**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 44/18

In the matter between:

**OUPA CHIPANE PHAAHLA** Applicant

and

**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** First Respondent

**COMMISSIONER OF CORRECTIONAL SERVICES** Second Respondent

and

**MAKOME STEFANAS TLHAKANYE** Intervening Party

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| **Neutral citation:** | *Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening)* [2019] ZACC 18 |
| **Coram:** | Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J |
| **Judgments:** | Dlodlo AJ (majority): [1] to [72]<br>Froneman J (concurring): [73] to [78]<br>Cameron J (concurring): [79] to [91] |
| **Heard on:** | 8 November 2019 |
| **Decided on:** | 3 May 2019 |
| **Summary:** | Section 136(1) of the Correctional Services Act 111 of 1998 declared invalid — parole eligibility is part of punishment — |

section 35(3)(n) of the Constitution — right to least severe punishment

Section 9(1) of the Constitution — equality before the law — legitimate government purpose — purpose at odds with rule of law never legitimate

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**ORDER**

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On application for confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria under case number 97569/15:

1. The application for condonation is granted.
2. Mr Makome Stefanas Tlhakanye is admitted as an intervening party.
3. The application for the admission of further evidence in terms of rule 31 of the Rules of the Constitutional Court is dismissed.
4. The order of invalidity of the High Court is confirmed and paragraph 1 is varied to read:

   "Sections 136(1) and 73(6)(b)(iv) of the Correctional Services Act 111 of 1998 (Correctional Services Act) are declared inconsistent with section 9(1) and (3) and section 35(3)(n) of the Constitution."
5. Parliament must, within 24 months from the date of this order, amend section 136(1) of the Correctional Services Act to apply parole regimes on the basis of date of commission of an offence, pending which the section shall read as follows:

   "Any person serving a sentence of incarceration for an offence committed before the commencement of Chapters 4, 6 and 7 of the Correctional Services Act is subject to the provisions of the Correctional Services 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."

6. The Minister of Justice and Correctional Services must pay costs of the applicant and the intervening party in this Court, including the costs of two counsel.

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**JUDGMENT**

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DLODLO AJ (Mogoeng CJ, Basson AJ, Cameron J, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

*Introduction*

> "Parole is an acknowledged part of our correctional system. It has proved to be a vital part of reformative treatment for the paroled person who is treated by moral suasion. This is consistent with the law: that everyone has the right not to be deprived of freedom arbitrarily or without just cause and that sentenced prisoners have the right to the benefit of the least severe of the prescribed punishments."[1]

[1] The question that we are faced with in this matter is whether the application of a longer non-parole period in the case of some inmates and not others on the basis of their date of sentence infringes on inmates' right to equality and fair trial rights guaranteed by the Constitution.

*Parties*

[2] The applicant, Mr Oupa Chipane Phaahla, is an inmate sentenced to life imprisonment and incarcerated in Zonderwater Correctional Centre.

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[1] *S v Jimmale* [2016] ZACC 27; 2016 (2) SACR 691 (CC); 2016 (11) BCLR 1389 (CC) at para 1.

[3] The application is opposed by the Minister of Justice and Correctional Services and the National Commissioner for Correctional Services, the first and second respondents, respectively.

[4] Mr Makome Stefanas Tlhakanye, an inmate who like the applicant is serving a life sentence of imprisonment, applied for leave to intervene in support of the application for confirmation and made submissions illustrating the impact of the impugned sections on inmates other than the applicant.

*Background*

[5] The concept of parole was first introduced into South African law under the Prisons and Reformatories Act[2] shortly after union in 1910.[3] This introduced a system of early release of inmates on probation – either into the community or into low-paid labour – as a reward for good behaviour.[4] However, parole has only been implemented systematically in the South African criminal justice system since the 1950s, with the enactment of the Prisons Act[5] (1959 Prisons Act).[6] Since then, as a result of legislative amendments and changes in policy, the length of non-parole time periods has changed a number of times.

[6] Between August 1987 and March 1994, inmates sentenced to life imprisonment were required to serve 10 years of their sentence before becoming eligible for consideration for parole, but it was only in exceptional circumstances that an inmate would be granted parole before they had served 15 years of their sentence.

[2] 13 of 1911.

[3] Moses *Parole in South Africa* (Juta & Co Ltd, Cape Town 2012) at 7.

[4] Id.

[5] 8 of 1959. The Prisons Act was later renamed the Correctional Services Act 8 of 1959 by sections 33(1) and 34 of the Correctional Services and Supervision Amendment Act 122 of 1991.

[6] Moses above n 3 at 7-8.

[7] From 1 March 1994 until 1 October 2004, inmates serving life sentences were required to serve a minimum period of 20 years in prison before they became eligible for parole. However, in terms of section 22A of the 1959 Prisons Act, introduced by an amendment in 1993,[7] inmates could earn credits for good behaviour.[8] These credits translated into days served, with the effect that the date for consideration for parole for those inmates was moved earlier. The effect of this was that inmates sentenced to life incarceration between 1 March 1994 and 1 October 2004 became eligible for parole after having served a minimum period of 13 years and four months of their life sentence.

[8] The 1959 Prisons Act was repealed in 1998 and replaced by the Correctional Services Act[9] (1998 Act) which, among other things, introduced a new parole release system. The 1998 Act was implemented in stages, with different chapters taking effect – and simultaneously replacing the corresponding chapters of the 1959 Prisons Act – over a number of years. The new parole system contained in Chapter VI of the 1998 Act came into effect on 1 October 2004.[10] As of 1 October 2004, in terms of section 73(6)(b)(iv) of the 1998 Act any inmate sentenced to life imprisonment must serve a minimum of 25 years in prison before they may be considered for release on

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[7] Section 9 of the Correctional Services and Supervision Amendment Act 68 of 1993.

[8] Section 22A 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 the institutional committee may, in allocating credits, take into account any other factor which may be relevant to the prisoner in question:
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> Provided further that—
>
> (a) a prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served;
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> (b) credits shall be awarded at the intervals referred to in section 62(1);
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> (c) a prisoner sentenced to imprisonment for up to and including six months shall, unless the institutional committee awards him fewer credits, be deemed to have been awarded the maximum number of credits.
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> (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 prisoner on parole.
>
> (3) In the calculation of credits, a fraction of a day shall be regarded as a full day."

[9] 111 of 1998.

[10] Proc R38 GG 26626 of 30 July 2004.

parole, unless they reach the age of 65 in which case they may be released earlier. The 1998 Act also did away with the credit system, which had created an administrative headache for the Department of Correctional Services (Department).[11]

[9] The situation can now briefly be described as follows: inmates sentenced to life imprisonment before 1 October 2004 are eligible for parole after having served 20 years;[12] and inmates sentenced to life imprisonment from 1 October 2004 onwards must serve a minimum of 25 years before they may be considered for release on parole.[13] Section 136(1) thus created a dual system of assessment, consideration and placement on parole of sentenced inmates determined by their date of sentence.

[10] The applicant was convicted on 25 September 2004 and sentenced to life imprisonment on 5 October 2004. Because he was sentenced four days after the commencement of the new parole regime, he must serve a minimum of 25 years before he becomes eligible for consideration for parole. Had the applicant been sentenced a few days earlier, he only would have had to serve 20 years of his sentence before he could be considered for release on parole. Aggrieved by this, the applicant launched an application in the High Court of South Africa, Gauteng Division, Pretoria (High Court) challenging the constitutionality of sections 73(6)(b)(iv) and 136(1) of the 1998 Act on the basis that these sections infringed his right to the benefit of the least severe of the prescribed punishments in terms of section 35(3)(n) of the Constitution, and his right to equality under section 9 of the Constitution.

