against the retrospective application of a statute increasing a penalty in the absence of express language or clear implication, and the general rule against interpreting legislation to extinguish existing rights and obligations. On that basis the court held that the sixth respondent was wrong to subject the respondent to the new parole regime which took away the credit system. And this was because of the established rule that the date of the offence fixes the punishment, of which parole forms part. The respondent was therefore entitled to be treated on the basis of the penalty existing at the date of commission of the offences.

[6] In its judgment refusing leave to appeal, which was wrong particularly in view of the existing contrary decisions of various divisions of the high court, the court oddly backtracked on its initial findings on the interpretation of the relevant provisions. It also expanded on its earlier reasons for its finding that the date of the offence fixes the punishment. The court relied on a judgment of this court, *Mchunu v The State*,[7] (handed down after the delivery of its main judgment, which dealt with the effect of court orders fixing non-parole periods) and certain foreign authorities for a finding that similar to the fixing of a non-parole period by a court, the fixing of a non-parole period by statute, which was tantamount to the retrospective abolition of the credit system, constituted punishment.

[7] On appeal before us, the Minister's counsel criticised the high court's judgment for misinterpreting the relevant statutory provisions, relying on distinguishable decisions and the contradiction in its two judgments. The respondent, supported by the

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[6] For example, *R v Sillas* 1959 (4) SA 305 (A); *R v Mazibuko* 1958 (4) SA 353 (A); *Veldman v Director of Public Prosecutions, WLD* (CCT 19/05) [2005] ZA CC 22 (5 December 2005); 2006 (2) SACR 319 (CC); *Van Wyk v Minister of Correctional Services & others* (40915/10) [2011] ZAGPPHC 125*;* 2012 (1) SACR 159 (GNP).

[7] *Mchunu v The State* (825/2012) ZASCA 126 (25 September 2013).

amicus curiae,[8] repeated his contentions in the high court and urged us to uphold its decision.

[8] As the Constitutional Court remarked in *Van Vuren v Minister of Correctional Services & others*,[9]

'Prison administration, more specifically community corrections in South Africa, is presently conducted within the framework of the [1998] Act and where applicable, the [1959] Act, together with relevant policies and guidelines under these Acts. The [1998] Act is being gradually brought into operation with the simultaneous abolition and repeal of the corresponding parts of the [1959] Act.'

(footnotes omitted)

[9] Although some of these gradual changes had begun when the respondent pleaded (and was convicted in respect of the first offence in June 2004) in respect of both offences, eligibility for placement on parole[10] of sentenced offenders was still regulated by the 1959 Act. In terms of s 65(4)*(a)*(*ii*) of the 1959 Act, where no non-parole period was fixed, a prisoner (as offenders were called thereunder)[11] serving a determinate sentence was eligible to be considered for placement on parole upon serving half of his term of imprisonment. This date could be brought forward by the application of the number of credits earned by the offender in accordance with s 22A, subject to the applicable criteria for the allocation of such credits.

[10] Section 22A created a system for the allocation of credits to offenders for their

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[8] The *amicus curiae* attended the appeal at the request of this court as the respondent appeared in person. The court is grateful for his assistance.

[9] *Van Vuren v Minister of Correctional Services & others* (CCT 07/10) [2010] ZACC 17 (30 September 2010); 2012 (1) SACR 103 (CC) para 24.

[10] Defined in s 1 of the 1998 Act as meaning 'a form of community corrections contemplated in Chapter VI. 'Community corrections' on the other hand is defined in the same section as meaning '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 [of Correctional Services]'.

[11] The definition of 'prisoner' was deleted by s 1 of the Correctional Services Amendment Act 25 of 2008.

compliance with the rules of the correctional institution and their active participation in programmes aimed at their treatment, training and rehabilitation.[12] This section (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.[13] By the time he was sentenced in 2005, the 1959 Act had been repealed and replaced by the 1998 Act.

[11] Simultaneous with this abolition, 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).

[12] The 1998 Act makes no reference to any kind of a credit system except in s 136, which contains transitional provisions, and reads, in relevant part:

'(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 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

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[12] The section 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.'

[13] In s 4 thereof.

allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act 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.

. . .'

[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,*[14] 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.[15] 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.

