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Parole in South Africa: understanding recent changes

Parole in South Africa: understanding recent changes

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Introduction
The South African parole regime has become a complex and confusing system. Recent case law has brought to light the effect of numerous amendments to the governing legislation and, to some degree, clarified how the eligibility of parole will be determined for various categories of prisoners. This newsletter sets out the governing legislation, explains the various amendments which have occurred, and discusses relevant case law.

The legislative framework
The Correctional Services Act 111 of 1998 (the 1998 Act) is the primary piece of legislation governing parole. The 1998 Act, in its current form, is significantly different from previous versions of itself due to a series of amendments over the years. This section therefore briefly outlines the different legislative regimes as they relate, first, to the time spent in prison prior to eligibility for parole, and secondly, to the institutional bodies tasked with determining eligibility and release.

Non-parole Periods
The Correctional Services Act 8 of 1959 (the 1959 Act) had different parole procedures for persons sentenced to life imprisonment and offenders sentenced to determinate periods of imprisonment. For those offenders sentenced to life imprisonment, the 1959 Act did not prescribe a minimum period of imprisonment that had to be served before an offender could be considered for parole. Instead, minimum periods of imprisonment were governed by ministerial policy, and these periods varied at different times.[1] Between 1987 and 1994, an offender who had served ten years of imprisonment could be considered for parole, but absent "exceptional circumstances," could only be released after having served 15 years imprisonment. In March 1994, the minimum period was increased to 20 years. [2]

For offenders with determinate sentences, the 1959 Act set out explicitly the minimum number of years that an offender was required to serve before being considered for parole. Section 65(4)(a), for example, required that a prisoner serving a determinate sentence, should not be considered for placement on parole "until he had served half of his term of imprisonment," but such a date could be brought forward by the "number of credits earned by the prisoner."[3]

Institutional bodies
The 1959 Act provided that one of the duties of the Parole Board was to submit recommendations as to whether or not an offender should be released on parole. [4] For prisoners serving determinate sentences, the Commissioner for Correctional Services, upon receipt of these recommendations, made the final decision as to whether a prisoner should be released on parole.[5] For prisoners who had been sentenced to life imprisonment, the National Advisory Council, [6] upon receipt of this report was required to make a recommendation to the Minister, who, in turn, was charged with making the ultimate decision as to whether an offender sentenced to life imprisonment should be released on parole.[7]

The Parole and Correctional Supervision Amendment Act 87 of 1997 (the 1997 Act) purported to amend some of the 1959 Act's parole provisions, which would have resulted, inter alia, in the courts being the final decision-maker in parole decisions concerning life sentences. However, the date of commencement of the 1997 Act was 1 October 2004, the same commencement date of the 1998 Act. Section 78 of the 1998 Act, prior to any further amendments, stipulated that it was the court, based on the recommendations of the Parole Board, that had the final say on whether a prisoner sentenced to life imprisonment should be released on parole. Nonetheless, the parole provisions were amended yet again,[8] and as of 1 October 2009, the Minister, once more, was given the final say on whether prisoners sentenced to life should be released on parole.[9]

The Correctional Services Act 111 of 1998
On 1 October 2004, the remaining portions of the 1998 Act dealing with parole (Chapters VI and VII) came into force. According to this Act, offenders sentenced to life imprisonment must serve 25 years before qualifying for parole.[10]

Offenders serving determinate sentences are required to serve the non-parole period stipulated in the 1998 Act, and in the absence of any relevant stipulation, half the sentence.[11] Some of the sentences in the 1998 Act which attract attracting non-parole periods are almost never used. These include "periodical incarceration,"[12] "incarceration for corrective training"[13] and "incarceration for the prevention of crime."[14] A range of sentences frequently used by sentencing courts, however, would, for example be those handed down in terms of the minimum sentencing legislation.[15] In this regard, the 1998 Act states that an offender must serve "at least four fifths of the imposed term of incarceration or 25 years, whichever is the shorter." The sentencing court, however, may order that the sentenced offender be considered for placement on parole after two thirds of such a term has been served.[16] Some of the sections on parole in the Act were, for a time, due to be amended by the Correctional Services Amendment Act 24 of 2008. However, the sections amending the Act have since been repealed by another piece of amending legislation,[17] albeit not yet in force.

The 1998 Act's "transitional provisions"
The so-called "transitional provisions"[18] of the 1998 Act, contained in section 136, were inserted into the legislation with the intention of bridging the gap between the parole regime of the 1959 Act and the 1998 Act. Section 136 of the 1998 Act reads:
"(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."

