JK2

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 97569/15

In the matter between:-

OUPA CHIPANE PHAAHLA

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Respondent

COMMISSIONER OF CORRECTIONAL SERVICES Second Respondent

APPLICATION FOR LEAVE TO APPEAL

KINDLY TAKE NOTICE that the Respondents apply for leave to appeal to the Supreme Court of Appeal of South Africa against-

(i.) the judgment of the Full Bench of the above Honourable Court delivered on 3 October 2017, in finding that section 73(6)(b)(iv) of the Correctional Services Act 111 of 1998 infringes upon the Applicant's rights in terms of section 9(1) and section 9(3) of the Constitution of the Republic of South Africa, 1996 ("the Constitution");

(ii.) the orders granted by the Honourable Court that-

(a) section 136(1) and section 73(6)(b)(iv) of the Correctional Services Act 111 of 1998 are declared inconsistent with section 9 of the Constitution insofar as such sections apply a

parole regime after 1 October 2004 that was not of application at the time that the offence was committed;

(b) the Applicant is entitled to be considered for placement on parole in terms of the provisions of the Correctional Services Act 8 of 1959 and in terms of the policy and guidelines applied by the former parole boards prior to the commencement of Chapters VI and VII of the Correctional Services Act 111 of 1998 ("the Act"), in the event that he committed the offences for which he is serving a sentence of life incarceration prior to the Act coming into force;

(iii.) the costs order granted by the Honourable Court.

The grounds on which leave to appeal is sought are as follows:

1.

1.1 The Honourable Court erred in finding that section 73(6)(b)(iv) of the Act infringes upon the Applicant's right to equality in terms of section 9(1) of the Constitution.

1.2 The need to re-visit the minimum period of incarceration to be served by an offender sentenced to life incarceration, by way of the enactment of section 73(6)(b)(iv) of the Act, arose in the light of various factors, *inter alia*:

1.2.1 the abolition of the death penalty pursuant to which the distinction which had hitherto existed between offenders who were sentenced to life incarceration due to extenuating

circumstances, on the one hand, and offenders who were sentenced to death due to the lack of extenuating circumstances on the other, no longer existed;

1.2.2 the risk of danger to the public upon the early release of offenders sentenced to life incarceration;

1.2.3 the need to protect the public against dangerous criminals when considering offenders sentenced to life incarceration for placement on parole;

1.2.4 the need to maintain public confidence in the criminal justice system when placing offenders sentenced to life incarceration on parole;

1.2.5 the increase in the prevalence of crimes, by way of a spiralling crime rate, for which offenders may be sentenced to life incarceration.

1.3 In the context of correctional law, the retroactive application of a change in parole policy does not conform to the principles of the rule of law. The purpose of section 136(1) of the Act was to ensure that the pre-existing right of offenders to be considered for placement on parole was not disturbed. In accordance with such pre-existing right of offenders to be considered for placement on parole, section 136(1) refers to offenders who were sentenced prior to 1 October 2004 (rather than offenders who committed the crime prior to 1 October 2004).

1.4 Section 73(6)(b)(iv) and section 136(1) of the Act involve a

balancing of the competing considerations of the need to re-visit the minimum period of incarceration henceforth to be served prior to consideration for placement on parole of offenders sentenced to life incarceration, and the need to ensure that the pre-existing right to be considered for placement on parole of offenders who were already serving a sentence of life incarceration was not disturbed. This is the basis for the differentiation between offenders sentenced before 1 October 2004, on the one hand, and those sentenced after 1 October 2004.

1.5 The Honourable Court accordingly erred in finding that there was no rational connection to a legitimate government purpose in differentiating between offenders who were sentenced prior to 1 October 2004, on the one hand, and offenders who were sentenced after 1 October 2004 for crimes committed before the Act passed into law on the other [by way of finding that the right to equality of the latter category of offenders is infringed by section 73(6)(b)(iv)].

2.

2.1 The Honourable Court erred in finding that it is the date of commission of the crime which should govern the parole regime applicable to offenders.

2.2 Firstly, it is so that the commission of a crime may extend over a period of time (e.g. in cases of conspiracy to commit a crime and continuing offences). Accordingly, the commission of a crime may extend over the period before and after the commencement of the Act. Were the date of commission of the crime to be

determinative of the parole regime applicable to an offender, one would in such cases not know which parole regime was applicable.

2.3 Secondly, it not infrequently happens that the court in imposing sentence takes several counts as one for purposes of sentence. By way of example, counts 1 – 2 may have been committed before the Act passed into law, whilst counts 3 – 5 may have been committed after the Act passed into law. Once again, in the event of the court taking counts 1 – 5 as one for purposes of sentence, were the date of commission of the crime to be determinative of the parole regime applicable to an offender, one would not know which parole regime was applicable.

2.4 Thirdly, to determine the parole regime applicable to an offender with reference to the date of the commission of the crime rather than the date of sentence could entail that an offender would be entitled to demand the implementation of a parole regime that no longer exists (e.g. the system of remission of sentence, which has long since no longer existed).