[11] The High Court[14] found that section 35(3)(n) of the Constitution did not apply because non-eligibility for parole is not part of the punishment prescribed by a court, unless the court specifically imposes a non-parole period in terms of section 276B of

[11] Id.

[12] Section 136(1) of the 1998 Act above n 9.

[13] Id section 73(6)(b)(iv).

[14] *Phaahla v Minister of Justice and Correctional Services* 2018 (1) SACR 218 (GP) (High Court judgment) at paras 21-2 and 26.

the Criminal Procedure Act[15] (CPA). However, the High Court did find that the impugned sections amounted to a breach of the applicant's right to equality in terms of section 9(1) and (3) of the Constitution because the use of date of sentence as a determining factor, rather than date of commission of the offence, was arbitrary and irrational, led to a retroactive application of the law, and amounted to unfair discrimination against the applicant and inmates in his position.[16] The Court held that to the extent that the impugned sections imposed a stricter parole regime on the basis of date of sentencing, the sections were constitutionally invalid.

[12] The respondents applied to the High Court for leave to appeal to the Supreme Court of Appeal. Nothing appears to have come of that application and it was struck off the roll.

[13] The applicant now applies to this Court in terms of rule 16(4) of the Rules of the Constitutional Court[17] and section 172(2)(d) of the Constitution[18] for confirmation of the order of the High Court. He makes this application on the grounds that the impugned sections breach his right to equal treatment and protection of the law in terms of section 9(1) of the Constitution, and right not to be discriminated against under

[15] 51 of 1977. Section 276B was introduced by section 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997 and is titled "Fixing of non-parole period". Subsection (1) provides:

> "(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."

[16] High Court judgment above n 14 at paras 45-7.

[17] Rule 16 of the Rules of the Constitutional Court is titled "Confirmation of an order of constitutional invalidity" and provides in relevant part:

> "(4) A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

[18] Section 172(2)(d) provides:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

section 9(3) of the Constitution.[19] He also submits that the impugned sections breach his right to a fair trial, specifically, his right to receive the least severe of the prescribed punishments if the prescribed punishment for the offence has changed between the time the offence was committed and the date of sentencing.[20]

*Jurisdiction*

[14] In terms of section 167(5) of the Constitution, this Court makes the final decision as to the constitutionality of an Act of Parliament, and any order of constitutional invalidity by the High Court must be confirmed by this Court before that order has any force.[21] Our jurisdiction is accordingly engaged.

*Condonation*

[15] The applicant applied for confirmation of the High Court's declaration of invalidity outside of the time period required by rule 16(4). His explanation was that the respondents' application for leave to appeal to the Supreme Court of Appeal resulted in confusion as to the relevant requirements. The applicant is an inmate and the explanation is credible. Accordingly, condonation is granted.

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[19] Section 9 of the Constitution provides in relevant part:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> . . .
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[20] Section 35(3) of the Constitution provides in relevant part:

> "Every accused person has a right to a fair trial, which includes the right—
>
> . . .
>
> (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

[21] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

*Application for leave to intervene*

[16] Applications to intervene as a party to proceedings are governed by rule 8(1) of the Rules of the Constitutional Court and the overriding consideration is whether it is in the interests of justice to allow a party to intervene.[22] Mr Tlhakanye has demonstrated that he has a direct and substantial interest in the outcome of this matter and he applied for leave to intervene timeously. It would therefore be in the interests of justice to admit him as an intervening party.[23]

*Rule 31 application*

[17] The respondents in this matter seek to introduce new facts not in the record in terms of rule 31 of the Rules of the Constitutional Court on the basis that they are common cause or incontrovertible, of an official or statistical nature capable of easy verification, and relevant to the formulation of a just and equitable order.

[18] In summary, the evidence the respondents seek to introduce pertains to their computer system which manages the data on correctional centre inmates. This system captures an inmate's offence, date of sentence, term of incarceration and date of eligibility for parole. It does not capture the date of the commission of the offence, as there has never been a need to capture this information. The date of the commission of the offence is captured on the warrant of detention. If the date of the commission of the offence is to become the basis for parole eligibility, as argued for by the applicant, the Department will need to capture manually the dates of commission and upload these to their system. The respondents also submit that there are currently 117 692 inmates serving determinate and life sentences. On these grounds, the respondents ask that should this Court find the impugned provisions constitutionally invalid, it will take this into consideration in crafting a just and equitable order by suspending the declaration

[22] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 11.

[23] *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 30.

of invalidity for a period of 12 months. This, they submit, would avoid opening the floodgates of litigation by inmates seeking *mandamus* orders (judicial writ or command) that they be considered for parole.

[19] The threshold that must be met for a rule 31 application to be successful is that the tendered evidence is relevant to the issues before the Court; and the facts sought to be adduced either must be common cause or incontrovertible, or they must be official, scientific, technical or statistical in nature and easily verifiable.[24] The applicant contends that the evidence is not relevant to the issues to be determined, is not verifiable at all and is not relevant to the issues at hand. I do not agree with the applicant that the proffered evidence is incapable of verification, but I also do not believe that it is of any great relevance to the issues at hand. Moreover, in *Prophet* this Court held that it is in the interests of fairness for the party tendering the application late to provide an explanation for lateness.[25] This the respondents failed to do either in their written submissions or in oral argument.

[20] In light of the circumstances of the applicant and intervening party – both of whom are incarcerated and the latter, self-represented – as well as the fact that the respondents had the opportunity to introduce this evidence at any point, including during proceedings in the High Court, I believe the prejudice to the applicant and intervening party warrants a dismissal of the rule 31 application.

*Issues*

[21] The central issue to be determined by this Court is whether the impugned sections of the 1998 Act infringe upon inmates' rights to a fair trial or equality.

[24] Rule 31(1) of the Rules of the Constitutional Court.

[25] *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC) at para 38.

*Applicant's submissions*

[22] The applicant submits that there is a presumption of non-retrospectivity in the law, and an interpretation of the law favouring liberty should be preferred. He relies on *Van Vuren* to argue that section 136(1) creates different categories of inmates for the purposes of parole eligibility and preserves the parole provisions applicable before 1 October 2004.[26] The applicant argues that the purpose of section 136 is to avoid retrospective application of the law through the application of parole provisions more onerous than those applicable before an inmate was sentenced. However, the applicant contends that the use of the date of sentence to distinguish between inmates for parole purposes is arbitrary and irrational, and counteracts the purpose of section 136. This is because the date that an offence is committed is fixed and certain, whereas the date on which someone will ultimately be sentenced is unpredictable due to unforeseeable delays, or lack thereof, in the criminal justice process.

[23] An example that counsel for the applicant provided during oral argument was that two accused persons may commit the same offence on the same day, but the date of conviction or sentence could differ by more than a year as a result of factors beyond the control of either of the accused. This would result in one accused serving only 20 years in prison, while the other must serve 25 years – for the same offence. The result is harsh and extremely prejudicial to anyone who, like the applicant, committed and was convicted of an offence before 1 October 2004 but was only sentenced after 1 October 2004. The applicant argues that the differentiation is irrational and does not serve a legitimate government purpose. According to *Harksen*[27] and *Prinsloo*[28] the differentiation therefore violates section 9(1) of the Constitution, and the High Court was correct in holding this to be the case.