Although section 136 commenced formally on 14 December 2001, in effect it commenced only on 1 October 2004. This was the result of the sections' references[19] to the commencement of chapters VI and VII of the 1998 Act. The transitional provisions are, in themselves, a new parole regime altogether and they apply to all people who were sentenced and were serving sentences of imprisonment prior to 1 October 2004. Accordingly, the parole regime set out in the 1998 Act, is not applicable to these offenders. It is applicable to only those who were sentenced on or after 1 October 2004. Importantly, however, the provisions in the 1998 Act relating to parole will be amended in due course. The Correctional Matters Amendment Act 5 of 2011 (2011 Amendment Act), although not yet in force, will bring about the following material changes to parole:
a)the provisions relating to determinative sentences will also apply to offenders serving "cumulative sentences of more than 24 months;"[20]
b)an offender serving a determinative sentence or cumulative sentences of not more than 24 months may be considered for parole after having served a quarter of their sentence, if no parole period has been stipulated;[21]
c)an offender serving any form of imprisonment may be considered for parole upon reaching the age of 65 years if he or she has already served 15 years;[22]
d)the provisions in the Act pertaining to corrective training, periodical incarceration, imprisonment for the prevention of crime and imprisonment in terms of the minimum sentencing legislation, will all be removed.

Case Law
The following cases arose as a result of the transitional provisions of the 1998 Act and concern the interpretation of the sections dealing with life imprisonment and the 1959 Act's credit system.

In *Derby-Lewis v The Minister of Correctional Services*[23] the applicant, who had been sentenced to death in 1993 (later commuted to life imprisonment), applied to the High Court for an order directing that he be placed on parole, in accordance with the recommendation from the Parole Board. Parole had not been granted by the National Council for Correctional Services on the grounds that the Parole Board had not yet enquired whether the deceased victim's widow wished to make representations regarding the applicant's placement on parole. Although the judgment turned, primarily, on this issue, the applicant had also challenged the constitutionality of section 136(1) to the extent that it was in conflict with the 1998 parole provisions, in particular, the fact that the parole decisions regarding prisoners sentenced to life imprisonment would be dealt with, ultimately, by the Minister whereas in terms of the then 1998 Act (prior to amendment)[24] parole was dealt with by the court. That, the applicant argued, amounted to discrimination between prisoners sentenced to life imprisonment before 1 October 2004, and those sentenced after that date. It was clear, based on the judgment, that the applicant feared an adverse decision from the Minister[25] and hoped for a more favourable conclusion from the court. These arguments, the court held, were not convincing and it found that the applicant, as were all prisoners in his position, was indeed subject to section 136(1) of the 1998 Act.

The applicant in *Van Vuren v The Minister of Correctional Services and Others*,[26] had been sentenced to death in 1992, a

sentence which was commuted to life imprisonment in 2000. During and after 2004, the applicant tried on a number of occasions to be considered for parole, but was unsuccessful. He eventually approached the courts in an attempt to get an order forcing the authorities to consider his parole application. The applicable parole policies by which his parole consideration should be governed became an issue before the court. The applicant argued initially that section 136(3)(a) was the provision applicable to his case, but that section 136(3)(a) was unconstitutional. The consequence of this section's non-compliance with the constitution was such that section 136(1) was the ultimate applicable provision. The applicant urged the court to interpret the phrase "policy and guidelines" in section 136(1) as referring to the policy and guidelines operative at the time when he was originally sentenced in 1992. The policy and guidelines operative in 1992 would have made him eligible for consideration for parole after having served 10 years of his sentence. Acting Judge Ellis in the High Court, in order to avoid a finding that section 136(3)(a) was superfluous, held that section 136(1) did not apply to offenders sentenced to life imprisonment. Rather, the rule that a special law derogates from a general rule, applied and therefore section 136(3)(a), being more specific in its application than section 136(1), was applicable to offenders sentenced to life imprisonment. Before the constitutionality of section 136(3)(a) could be fully presented before the court, the Derby-Lewis judgment was handed down. Accordingly, the applicant dropped his arguments regarding section 136(3)(a) and maintained the argument in relation to the interpretation of section 136(1). Bertelsman J of the High Court found, in light of the binding judgment of the full court in Derby-Lewis, that section 136(1) was applicable to the applicant but that the applicable policies were not those in operation in 1992, but those operational immediately prior to the promulgation of the relevant chapters of the 1998 Act. This meant that the applicant could be considered for parole only after having served 20 years of imprisonment.

The applicant proceeded to the Constitutional Court, where he argued that the High Court was incorrect in its finding that he could not rely on section 136(1). In addition, he argued that should the Court find that section 136(3) (and not section 136(1)) was applicable to him, the court should hear a challenge on the constitutionality of section 136(3). The case thus turned on the interpretation of section 136 of the 1998 Act.