2.5 In determining whether the differentiation between the categories of offenders which formed the subject-matter of the application was rational, the Honourable Court stated that there are three logical points by reference to which a change in the regime of parole might apply (to wit, the date of sentencing, the date of conviction or the date of commission of the crime).

2.6 In determining whether the equality right in terms of section 9(1) of the Constitution of offenders who were sentenced after 1

October 2004 for crimes committed before the Act passed into law is infringed by section 73(6)(b)(iv) (read with section 136(1)), the question is not whether the legislature may have achieved its purposes more effectively in a different manner, or whether legislation could have been more closely connected to the purpose sought to be achieved. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose.

2.7 Finally, parole is premised on an offender having been sentenced, rather that the offender having committed an offence.

2.8 In the premises, the Honourable Court erred in finding that to adopt the date of sentencing to determine the parole regime applicable to an offender involves an arbitrary approach.

3.

3.1 The Honourable Court erred in finding that section 73(6)(b)(iv) of the Act infringes upon the Applicant's right in terms of section 9(3) of the Constitution not to be unfairly discriminated against.

3.2 Whether or not section 73(6)(b)(iv) (read with section 136(1)) amounts to discrimination depends upon whether the impugned provisions impair the fundamental human dignity of the Applicant, or affect him adversely in a comparably serious manner. This must be determined objectively. Viewed objectively, regard being had to the purpose thereof, the impugned provisions do not impair the fundamental human dignity of the Applicant (or other offenders who fall into the same category as him).

3.3 In the premises, the Honourable Court erred in finding that section 73(6)(b)(iv) amounts to discrimination against the Applicant (or other offenders in the same category as him).

3.4 In the alternative to paragraphs 3.1 – 3.3 above, regard being had to the history and purpose thereof, section 73(6)(b)(iv) of the Act is directed to a legitimate government purpose, rather than impairing the human dignity of the Applicant (or offenders in the same category as him). In the premises, section 73(6)(b)(iv) (read together with section 136(1)) does not amount to unfair discrimination.

4.

In the alternative to paragraphs 1 – 3 above, section 73(6)(b)(iv) of the Act [read together with section 136(1)] constitutes a limitation of the rights in terms of section 9(1) and section 9(3) of the Constitution of offenders (such as the Applicant) who were sentenced to life incarceration after 1 October 2004 for crimes committed before the Act passed into law, which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, by way of the pursuit of a legitimate government purpose.

5.

5.1 The judgment throws the administration of parole into confusion. The issue before the Honourable Court *a quo* related to an offender serving an indeterminate sentence (life sentence). Section 136(1) of the Act deals with both determinate and indeterminate sentences. The declaration of invalidity, therefore,

applies to both determinate and indeterminate sentences.

5.2 Firstly, the declaration of invalidity of section 136(1) of the Constitution is inconsistent with the interpretation of the said section by the Constitutional Court in ***Van Vuren v Minister of Justice*** 2010 (12) BCLR 1233.

5.3 Secondly, the declaration granted by the Honourable Court *a quo* is rendered impractical, in that, in administering parole, the Department of Correctional Services bases the parole regime on the date of sentence, and not the date of commission of the offence.

6.

6.1 The Respondents were initially brought before Court on the basis that section 73(6)(b)(iv) of the Act (read with section 136(1)) infringed the Applicant's right in terms of section 35(3)(n) of the Constitution to a fair trial. The bulk of the case (and the judgment) centred around the Applicant's challenge to the impugned provisions in the light of section 35(3)(n) of the Constitution.

6.2 The Honourable Court dismissed the pleaded application insofar as it was alleged by the Applicant that the impugned provisions infringed his rights in terms of section 35(3)(n) of the Constitution. The application succeeded, however, based on an alleged infringement of section 9 of the Constitution (being an issue which was raised *mero motu* by the Honourable Court by way of inviting the parties to file supplementary papers in this

regard).

6.3 In the premises, the Honourable Court reached an unjustifiable conclusion in ordering the Respondents to pay the costs of the application.

7.

The Respondents accordingly apply for leave to appeal on the basis that there exist reasonable prospects of success on appeal.

SIGNED AT PRETORIA ON THIS 24TH DAY OF OCTOBER 2017

State Attorney (Pretoria)
Attorney for the Respondents
316 Salu Building
316 Thabo Sehume Street
PRETORIA
Ref: Mr M Masenamela
2670/15/Z4/NT
Tel: (012) 309 1559
Fax: (012) 309 1649/50

To: **The Registrar,**
North Gauteng High Court
PRETORIA

And To: **Julian Knight @ Associates Inc**
Attorneys for the Applicant
129 Murray Street
Brooklyn
PRETORIA
Ref: Mr Knight/P124

JULIAN KNIGHT
and ASSOCIATES Inc
RECEIVED/ONTVANG
2017 -10- 24
ACCEPTED WITHOUT PREJUDICE/
ONTVANG SONDER
BENADELING VAN REGTE

12:10