[26] *Van Vuren v Minister of Correctional Services* [2010] ZACC 17; 2012 (1) SACR 103 (CC); 2010 (12) BCLR 1233 (CC).

[27] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[28] *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SACR 1012 (CC); 1997 (6) BCLR 759 (CC).

[24] The applicant also argues that parole forms a part of, or is inextricably linked to, sentencing and punishment as it changes the conditions of punishment from imprisonment to correctional supervision within the community. The possibility of parole, then, ameliorates a sentence of imprisonment and eligibility or non-eligibility can shorten or lengthen the period that a person must spend imprisoned. Parole therefore has the effect that the length of a term of imprisonment can differ materially from what is ordered by a court.

[25] The applicant submits that the date applicable in the sentencing process, which is when the punishment is determined, is the date of the commission of the offence. A person may not be sentenced to a harsher punishment than what was applicable at the time of the offence. Therefore in terms of section 35(3)(n) – if parole is part of the punishment – the parole regime applicable cannot be more severe than what was applicable at the time the offence was committed.

*Intervening party's submissions*

[26] Mr Tlhakanye's submission is that the date of commission of an offence should be used as the determining factor between the categories of parole and that the use of the date of sentencing infringes the right to equality before the law. He also argues that parole is part of the punishment, and eligibility for parole affects the length of time someone spends in prison, which is the most restrictive part of a sentence, and must therefore be deemed as part of the punishment. He further contends that differentiation based on date of sentencing is arbitrary and irrational. This is because accused persons do not have control over the date they are sentenced, and punishment is connected rationally to the accused's offence. He argues that it is also irrational because it leads to the absurd result that two people who commit the same offence on the same day but are sentenced on different days are punished in accordance with different parole regimes. Finally, Mr Tlhakanye submits that differentiation based on date of commission of sentencing does not serve a legitimate government purpose. The respondents' submissions concerning uncertainty as to dates or circumstances where

offences are committed over extended periods of time can be resolved in a way that does not infringe on the right to a fair trial or the right to equality.

*Respondents' submissions*

[27] The respondents submit that the impugned provisions do not violate section 9(1) because the amendment of the minimum detention period involved the balancing of a number of competing and important considerations that bear a rational connection to a legitimate government purpose. The respondents argue that using the date of the commission of the offence would lead to a number of difficulties, for example, when the commission of an offence was ongoing and occurred both before and after 1 October 2004. Similarly, an accused could be tried for a number of different offences, some of which took place before 1 October 2004, and others, after. Furthermore, the respondents contend, parole is premised on an accused being found guilty and sentenced rather than on the commission of the offence. For this reason, the date of sentence is relevant. Moreover, under the common law, it is the date of sentence which is relevant to how a judicial sentence should be served.

[28] The respondents further argue that the provisions do not impair the fundamental human dignity of inmates sentenced to imprisonment after 1 October 2004 for offences committed prior to 1 October 2004, nor do they affect them adversely in a comparably serious manner. Therefore the provisions do not amount to discrimination. However, even if the provisions do amount to discrimination, then this discrimination is not unfair because it is directed toward a legitimate government purpose, and the limitation of the applicant's right to equality is reasonable and justifiable.

*Is the harshening of parole a kind of punishment?*

[29] The applicant argues that the application of a more burdensome parole system infringes upon his right to equality and right to the benefit of the least severe of the prescribed punishments in terms of section 35(3)(n) of the Constitution. The question that then arises is whether the rules that govern non-eligibility for parole are part of the

rules that govern punishment. For if they do not, on what basis can the impugned sections be found to infringe on either the right to equality or the right to a fair trial? If the impugned sections, which have the effect of lengthening or shortening a term of imprisonment, are not found to result in inmates receiving different punishments for the same offences, then on what basis can we find that there is differentiation or discrimination that would trigger section 9, or that his section 35(3)(n) right has been infringed?

[30] Punishment is difficult to define; its definition is often determined by reference to the different measures taken to punish law-breakers.[29] For our purposes, this will suffice. Section 276 of the CPA is titled "Nature of punishments" and sets out the different types of sentences that may be meted out by courts to a person convicted of an offence.[30] These include: imprisonment, including life imprisonment; correctional supervision; and imprisonment from which a person may be placed under correctional supervision in the discretion of the National Commissioner of Correctional Services or a parole board, now referred to as parole and correctional supervision boards.

[31] Significantly, correctional supervision is among the types of punishments listed. Parole and correctional supervision are substantively identical. Correctional

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[29] Boonin *The Problem of Punishment* (Cambridge University Press, Cambridge 2008) at 3.

[30] CPA above n 15. Section 276(1) provides in full:

> "Subject to the provisions of this Act and any other law of the common law, the following sentences may be passed upon a person convicted of an offence, namely—
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> (a) [Para (a) deleted by section 34 of Act 105 of 1997];
>
> (b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B(1);
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> (c) periodical imprisonment;
>
> (d) declaration as an habitual criminal;
>
> (e) committal to any institution established by law;
>
> (f) a fine;
>
> (g) [Para (g) deleted by section 2 of Act 33 of 1997];
>
> (h) correctional supervision;
>
> (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board."

supervision is defined by the CPA as "a community-based sentence to which a person is subject in accordance with Chapters V and VI of the [1998 Act]".[31] Section 1 of the 1998 Act defines "community corrections" as "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".[32] This must then include parole, which is a non-custodial measure and form of supervision in the community, indicating that parole is in fact a kind of punishment. Finally parole itself is defined by the 1998 Act as "a form of community corrections contemplated in Chapter VI [of the 1998 Act]".

[32] The purpose of community corrections is set out in section 50 of the 1998 Act, which provides:

> "(1) The objectives of community corrections are to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future . . .
>
> (2) The immediate aim of the implementation of community corrections is to ensure that persons subject to community corrections abide by the conditions imposed upon them in order to protect the community from offences which such persons may commit."

This description surely applies equally to parole and correctional supervision.

[33] Section 51 of the 1998 Act then lists the different types of community corrections governed by Chapter VI, among which are correctional supervision and parole. Section 52(1) of the 1998 Act empowers a parole board granting parole and a court sentencing someone to correctional supervision to impose the same conditions for each, again indicating that the two are not substantively distinct.

[31] Id section 1.

[32] Section 1 of the 1998 Act.

[34] Correctional supervision is a class of punishment, and so the rules prescribing correctional supervision prescribe a form of punishment. Parole is defined in substantively the same way, serves the same purpose, and is governed by the same rules as correctional supervision. In substance, therefore, the two are identical and parole, like correctional supervision, must surely be a type of punishment.

[35] It could be argued that parole is a privilege, not a right, and is merely a mitigation of the prescribed punishment of imprisonment, not a prescribed punishment in itself. It is simply a way of serving out one's sentence in an environment other than a prison. On this reasoning the rules prescribing parole eligibility do not amount to a prescribed punishment. However, as counsel for the respondents correctly conceded, parole is still a manner of serving out one's sentence. It is therefore still a punishment although a lesser one than imprisonment. It still amounts to a deprivation of liberty for a set period, albeit outside of prison. Parolees remain subject to the supervision and authority of the Department for the remainder of their sentence. That it mitigates a sentence of imprisonment does not detract from this.

