

SOUTH AFRICA / JUDGMENT

# Van Vuuren and Others v Minister of Correctional Services (46062/08)

## [2009] ZAGPPHC 315 (17 August 2009)

### [2009] ZAGPPHC 315

## COURT

North Gauteng High Court, Pretoria

## BEFORE

Bertelsmann

## CASE / FILE NUMBER

46062/08

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IN

THE HIGH COURT OF SOUTH AFRICA  
(NORTH  
GAUTENG HIGH COURT, PRETORIA)

## CASE NO:

46062/08

2009-07-03

In the matter between

J L VAN VUUREN &amp; 7

OTHERS.....

Applicants

and

MINISTER OF CORRECTIONAL

SERVICES.....Respondent

### JUDGMENT

BERTELSMANN, J: There are seven individual applications all aimed at ensuring that the applicants are considered for parole by the appropriate body, either the Minister of Correctional Services or the National Council on Correctional Services. The applicants argued that they are entitled to be considered for parole immediately, even though all of them are serving sentences of life imprisonment. In fact, with the exception of the fourth and fifth applicants, the applicants were sentenced to death for various counts of murder. These death sentences were commuted to life imprisonment during 1994 or earlier.

When the applications were launched the essential issue in each of the applications was the constitutionality of section 136 of the Correctional Services Act 111 of 1998. This section reads as follows in its finally amended form:

*“(1) Any person serving a sentence of imprisonment immediately before the commencement of chapters IV, V and VII is subject to the provisions of the Correctional Services Act 8 of 1959 relating to his or her placement under community corrections and has 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 determined sentence of imprisonment as contemplated in subsection (1) such prisoner must be allocated the maximum number of credits in terms of section 22(a) of the Correctional Services Act 59 [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 (1) 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.

If a person is sentenced to life imprisonment after the commencement of chapters IV, VI and VII while serving a life sentence imposed prior to the commencement, the matter must, after the prisoner has served 25 years cumulatively, be referred to the court which imposed the last sentence of life imprisonment for consideration of placement under day parole or parole.”

It is clear from a simple reading of the section that if it does apply to the applicants those of the applicants who have not yet served 20 years of their life sentence are not entitled to be considered for parole. This is the position the respondents contend for. In accordance with this approach they consented to an order at the last hearing that the first, sixth and seventh applicants' matters should be placed before the National Council for Correctional Services at the earliest opportunity. These applicants have accordingly since such an order was granted no further interest in the proceedings. All the applications were launched on the basis that section 136 of the 1998 act was unconstitutional. While these applications were still pending the matter of Derby-Lewis was referred to the full bench of this division. This case raised the same question of the constitutionality of section 136 and the applicants' matter was therefore postponed pending the authoritative decision of the full bench. The judgment that was delivered by a unanimous full bench held that section 136 is constitutionally compatible and that it does apply to the applicants. VAN DER MERWE, J's judgment reads as follows in this regard on pages 19 and 21 of the typed

version of the judgment:

*“On a mere reading of section 136(1) it is clear that it refers to any person serving a sentence of imprisonment before the commencement of chapters IV, VI and VII of the 1998 Act. The applicant [Derby-Lewis] falls squarely under the provisions of section 136(1) because chapter IV came into operation on 31 July 2004 and chapters VI and VII on 31 October 2004, in terms of proclamation R38/2004.”*

And on page 21 from the last paragraph:

*“I agree with the respondents’ submission that only the provisions of section 136 of the 1998 Act are applicable to lifers sentenced pre-October 2004. All the provisions of the 1995 Act regarding parole for lifers have been repealed and the provisions of section 136(1) do not keep those provisions alive in spite of their repeal in terms of proclamation R38/2004.”*

Derby-Lewis was sentenced in October 1993 and he was sentenced to death. This penalty was later commuted to life imprisonment. His case is therefore on all fours with the applicants’ matters with the only difference being the age of Mr Derby-Lewis, which is irrelevant to the issue that has to be decided in these cases. It is clear irrelevant to the issue that has to be decided in these cases. It is clear from the passage that I have quoted that the full bench has authoritatively laid down that section 136(1) applies to all persons serving life sentences including the applicants. This court is bound by that judgment.

Realising that the Derby-Lewis judgment was death knell for their applications the applicants adopted a different stance when the matter resumed. They argue now that while section 136 is constitutionally compatible and therefore valid the old 1958 act section 64(c) still applied until the latest amendment of section 136 in 2001 and that the old dispensation that life sentences could be commuted after 10 or 15 years must therefore apply to them. This argument cannot be sustained in the light of the unequivocal ruling in the Derby-Lewis case I have quoted above. Quite apart from the fact that this belated argument was never raised on the papers but only on the last day of the hearing.

The applications of the second, third, fourth and fifth applicants must therefore be dismissed. As far as costs are concerned the first, sixth and seventh applicants have been partially successful but launched the application on a basis that has proved to be abortive. No order as to costs is made in their case. As far as the second to fifth applicants are concerned they should have abandoned the applications after the Derby- Lewis judgment was delivered. They must therefore pay the respondent’s costs but only for the last appearance and only on the basis of the employment of one junior counsel. No order of costs is made in regard to the balance of the proceedings.

from the passage that I have quoted that the full bench has authoritatively laid down that section 13.6(1) applies to all persons serving life sentences including the applicants. This court is bound by that judgment.

Realising that the Derby-Lewis judgment was the death knell for their applications, the applicants adopted a different stance when the matter resumed. They argue now that while section 136 is constitutionally compatible and therefore valid, the old 1958 Act's section 64(c) still applied until the latest amendment of section 136 in 2001 and that the old dispensation that life sentences could be commuted after 10 or 15 years must therefore apply to them. This argument cannot be sustained in the light of the unequivocal ruling in the Derby-Lewis case I have quoted above, quite apart from the fact that this belated argument was never raised on the papers but only on the last day of the hearing.

The applications of the second, third, fourth and fifth applicants must therefore be dismissed. As far as costs are concerned the first, sixth and seventh applicants have been partially successful but launched the application on a basis that has proved to be abortive. No order as to costs is made in their case. As far as the second to fifth applicants are concerned they should have abandoned the applications after the Derby- Lewis judgment was delivered. They must therefore pay the respondent's costs but only for the last appearance and only on the basis of the employment of one junior counsel. No order of costs is made in regard to the balance of the proceedings.

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