[14] But then s 136 says nothing at all about offenders sentenced after the commencement of Chapter VII. The respondent argued that there was a *lacuna* in the

[14] Fn 8. In this matter the Constitutional Court considered the proper interpretation of s 136 and, pertinently, whether the provisions of the 1959 Act and the policy and guidelines applied by the former parole boards applied to the applicant, an offender whose death sentence had been commuted to life imprisonment in 1992, or whether the applicant was entitled to be considered for placement on parole only after completing 20 years in detention in terms of s 136(3)(*a*) and the new policy and guidelines.

section which, for its proper application and interpretation, should be remedied by reading in the words 'for an offence committed' so that it reads:

'Any person serving a sentence of imprisonment/incarceration *for an offence committed* 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)…'

(Emphasis added)

[15] As was pointed out in *Van Vuren*,[16] the provisions of s 136 must be read as a whole to determine the impugned subsection. Similar to ss 136(1) and (2), s 136(3) also deals expressly with sentenced offenders serving incarceration 'immediately before the commencement of Chapters IV, VI and VII'. Only subsection (4) refers to an offender sentenced to incarceration after the commencement of the new dispensation. But these provisions are set apart by their context and could not possibly have anything to do with the respondent's class of offenders. This is so because they deal with 'a person … sentenced to life incarceration after the commencement of Chapters IV,VI and VII while serving a life sentence imposed prior to the commencement', whose assessment for parole must be referred to the Minister for his consideration in consultation with the National Council for Correctional Services. So, clearly the legislature was not oblivious of the class of offenders sentenced after 1 October 2004. It seems to have rather been concerned only with those offenders sentenced to life incarceration after the commencement of chapter IV,VI and VII while serving a life sentence. There is, therefore, no room for the 'reading in' proposed by the respondent which, in my view, would not cure the 'gap' even if it was effected.

[16] The interpretation contended for by the respondent is also beset by practical difficulties and could yield absurd results. One glaring example is a case of, say, a

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[15] See also *S v Mafoho* (149/12) [2012] ZASCA 49 (28 March 2013); 2013 (2) SACR 179 (SCA) para 12.
[16] At para 55.

murderer who commits murder before the coming into operation of chapters IV, VI, and VII but evades capture or is for any reason not brought to justice over a long period of time. If the respondent's interpretation were accepted, such an offender would be entitled to demand the implementation of a parole regime that no longer existed and for which there were no implementation mechanisms when he was finally brought to justice. Clearly, the legislature could not have contemplated such a scenario.

[17] This reasoning inexorably leads to one conclusion: that the respondent's class of offenders, ie those not yet sentenced and serving determinate sentences of incarceration on 1 October 2004, was deliberately left outside the ambit of s 136 and that these provisions were intended to retain the benefits of the parole regime under the 1959 Act *only* in respect of offenders serving determinate sentences of incarceration by 1 October 2004.[17] This intention is replicated in the transitional provisions of the Parole and Correctional Supervision Amendment Act contained in s 24. In terms thereof '[a]ny person serving a sentence of imprisonment immediately before the commencement of this Act shall be deemed to have been awarded the maximum number of credits in terms of s 22A of the [1959] Act as it was in force immediately before the commencement of this Act'.

[18] In that case, s 73(6)(*a*) of the 1998 Act governs the respondent's consideration for placement on parole or community corrections. This was the ultimate finding in the *Broodryk*, *Ackers* and *Makaba* decisions with which the high court disagreed. Needless to say, its change of mind in the comprehensive judgment on application for leave to appeal regarding its initial view in its main judgment, that s 136 did not avail the respondent because he did not fit the definition of the offender contemplated in s

[17] J Moses *'Parole in South Africa'* (2012) at 69.

136(1), was impermissible and constituted a material misdirection on its part. And none of the authorities upon which the court relied came any closer to dealing with the question when a sentenced offender should be considered for placement on parole or community corrections. They were all distinguished by their own facts.

[19] The appeal should accordingly succeed. Neither of the parties sought a costs order as this is a test case, and none will be made. In the premises the following order is made:

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed.'

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M M L Maya

Judge of Appeal

APPEARANCES

For the Appellant:	S J R Mogagabe SC (with Z Buthelezi)
	Instructed by:
	The State Attorney, Johannesburg
	The State Attorney, Bloemfontein
For the Respondent:	In Person
Amicus Curiae:	D M Grewar
	Instructed by:
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