[36] It was also argued by counsel for the respondents that parole is determined by the Executive, and therefore it is not a part of the sentence, as sentencing takes place at court and is undertaken by the Judiciary. On this reasoning, to consider parole to be part of the punishment would create a tension between executive and judicial functions and allow the Executive to encroach upon the Judiciary. A converse argument in respect of this tension between the Executive and the courts in respect of sentencing was considered briefly by the Supreme Court of Appeal in *Mhlakaza*[33] and in *Botha*.[34] In *Botha*, the Court touched on the issue whether a trial court's imposition of a non-parole period encroached on the domain of the Executive.[35] The Court held that "a

[33] *S v Mhlakaza* [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) at 521E-I.

[34] *S v Botha* [2004] ZASCA 51; 2006 (2) SACR 110 (SCA) at para 25.

[35] These cases were heard before the promulgation of section 276B of the CPA, which came into effect on 1 October 2004 per the proclamation in Proc R45 2004 GG 26808 of 1 October 2004.

recommendation [of a non-parole period] is an undesirable incursion into the domain of another arm of state".[36]

[37] First, before the promulgation of section 276B of the CPA, the imposition of a non-parole period amounted to an encroachment of the functions of the Executive by the Judiciary. However, this is distinct from an automatic eligibility criterion established by legislation that, exceptional circumstances aside, will take effect through ordinary effluxion of time and has little or nothing to do with sentencing by a court.

[38] Second, the argument conflates sentence with punishment. Section 35(3)(n) of the Constitution distinguishes between sentence and punishment, indicating that in the eyes of the drafters, the two are distinct concepts. A sentence is a measure of punishment, but it is not the punishment itself; it is the decision, usually but not necessarily of a court, as to which punishment should be imposed. Sentencing is conducted by a court, which must choose from the options provided to it by the Legislature and does not have the prerogative to decide precisely how and where that punishment will be carried out. Courts must apply the appropriate punishment established by statute or the common law. However, as pointed out by the Supreme Court of Appeal in *Mhlakaza*, when sentencing a person to imprisonment, "[t]he function of the sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served".[37]

[39] That the courts prescribe imprisonment as a punishment, or indeed any other penalty, does not mean that any material change in conditions that happens subsequent to the sentence is not a class of punishment. Of course, an inmate may move from a maximum security centre to a medium security centre, or gain or lose privileges, but such conditions are the result of decisions taken in the administration of imprisonment,

[36] *Botha* above n 35 at para 25.

[37] *Mhlakaza* above n 34 at 521D.

a type of punishment. Parole is a different class to security levels or privileges. It is a non-custodial punishment served in the community. It is a distinct form of punishment from that of imprisonment.

[40] Third, like parole, correctional supervision is implemented by the Executive in terms of section 276(1)(i) of the CPA, which provides as a form of punishment "imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board". How is this any different from a sentence of imprisonment during which almost every person will become eligible to apply for parole after serving their non-parole period and will be granted such parole subject to the discretion of the parole and correctional supervision board?

[41] Fourth, the rules governing the length of the period to be served in a prison before an inmate becomes eligible for parole are statutory and function automatically. They determine when inmates may apply for parole. These rules determine not whether someone should be released, but when they will have their first opportunity to apply for release on parole. The effect of these rules is to lengthen or shorten a term of imprisonment, which is a type of punishment. Importantly, these rules are distinct from the application of parole policies and criteria by correctional service administrators in determining whether a parole application will be successful.

[42] Finally, as discussed above, the right to a fair trial is one that "embraces the concept of substantive fairness".[38] In the case of *S v Zuma*, this Court held that "constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them".[39] Poignantly, this was said in relation to the fair trial right under section 25(3) of the interim Constitution – now section 35(3) of the Constitution. The Court went on to say:

[38] *S v Zuma* [1995] ZACC 1; 1995 (1) SACR 568 (CC); 1995 (4) BCLR 401 (CC) at para 15, citing *Attorney General v Moagi* 1982 (2) Botswana LR 124 at 184 (judgment of Kentridge AJ).

[39] Id at para 15.

> "The right to a fair trial conferred by [section 25(3) of the interim Constitution] is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force."[40]

[43] Thus, even if on a narrow and technical analysis punishment were to exclude parole, *Zuma* supports a broad interpretation of section 35(3)(n) so as to consider at the very least the legislated pre-conditions for parole eligibility to fall within the ambit of "prescribed punishment".

[44] If we accept that parole is part of the punishment, then we must also accept that people who commit similar offences at the same time could, depending on elements of the criminal justice system beyond their control, receive punishments that differ vastly in severity. The applicant himself, had he been sentenced one week earlier, would have spent only 20 years in prison before becoming eligible for parole. However, because of a delay of a few days, he must now spend an additional five years deprived of his liberty. This different treatment immediately implicates the right to equality, and so we must proceed to consider whether the different treatment of sentenced inmates contravenes either section 9(1) or (3). It also triggers the right to receive the least severe of the prescribed punishments in terms of section 35(3)(n).

*Do the impugned sections infringe the applicant's right to equality?*

[45] The High Court held that the impugned sections contravene section 9(1) and (3). However, it does not provide substantiation for its finding in respect of the latter.

[46] In *Van Der Walt* this Court held that "[section 9(1)] means that all persons in a similar position must be afforded the same right[s]".[41] It is a well-established principle in our law that where an impugned provision differentiates between categories of

[40] Id at para 16.

[41] *Van Der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) at para 24.

people, it must bear a rational connection to a legitimate government purpose; otherwise the differentiation is in violation of section 9(1) of the Constitution.[42] The test used to determine whether statutory provisions amount to unequal treatment by the law or constitute unfair discrimination was set out in full by this Court in *Harksen*.[43] According to *Harksen*, when section 9 is invoked to challenge a statutory provision—

> "the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section [9(1)] . . . there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section [9(1)]."[44]

And, if the impugned provision does differentiate—

> "[i]t becomes necessary . . . to consider the governmental purpose of the section, whether that purpose is a legitimate one and, if so, whether the differentiation does have a rational connection to that purpose."[45]

[47] We have already established that the impugned sections have the effect of retroactively imposing different punishments for the same offence on the basis of date of sentencing, so we can proceed to the next stage of the enquiry: is the differentiation rationally connected to a legitimate government purpose? A number of decisions of this Court, starting with *Prinsloo*, dealt specifically with the rationality enquiry.[46] In *Prinsloo*, decided before the final Constitution was enacted, this Court held:

> "In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences"

[42] See *Harksen* above n 27 at para 43; *Prinsloo* above n 28 at para 26.

[43] *Harksen* id at para 43.

[44] Id at para 43.

[45] Id at para 56.

[46] *Prinsloo* above n 28.

> that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. . . .
>
> Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8 [of the interim Constitution]."[47]

[48] It is important to note that when conducting a rationality enquiry, the court must focus only on whether the differentiation is arbitrary or not rationally connected to a legitimate government purpose. It is not for the court to decide if there is a better means to achieve the object of the differentiation.[48] When considering whether there is a rational link to the achievement of a legitimate government purpose—

> "[t]he question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious."[49]

Section 9(1) thus presents the respondents with a very low threshold to meet.

[49] In *Rahube* this Court held that a provision or statute that differentiates between people without a legitimate government purpose will be irrational and unconstitutional due to its inconsistency with section 9(1).[50] The respondents submit that section 136(1) is intended to avoid the retrospective application of a change in parole policy by

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[47] Id at paras 25-6.

[48] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at para 17.

[49] *Weare v Ndebele N.O.* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) at para 46.