Nkabinde J, for the majority of the Court, essentially agreed with the *Derby Lewis* Court that section 136(1) applies to those serving life sentences. She reasoned however, that given the specific wording of section 136(1), it had a more nuanced meaning than that found by the Derby Lewis Court. The two phrases in the subsection, "immediately before" and "prior to" refer to different issues and time categories. The former, an adverbial phrase of time, refers to the category of persons serving custodial sentences whereas the latter refers to the applicable policy and guidelines. "Prior to", argues Nkabinde J, "has a broader meaning than 'immediately before'."[27] Accordingly, it refers to the policy and guidelines applicable at any time before 1 October 2004.[28] "Immediately before," therefore, must mean directly before commencement. This interpretation was strengthened, she argued, by section 136(4), which refers to life sentences imposed "prior to the commencement" which "clearly embraces life sentences imposed at any time before the commencement of the Chapters."[29] Principles of interpretation require that "prior to" in subsections (1) and (4) must be consistent in their meaning, which led Nkabinde J to the conclusion that "prior to" in section 136 means at any time before. Nkabinde J describes the effect of the majority's interpretation:
"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."[30]

Nkabinde J's approach is confusing. Firstly, her reading of the section 136 requires that "any prisoner," in section 136(3)(a) must be read as "any prisoner sentenced after March 1994." And "any person serving a sentence of imprisonment" must be read as "any person serving a sentence of imprisonment, excluding prisoners sentenced to life imprisonment after March 1994." Secondly, the majority, as Yacoob J in his dissenting judgment states, is faced with the problem of re-organising the complex web of institutional bodies which were responsible for parole applications at different points in time, depending on which parole regime was applicable.[31] This is not simply an exercise in interpretation, but rather, as has previously been pointed out by Justice O'Regan, "an exercise in [legislative] drafting."[32]

Brickhill and Bishop suggest that there was an "obvious alternative [to the majority's approach]…find that section 136(3) applies to Mr Van Vuren, then declare it unconstitutional and remedy the invalidity…"[33] The invalidity in this case would be in relation to section 35(3)(n) of the Constitution, which states:
"Every accused has the a right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for the offence if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

Whether section 136(3) would, in circumstances where it prolonged the sentence of those sentenced to life incarceration, be a breach of section 35(3)(n) of the Constitution is, however, a complex question. This is illustrated well in the European Court of Rights' judgment, *Kafkaris v Cyprus*.[34] In this matter, the applicant had been sentenced to life, which, according to Cypriot regulations at the time of sentencing, provided that a prisoner serving life imprisonment could have his or her sentenced remitted after having served a minimum of 20 years. During the course of his incarceration, Cypriot prison law changed. The result of this change was that the applicant no longer had a right to have his sentence remitted.[35] He accordingly challenged the amending legislation as being a violation of article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides, in part, that no one shall have a heavier penalty

imposed on him or her than that which was applicable at the time of the commission of the criminal offence. The ECHR found that there was although the change in legislation rendered the applicant's imprisonment "effectively harsher," the changes did not result in a harsher penalty than that initially handed down by the trial court. Rather, it was the "execution" of the sentenced that was effected.

Whether a South African court would come to a similar conclusion as the ECHR in relation to section 136(3), or any similar future provision, is difficult to predict. However, given the persuasive guidance of the ECHR and the fact that the provision simply extends the minimum period that must be served (as opposed to imposing an indefinite sentence of life imprisonment), it is unlikely that a court would find section 136(3) an unjustifiable limitation on section 35(3)(n) of the Constitution.[36]

In *Van Wyk v Minister of Correctional Services*,[37] the applicant had been sentenced to life imprisonment. At the time of sentencing, (prior to 1 October 2004), the applicable policy required that an offender could only be considered for parole after having served 20 years. In addition, according to the 1959 Act,[38] the so-called 'credit system' allowed for the allocation of credits to offenders in return for their observance of the prison rules, thereby potentially lessening the number of days and months "earned by a prisoner as credits."[39] The credit system was abolished by the 1998 Act. Section 136(2), did state, however, in relation to determinate sentences, that a prisoner be allocated the maximum number of credits in terms of the 1959 Act when being considered for release on parole. A Departmental policy was then issued, stating that the consideration date for parole could not be "advanced by credits allocated" in relation to prisoners serving life sentences.[40] The 1959 Act had not differentiated between prisoners serving determinate sentences and those serving life sentences, however. This, argued the applicant, had the effect of retrospectively removing a right he had previously enjoyed under the 1959 Act. The High Court agreed with the applicant, and declared the Departmental Order unconstitutional, the result of which is that prisoners sentenced to life imprisonment prior to 1 October 2004 are now entitled to the benefit of the credit system of the 1959 Act.