[50] *Rahube v Rahube* [2018] ZACC 42; 2019 (2) SA 54 (CC); 2019 (1) BCLR 125 (CC) at para 37.

preserving the existing policy for inmates sentenced before 1 October 2004. Stated differently, the purpose in differentiating is to protect a group of people from retroactive application of the law. However, the differentiation serves to leave another group of people vulnerable to retroactive application of the law that will affect them in a way that is prejudicial. One of the tenets of the principle of legality enshrined by section 1(c)[51] of our Constitution is non-retroactivity of the law. Everyone deserves protection from retroactivity of the law where the result of retroactivity would be prejudicial. To afford protection from retroactivity only to one group and not to another therefore cannot be a legitimate purpose. The second judgment argues that this was not the government's purpose, and that the government's focus was simply too narrow. I disagree. It cannot have escaped the government's attention that by extending this protection only to a group sentenced before 1 October 2004, that the group sentenced after 1 October 2004 would be left exposed. It is a patently obvious consequence of the impugned provisions.

[50] In *Van Vuren* this Court pronounced authoritatively on the principle at issue, although the section 9(1) argument was not before it. It said:

> "In the context of correctional law, deprivation [of liberty] 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 the foundational values of constitutional supremacy and the rule of law, which this Court should not countenance."[52]

[51] Section 1(c) of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (c) Supremacy of the constitution and the rule of law."

[52] *Van Vuren* above n 26 at para 60.

[51] This is not to say that any law that applies retroactively will be arbitrary or irrational per se. Even section 35(3)(n), discussed below, contemplates circumstances in which the retroactive application of the law will be acceptable: where the punishment for an offence is changed between the commission of an offence and date of sentence, the least severe punishment shall apply. This clearly indicates that where the retroactive application of the law will not prejudice an accused, it is possible that it would be constitutionally permissible. However, it can never be a legitimate government purpose to differentiate between two groups of people in order to protect only one of them from the prejudicial retroactive application of the law. To say that it could be a legitimate government purpose is to say that a purpose at odds with the rule of law is legitimate. For this reason, I find that the government's purpose in differentiating between inmates on the basis of their date of sentence is not legitimate and fails the test for section 9(1).

[52] That the impugned provisions violate section 9(1) is sufficient to invalidate them. There is no need to go further and make an enquiry in respect of section 9(3).[53] However, as this Court did in *Rahube*, I will explain why this discriminatory irrationality also does not pass the much higher threshold imposed by section 9(3).[54]

[53] In differentiating between people on the basis of the date of their sentencing, the transitional arrangements discriminate on the basis of their status as convicted persons. Although not a listed ground, their status is an attribute or characteristic that undoubtedly has "the potential to impair the fundamental dignity of [these] persons as human beings, or to affect them adversely in a comparably serious manner".[55] In this case the impact of this differentiation is unfair, as it subjects a group of people to a more severe parole regime than those who happened to be sentenced earlier. This limitation of the right to equality cannot be justified under section 36 of the Constitution.[56] Thus

[53] *Prinsloo* above n 28 at para 26.

[54] *Rahube* above n 51 at para 45.

[55] *Harksen* above n 27 at para 60.

[56] Woolman and Botha "Limitations" in Woolman et al (eds) *Constitutional Law of South Africa* 2nd Edition Original Service: 07-06 (2018) Volume 3 (*CLOSA*) states:

even if the purpose of the impugned sections was legitimate, the reasons provided by the Minister would not have justified their discriminatory impact; there are other less restrictive means to secure legal certainty and effective implementation of the new parole regime. Not to use those lesser means renders the differentiation unfair. Section 136(1) would thus have been found to discriminate unfairly between people who were sentenced before 1 October 2004 and people who were sentenced after 1 October 2004 for all offences committed before that date.

[54] The impugned provisions must therefore be declared constitutionally invalid insofar as they deny equal protection of the law on the basis of date of sentencing. This is in itself sufficient for holding the section constitutionally invalid. However, what of the right to a fair trial?

*The right to a fair trial*

[55] The High Court decided against the applicant on the question of whether the impugned sections breach his right to a fair trial,[57] but I believe that it warrants further consideration. If we accept that parole is a kind of punishment and that the rules for parole eligibility lengthen or shorten the minimum period of imprisonment, then the right to receive the least severe of the prescribed punishments in terms of section 35(3)(n) is implicated. Section 35(3)(n) is a component of the right to a fair trial guaranteed by section 35(3) of the Constitution. The Constitution classifies the rights listed in section 35(3) as non-derogable.[58] In *Jaipal* this Court said of fair trial rights:

> "Although the courts have been loath to state categorically that a finding of unfairness under section 9(3) ends the court's analysis, in not a single Constitutional Court equality judgment has the Court found that unfair conduct or an unfair law – in terms of . . . section 9(3) or section 9(4) – can be justified in terms of section 36. . . . The only judgment on record in which a Court has found unfairness in terms of section 9(3), but then held the unfair law to be reasonable and justifiable in terms of section 36 is *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality*." (Footnotes omitted.)

See *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C). See also *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (judgment of Ngcobo J) which dealt with the interaction between the internal limitation in section 27(2) of the Constitution and the limitations clause, section 36 of the Constitution.

[57] High Court judgment above n 14 at para 26.

[58] Section 37(5)(c) of the Constitution.

> "The basic requirement that a trial must be fair is central to any civilised criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness."[59]

In a similar vein, this Court held in *Zuma* that the fair trial rights protected by section 25(3) of the interim Constitution – the equivalent of section 35(3) of the Constitution – "embraced a concept of substantive fairness".[60]

[56] Section 35(3)(n) incorporates the fundamental principle of legality expressed through the maxim *nulla poena sine lege* (no punishment without law).[61] This requires that punishment be governed by rules which themselves comply with the principle of legality – including prospectivity – as an aspect of the rule of law.[62] This aspect of legality has been thus described by this Court:

> "[T]he rule of law embraces some internal qualities of all public law: that it should be certain, that is ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation."[63]

[57] In *Veldman* this Court described section 35(3)(n) as protection for an accused person "against the retrospective application of increased prescribed punishment".[64] This is because section 35(3)(n) ensures that a more severe punishment than what was prescribed for an offence at the time an accused committed the offence is not meted out to that accused.

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[59] *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) at para 26.

[60] *S v Zuma* above n 38 at para 16.

[61] *Director of Public Prosecutions, Western Cape v Prins* [2012] ZASCA 106; 2012 (2) SACR 183 (SCA) at para 7.

[62] Van Zyl Smit "Sentencing and Punishment" in *CLOSA* above n 56 at 49-4.

[63] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 39. See also *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC) at para 26.

[64] *Veldman* id at para 21.

[58] At a criminal trial section 35(3)(n) would usually fulfil an interpretive function. As an interpretive presumption, section 35(3)(n) has been applied to resolve ambiguities in sentencing legislation in favour of prospectivity rather than retrospectivity.[65] This is illustrated by the Supreme Court of Appeal's decision in *Basson*:

> "There is a strong presumption against the retrospective operation of a statute: generally a statute will be construed as operating prospectively only unless the Legislature has expressed a contrary intention."[66]

[59] This brings us to the nub of the application of section 35(3)(n) here. Unlike the cases which have dealt with the potential retrospectivity of sentencing legislation, this matter bears out the limits of the interpretive function of section 35(3)(n). This is because there is no ambiguity in section 136(1) in respect of its retrospective operation to an accused in the applicant's position – it clearly envisages that the new parole regime will apply to accused persons who are sentenced after 1 October 2004. It thus retrospectively changes the conditions for parole eligibility which govern inmates' imprisonment. There are no other legislative provisions that allow the trial judge to exercise any power over the legislatively imposed parole regime. It is essentially for this reason that the Court held that section 35(3)(n) is not of any help in the inquiry into the constitutional validity of section 136(1).[67]

[60] Given the functions of section 35(3)(n) as an interpretive presumption, it is useful to set out briefly how a trial judge ought to apply it when faced with legislation that imposes potentially retrospective punishment. In *Dzukuda* Ackermann J drew together the principles that have been developed in this Court's jurisprudence for dealing with

[65] *Van Vuren* above n 26 and *National Director of Public Prosecutions v Basson* [2001] ZASCA 111; 2001 (2) SACR 712 (SCA) (*Basson*) offer the clearest examples of the interpretive presumption against retrospectivity in sentencing.

[66] *Basson* id at para 12.

[67] High Court judgment above n 14 at para 26.

constitutionally infirm legislation.[68] Applied to the current context, it is clear that a trial judge should first consider whether the sentencing legislation can be read down before entertaining a challenge to its constitutionality:

> "(a) . . . The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.
>
> (b) . . .
>
> (c) If such provisions, properly construed, compel the presiding officer (judicial or otherwise) to act or apply such provisions in a way which would infringe any of the [accused's] constitutional rights, then the constitutionality of such provisions would properly be in issue."[69]

[61] In short, section 35(3)(n) should first serve as an interpretive presumption that aids reading down sentencing legislation in conformity with the Constitution. If there is no ambiguity, however, and the express intention of the legislation is to prescribe a more severe punishment retrospectively, then the constitutionality of that legislation will be at issue.

[62] Does section 35(3)(n) have any further independent role to play in deciding the constitutional validity of section 136(1)? If not, section 9 would have been sufficient to determine the issue. The principle of legality is closely related to the requirements of equality before the law and equal protection of the law contained in section 9(1) of the Constitution.[70] There is thus an intersection between section 9(1) and

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[68] *S v Dzukuda; S v Tshilo* [2000] ZACC 16; 2000 (2) SACR 443 (CC); 2000 (11) BCLR 1252 (CC) (*Dzukuda*) at para 37.

[69] Id.

[70] See Van Zyl Smit "Sentencing and Punishment" in *CLOSA* above n 56 at 49-7. The formulation of section 9(1) of our Constitution has a strong textual resonance with the "equal protection of the laws" guaranteed in section 1 of the Fourteenth Amendment of the US Constitution. The US Supreme Court has held that equal protection of the law requires that "in the administration of criminal justice no different or higher punishment should be imposed upon one than such is prescribed to all for like offences." See *Barbier v Connolly* 113 US 27 (1884) at 31 and *Truax v Corrigan* 257 US 312 (1921) at 334-5.

section 35(3)(n) that illustrates the interdependence of rights in the Bill of Rights. Indirectly, section 35(3)(n) also ensures that accused persons who committed the same offences on the same date, but were convicted and sentenced on different dates, receive equal treatment under the law, reflecting the guarantee in section 9(1) of the Constitution. If two people commit offences at the same time, then, all other things being equal, they must receive the same punishment, notwithstanding an amendment to the prescribed punishment between commission of offence and sentencing. The one cannot benefit from a lesser punishment or suffer from a harsher punishment, while the other is treated conversely. In this sense, section 35(3)(n) is linked to section 9(1) of the Constitution. As the Court explained in *Prinsloo*, section 9(1) gives everyone the right not to be differentiated from others irrationally.[71] To mete out two different punishments to two accused who committed substantially identical offences at a time when a single punishment was prescribed for that offence would be irrational differentiation. The differentiation would invariably amount to the retroactive application of criminal laws – a palpably illegitimate purpose that undermines fundamental tenets of criminal law.[72] One of the functions of section 35(3)(n) is to give effect to equality before the law and the principle of non-retrospectivity. This Court has acknowledged on various occasions the intersection between different rights in the Bill of Rights.[73] This is another one of those intersections.

[63] Yet this does not mean that the prohibition against retrospectivity in punishment requires any comparison between two groups of accused persons. The retrospective application of a prescribed punishment might conceivably treat all prisoners equally, but in retrospectively prescribing punishment it would still fall foul of section 35(3)(n). In short, the prohibition against retrospectivity in punishment intersects with the

[71] *Prinsloo* above n 28 at para 22.

[72] Burchell *Principles of Criminal Law* 5 ed (Juta & Co Ltd, Cape Town 2016) at 35-6.

[73] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 64; *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27; and *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 8.

guarantee of equality before the law but does not require unequal treatment to be engaged.

[64] It is important to appreciate the self-standing pedigree of section 35(3)(n) because of the various meanings and applications that it holds as the constitutional embodiment of *nulla poena sine lege* (no punishment without law).[74] As an expression of legality, section 35(3)(n) prohibits punishment that has not been clearly set out in statute or common law, thus demonstrating how *nulla poena sine lege* (no punishment without law) is inextricably intertwined with *nulla crimen sine lege* (no crime without law).[75] As an interpretive presumption, section 35(3)(n) has been applied to resolve ambiguities in sentencing legislation in favour of prospectivity rather than retrospectivity.

[65] As a substantive rights guarantee, however, section 35(3)(n) creates a prohibition against the retrospective application of punishment that is more severe than the prescribed punishment applicable at the time the offence was committed. As this Court emphasised in *Savoi*, this interpretive function does not detract from the self-standing pedigree of section 35(3)(n) as a substantive rights guarantee:

> "In pre-constitutional South Africa the notion of retrospectivity served no more than as a tool of interpretation: laws were presumed not to have been meant to operate retrospectively. Nothing stood in the way of Parliament – in accordance with the principle of parliamentary supremacy, which we were subject to – to enact laws that operated retrospectively. Converting a general principle of interpretation into a fundamental right signifies the intrinsic worth the framers of the Constitution saw in not having criminal laws that operate retrospectively."[76]

[74] For an illuminating account of the historical origins and development of *nulla poena sine lege*, see Hall "Nulla Poena Sine Lege" (1937) 47 *Yale Law Journal* 165.

[75] Snyckers and Le Roux "Criminal Procedure: Rights of Arrested, Detained and Accused Persons" in *CLOSA* above n 56 at 51-170.

[76] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC) at para 78.

[66] The conceptualisation of section 35(3)(n) as a substantive rights guarantee is supported by the "substantive fairness"[77] which is embraced by the "comprehensive and integrated" right to a fair trial.[78] This Court has emphasised on many occasions that the discrete sub-rights under section 35(3) are the hallmarks or specified elements of a fair trial, but this list is by no means exhaustive, with the residual right to a fair trial being casuistically developed through a substantive rather than formal or textual approach in our constitutional jurisprudence.[79] In *Dzukuda* this Court showed that there may be more than one way for the legislature to devise a system of criminal procedure which effectively secures the norm of a fair trial prescribed by section 35(3), but "[t]he question to be determined in each case is whether the criminal procedure scheme, or the relevant part thereof, devised by the Legislature, whatever its form, conforms in substance to that norm".[80] Similarly, this is the ultimate question in assessing whether the legislative framework of a sentencing system is constitutionally valid.[81]

[67] All three branches of government contribute to the prescription and implementation of punishment in the criminal justice system, but the constitutional norms of section 35(3) enjoy supreme authority. In *Dodo*, this Court specifically recognised the legitimate interest that the Legislature has in prescribing punishments, but was careful to point out that the Legislature cannot oblige the courts to enforce a sentence that violates section 35(3) or any other fundamental rights:

> "When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the Legislature to determine what conduct should be criminalised and punished. Even here the separation is not complete,

[77] *Zuma* above n 38 at para 16.