Footnotes:

1. Section 64 of the 1959 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) stated:
"(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 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."
2The final report of the Commission of Inquiry into Unrest in Prisons, headed by Justice Kriegler, and which dealt, inter alia, with the parole system, was made available in 1994. Based on this report, the National Advisory Council, responsible for making policy recommendations to the Minister, recommended that in the case of offenders sentenced to life incarceration 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. Importantly, in terms of the Criminal Procedure Act 51 of 1997, a sentencing court has the power to impose a non-parole period at the time of sentencing. (for a discussion on this see JD Mujuzi 'Unpacking the law and practice relating to parole in South Africa' PER (2011) PELJ 14, 5.
3The whole of section 65(4) read:
"(a) A prisoner serving a determinate sentence or any of the sentences contemplated in subparagraphs (ii) and (iii) of paragraph (b) shall not be considered for placement on parole until he has served half of his term of imprisonment: Provided that the date on which consideration may be given to whether a prisoner may be placed on parole may be brought forward by the number of credits earned by the prisoner.
(b) A person who has under any law been sentenced to-
(i)periodical imprisonment, shall be detained periodically in a prison in the manner prescribed by regulation;
(ii)imprisonment for corrective training, shall be detained in a prison for a period of four years;
(iii)imprisonment for the prevention of crime, shall be detained in a prison for a period of eight years;
(iv)an indeterminate sentence, by virtue of his having been declared an habitual criminal, shall be detained in a prison until, after a period of at least seven years, he is placed on parole.
4Section 65 of the 1959 Act. Unlike the Parole Boards currently in place in terms of the 1998 Act, no civilian representations were allowed.
5Section 65(8) of the 1959 Act.
6 The National Advisory Council was a body established for the purpose of advising the Minister on general policy considerations, including the placement of sentenced offenders on parole.
7 Section 65(5) and 65(6) of the 1959 Act. It is perhaps necessary to outline the changes in the institutional committees: Under the 1959 Act, the Parole Board had no power to make a final decision in respect of the release of an offender – it could only make recommendations to the Commissioner in respect prisoners serving determinate sentences. Under the 1998 Act, however, the Parole Board has the authority to release offenders serving determinate sentences. For prisoners serving life sentences, the 1959 Act required that the Advisory Council recommend to the Minister that an offender be paroled. Between 1 October 2004 and September 2009, however, it did not have this power. Instead, the Parole Board simply made recommendations to a court. Under the 1998 Act, the National Council (which has replaced the Advisory Council) is empowered to make recommendations to the Minister on the release of a prisoner serving a life sentence.
8 Correctional Services Amendment Act 25 of 2008.
9The Correctional Matters Amendment Act 111 of 1998 will not change the current provisions in any material way.
10 The Correctional Matters Amendment Act 111 of 1998 will not change the current provisions in any material way.
11 Section 73(6)(a) of the 1998 Act.
12 Section 73(6)(b)(i) of the 1998 Act.
13 Section 73(6)(b)(ii) of the 1998 Act.
14 Section 73(6)(iii) of the 1998 Act.
15 Section 51 or 52 of the Criminal Law Amendment Act 105 of 1997.

16 Section 73(6)(v) of the 1998 Act.
17 The Correctional Matters Amendment Act 5 of 2011, discussed below.
18 Section 136 of the 1998 Act.
19 In sections 136(1) and 136(3).
20 Section 73 of the 2011 Amendment Act.
21 Section 73(6)(aA) of the 2011 Amendment Act.
22 Section 73(6)(b)(vi) of the 2011 Amendment Act.
23 [2009] 3 All SA 55 (GNP).
24 Sections 73 and 78 of the 1998 Act prior to amendment.
25 The applicant had been convicted of a politically motivated murder, that of Chris Hani, and feared that the political climate would be far from sympathetic to his cause.
26 2010 (12) BCLR 1233 (CC).
27 Van Vuran supra at para 57.
28 Van Vuren supra at para 57.
29 Van Vuren supra at para 57.
30 Van Vuren supra at para 59.
31 See Van Vuren supra at para 129-131.
32 Bertie Van Zyl (Pty) Ltd v Minister of Safety and Security 2009 JDR 0416 (CC).
33 Bishop and Brickhill, Juta Quarterly Report, Constitutional Law (2010) 3.
34 Kafkaris v Cyprus 21906/04 [2008] ECHR 143. See also the United States Supreme Court decision of Garner, Former Chairman of the State Board of Pardons and Paroles of Georgia, et al. v Jones 529 US 244, 256-7 (2000).
35 Karkaris supra at para 151.
36 Were the change in non-parole periods to come from an administrative source, however, such as the Commissioner, the changes would have to be consistent with a prisoner's right to just administrative action (section 33 of the Constitution). See Combrink and Another v Minister of Correctional Services and Another 2001 (3) SA 338 (D).
37 Unreported, referred to as [2011] ZAGPPHC 125, 26 July 2011.
38 Section 22A of the 1959 Act.
39 Id.
40 The Department of Correctional Services Order BVI(1A)(22).

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