[78] *Dzukuda* above n 68 at para 9.

[79] See, for example, *Zuma* above n 38 at para 16; *Jaipal* above n 59 at para 27; *Dzukuda* id at para 9.

[80] *Dzukuda* id at para 10.

[81] Van Zyl Smit *CLOSA* above n 56 at 49-3.

> because this function of the Legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts."[82]

[68] Thus even if the usual interpretive function of section 35(3)(n) could not assist directly in the sentencing process, as an independent substantive rights guarantee it nevertheless could serve as an important check on sentencing legislation, ensuring that it does not retrospectively impose more severe punishments on unsentenced accused persons than those to which they would have been subject at the time they committed the offence.

[69] We have already found that the rules lengthening parole non-eligibility periods result in an increase of the severity of imprisonment. Clearly then the impugned provisions have the effect of imposing a more severe punishment. They are thus also in contravention of section 35(3)(n) of the Constitution.

*Date of commission of offence or date of conviction?*

[70] The question that remains is: if the date of sentencing is to be abandoned, what date should take its place – the date of conviction or the date of commission of the offence? During oral argument it was put to counsel whether the date of conviction would provide a compromise. Counsel for the applicant argued that although in this instance using the date of conviction would provide the applicant with a satisfactory result, generally the use of the date of conviction would face similar obstacles to those encountered when using the date of sentencing. Firstly, an accused has no control over the length of a criminal trial or frequent delays in the criminal justice process. As with sentencing, two accused could commit the same offence on the same day, be arrested on the same day and still be convicted on different dates. The result would be that the two accused would not be treated equally by the law. Secondly, if parole is part of the punishment, as we have held that it is, then the relevant date must be the date of the offence. This accords with section 35(3)(n), which provides that if the punishment has

[82] *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 22.

changed between date of offence and date of sentence, the accused has the right to the benefit of the least severe of the two punishments. The relevant dates are those of the commission of the offence and those of sentencing; the date of conviction does not enter the equation. For these reasons, the applicant's proposition should win the day: punishment, and parole eligibility, should be determined by the date of commission of the offence.

[71] The respondents referred to two decisions, *Makaba*[83] and *Broodryk*,[84] that both run counter to the determination in this case. It is plain that, to the extent that they do, they must be considered to be overruled.

*Order*

[72] In the result, I make the following order:

1. The application for condonation is granted.
2. Mr Makome Stefanas Tlhakanye is admitted as an intervening party.
3. The application for the admission of further evidence in terms of rule 31 of the Rules of the Constitutional Court is dismissed.
4. The order of invalidity of the High Court is confirmed and paragraph 1 is varied to read:
   "Sections 136(1) and 73(6)(b)(iv) of the Correctional Services Act 111 of 1998 (Correctional Services Act) are declared inconsistent with section 9(1) and (3) and section 35(3)(n) of the Constitution."
5. Parliament must, within 24 months from the date of this order, amend section 136(1) of the Correctional Services Act to apply parole regimes on the basis of date of commission of an offence, pending which the section shall read as follows:

[83] *Makaba v Minister of Correctional Services* [2012] ZAFSHC 157 at paras 24-33.

[84] *Broodryk v Minister of Correctional Services* 2014 (1) SACR 471 (GJ) at paras 11-2.

"Any person serving a sentence of incarceration for an offence committed before the commencement of Chapters 4, 6 and 7 of the Correctional Services Act is subject to the provisions of the Correctional Services 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."

6. The Minister of Justice and Correctional Services must pay costs of the applicant and the intervening party in this Court, including the costs of two counsel.

FRONEMAN J:

[73] I have read the judgment of my brother Dlodlo AJ (first judgment) and agree with the outcome. I agree that the impugned provisions are constitutionally invalid for infringing, separately and independently, section 9(3) and the substantive rights guaranteed[85] in section 35(3)(n) of the Constitution. I disagree that section 9(1) has been infringed.

[74] The first judgment holds that—

> "it can never be a legitimate government purpose to differentiate between two groups of people in order to protect only one of them from the prejudicial retroactive application of the law. To say that it could be a legitimate government purpose is to say that a purpose at odds with the rule of law is legitimate. For this reason, I find that the government's purpose in differentiating between inmates on the basis of their date of sentence is not legitimate and fails the test for section 9(1)."[86]

[85] As explained, and contrasted to its interpretative function, in the first judgment at [64] to [69].

[86] First judgment at [51].

[75] But that is not what the Department stated as its purpose. The Department explained how the amendments balance a range of competing considerations in crafting transitional arrangements that would avoid the retrospective application of a new parole regime to inmates sentenced before 1 October 2004. In choosing to rely on the date of sentencing as the operative date for the new parole regime, the Legislature simultaneously sought to avoid retroactive application of the new parole eligibility regime and to strive for practicable and efficient implementation. In the context of our criminal justice system, it is legitimate – even laudable – for the Legislature to strive towards a legislative framework that is clear and easy for the many moving parts of the system to implement efficiently and consistently.

[76] In addition, the further three substantive examples proffered by the Department illustrate its rationale for tying the parole changes to the date of sentencing. Its first two examples, of continuing crimes and multiple offences, demonstrate how the date of sentencing provides legal certainty and clarity for determining the applicable parole regime which may extend on both sides of the operative date. The Department argued that confusion would ensue in these very common types of cases if the date of commission of the offence were to be used as the determining factor. The third example, drawn from the Supreme Court of Appeal's decision in *Seganoe*,[87] points to how prolonged delays in sentencing could result in difficulties where the implementation mechanisms of the old parole regime are no longer operational.

[77] The Department did not articulate its purpose as being to undermine the rule of law or to retroactively make people suffer longer sentences. The Department's proffered purpose was to avoid imposing a harsher punishment on people who were already incarcerated and to do so in a way that facilitated efficient and workable implementation. Accepting the Department's stated purpose requires no reading-in or generosity in interpretation. To the contrary, it is both the most natural and the most

[87] *Minister of Correctional Services v Seganoe* [2015] ZASCA 148; 2016 (1) SACR 221 (SCA) at para 16.

logical understanding of the legislative intent in this case.

[78] It is tempting to reformulate this purpose with a broader perspective, as the first judgment does, but it is a temptation that should be resisted. Although section 9(1) requires that the purpose and scheme be examined in proper context, it does not require an analysis of the impact of the impugned action or of the policy choices made. It merely requires the government to have a defensible purpose, together with reasons for its actions that bear a rational relationship to the stated purpose.[88] And that has been done.

CAMERON J (Dlodlo AJ concurring):

[79] At issue is a statute that introduced harsher parole conditions, after the offences in issue were committed, for those upon whom sentences of life imprisonment were imposed after 1 October 2004. Those sentenced before 1 October 2004 continued to benefit from the more beneficent parole conditions that applied when they committed their offences. Those sentenced the next day, and after, were subject to new, and very much harsher, parole conditions.

[80] The question is whether differentiating between inmates, in every other respect alike, whose sentences were imposed on one day, as opposed to those sentenced the very next day, is a rational exercise of Parliament's power to legislate. In the first judgment Dlodlo AJ concludes that tying the harsher parole conditions to the date of sentence, rather than the date of commission of the offence, violates the Bill of Rights because it imposes a more severe punishment, changed between the time of the offence

[88] Compare *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 37 and Albertyn and Goldblatt "Equality" in *CLOSA* above n 56 at 35-21.

and the time of sentencing.[89] In addition, he concludes that the date-of-sentence tie is arbitrary and constitutionally noxious on the ground that it is irrational, too. I write to express support for not only the first, but also the second conclusion.

[81] A rationality challenge to legislation evaluates the relationship between means and ends.[90] There must be a rational link between what the legislation sets out to do and how it does it.[91] It is a very low bar.[92] The evaluation does not probe whether some other means would achieve the legislation's purpose better, but only whether the means actually employed are rationally related to the purpose for which the power is being exercised.[93]

[82] Here, Parliament in 1998 enacted that one sentenced to life imprisonment would not be eligible for parole until after serving at least 25 years in prison[94] – but the statute was brought into operation only later, on 1 October 2004. The statute's transitional provision preserved pre-existing parole conditions for those already "serving a sentence" on the day the statute commenced – but imposed the harsher conditions on those sentenced the very next day and thereafter.[95]

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[89] Section 35(3)(n) of the Constitution as set out in fn 20 in the first judgment.

[90] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 32, which summarises this Court's jurisprudence on executive and administrative decisions and law-making. At issue there was the exercise of a power that a statute conferred on the President to appoint the National Director of Public Prosecutions.

[91] As this Court explained in *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) at para 114, what is required is a rational "link between the means adopted by the Legislature and the legitimate governmental end sought to be achieved".

[92] See [48].

[93] *Democratic Alliance* above n 90 at para 32.

[94] Section 73(6)(b)(iv) of the 1998 Act. An exception is made for those reaching the age of 65 years. The statute provides that one sentenced to life imprisonment—

> "may not be placed on parole until he or she has served at least 25 years of the sentence but a prisoner on reaching the age of 65 years may be placed on parole if he or she has served at least 15 years of such sentence."

[95] Section 136 of 1998 Act, headed "Transitional Provision", provides in subsection (1):

> "Any person serving a sentence immediately before the commencement of this Act will be subject to the provisions of the Correctional Services Act, 1959 (Act No. 8 of 1959), relating to his or her placement under community corrections but the Minister may make such regulations as are necessary to achieve a uniform policy framework to deal with prisoners who were

[83] Was this rational? Was it any more rational than if the legislation had said that those who had blue eyes would be subject to the old parole regime, and those with black eyes would suffer the new? In my view, not. To tie the new parole regime to date of sentence, rather than date of offence, creates irrational, absurd and capricious disparities. These have no warrantable link at all to what Parliament set out to do, which was to introduce the new parole system.

[84] Parliament's power to stiffen parole conditions for those sentenced to life imprisonment was not placed in dispute before us.[96] The only issue was on what basis the new harsher conditions were to be put into effect – date of offence or date of sentence. That the new regime had to come into effect at some point is beyond doubt. What is in issue is thus the means Parliament used to achieve that end, namely the arbitrarily chosen date on which the legislation came into effect.

[85] In the respondents' answering deposition in the High Court, the lawyer authorised to depose on behalf of the Minister and the Department[97] recognises that "the retroactive application of a change in parole policy does not conform to the principles of the rule of law".[98] He adds that the purpose of tying the introduction of the new parole regime to date of sentence was "accordingly to ensure that the pre-existing right of offenders to be considered for placement on parole is not disturbed":

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> sentenced immediately before the commencement of this Act, and no prisoner may be prejudiced by such regulations."

[96] The statement by this Court in *Van Vuren* above n 26 at para 60, quoted in the first judgment at [50], may be wide enough to call into question the constitutional propriety of all retroactive parole-harshening provisions, but the applicant did not seek to make this argument.

[97] Jacques-Louis van Wyk, Acting Director: Legal Services in the Office of the National Commissioner.

[98] In *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC) at para 33, this Court dealt with 'the fine distinction between the broad concept of retrospectivity and the distinctive notion of retroactivity'. Langa CJ on behalf of the Court pointed out that a retrospective provision operates for the future only but imposes new results in respect of past events, while a retroactive provision operates from a time before the enactment of the provision itself by changing the applicable law with effect from a date in the past.

> "Hence the reference in section 136(1) to offenders who were sentenced prior to 1 October 2004 (rather than offenders who committed the crime prior to 1 October 2004)."

[86] But this does not meet the point. It explains why the legislation had to be brought into effect. And it explains why those already sentenced on that day should be spared the harsher parole regime. But it does not explain why those not yet sentenced *on the particular date when the legislation commenced* should be treated more harshly. For that, the respondents would have to explain why the statute was brought into operation on 1 October 2004, rather than on 2 or 3 or 4 October 2004, or any date before or after that. Of course, all time periods have to run from one specified day or another. But when a time period imposes devastatingly different consequences on otherwise equally placed persons on the sole basis of an arbitrarily chosen date, more is required. The mere fact that an otherwise unexplained date dawned does not suffice.

[87] The respondents' deposition explains quite lucidly why it changed the parole system. They had logical reasons for doing so. These included harshening it and rationalising within the system the position of those sentenced to life imprisonment proper as distinct from those whose sentences were commuted to life imprisonment after this Court declared the death penalty incompatible with constitutional values.[99] All this originated in the recommendations of the National Advisory Council on Correctional Services, whose function under the present statute's predecessor was to advise the Minister of Correctional Services on general policy considerations.[100]

[88] But why date of sentence, rather than date of offence? The respondents answering deposition gives no reason, other than invoking *Seganoe*.[101] There the Supreme Court of Appeal rejected an interpretation of the very transitional provisions in issue here that would have preserved the existing parole regime for all inmates

[99] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[100] Under section 64 of the 1959 Prisons Act.

[101] *Seganoe* above n 87.

convicted of offences committed during the operation of the 1959 Prisons Act, including those sentenced after the current statute commenced.[102] In rejecting that interpretation, the Court pointed to practical difficulties and the possibility of "absurd results":

> "One glaring example is a case of, say, a murderer who commits murder before the coming into operation of chapters IV, VI, and VII [of the 1998 Act] but evades capture or is for any reason not brought to justice over a long period of time. If the respondent's [an inmate] interpretation were accepted, such an [inmate] 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."[103]

[89] There are two difficulties with this reasoning. First, it makes a good point against procrastinating criminal accused persons who, having eluded arraignment or conviction or sentence for long years, then try to claim back the benefit of long-past parole regimes. But what about those criminal accused persons trapped without fault in the law's delays? What about those tried promptly, who plead guilty without tarrying, who happened to be sentenced on 2 October 2004, rather than the day before? Should they suffer harsher punishment only and solely because of a change in clocks?

[90] Second, *Seganoe*'s reasoning implicitly presupposes that additionally burdensome parole conditions legislatively imposed post-offence, like those here, are not a more severe "punishment" in violation of the fair trial guarantee in the Bill of Rights.[104] The first judgment rightly holds they are.[105] The first judgment undoes the point.[106] That means the *Seganoe* reasoning cannot stand. It follows that it cannot be rational for the Legislature to tie the imposition of a more burdensome parole regime to the avoidance of a result that itself violates the Bill of Rights. And the Department's

[102] Id at paras 12-3.

[103] Id at para 16.

[104] Id at paras 15-7.

[105] See [69].

[106] See [64] to [69].

and Legislature's subjective intentions make no difference: the assessment is objective.[107]

[91] For these additional reasons I support the conclusion in the first judgment that the legislation violates section 9(1) of the Constitution and must be set aside on that ground too.[108]

[107] This Court explained in *Pharmaceutical Manufacturers* above n 63 at para 86:

> "The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle."

[108] See [51] to [54].

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