REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 58/2014

In the matter between:

STEVE "RICCO" KAMAHERE AND 25 OTHERS	**APPLICANTS**

And

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**FIRST RESPONDENT**
SPEAKER OF THE NATIONAL ASSEMBLY	**SECOND RESPONDENT**
CHAIRPERSON OF THE NATIONAL COUNCIL	**THIRD RESPONDENT**
MINISTER OF SAFETY AND SECURITY	**FOURTH RESPONDENT**
COMMISSIONER GENERAL OF PRISONS	**FIFTH RESPONDENT**
THE HEAD OF WINDHOEK CENTRAL PRISON	**SIXTH RESPONDENT**
NATIONAL RELEASE BOARD	**SEVENTH RESPONDENT**
THE CHAIRPERSON OF THE INSTITUTIONAL COMMITTEE	**EIGHTH RESPONDENT**

Neutral citation: *Kamahere v The Government of the Republic of Namibia* (A 58/2014) [2014] NAHCMD 209 (10 July 2014)

Coram: PARKER AJ
Heard: **17 June 2014**
Delivered: **10 July 2014**

Flynote: Practice – Declaratory orders – Power of the court to grant governed by s 16 of High Court Act 16 of 1990 – Court finding that the applicants have failed to

establish a right which the court may protect – Consequently, court exercised its discretion against granting the declaratory orders sought.

Summary: Practice – Declaratory orders – Power of the court to grant declaratory orders governed by s 16 of the High Court Act 16 of 1990 – Applicants who are serving sentence of life imprisonment relied on two repealed laws and a Colonial Cabinet Memorandum for relief – Court found that the applicants did not pursue their right under the Prisons Act 8 of 1959 that was repealed by the Prisons Act 17 of 1998 or under Act 17 of 1998 which in turn has been repealed by the Correctional Service Act 9 of 2012 – Court found that enjoyment of the applicants' rights was subject to similar limitation provisions provided in Act 8 of 1959 and Act 17 of 1998 – Court found that the applicants had not exercised their rights upon the repeal of the Acts and therefore the limitation provisions in Act 8 of 1959 had upon coming into operation of Act 17 of 1998 rendered those rights non-existent and the limitation provisions in Act 17 of 1998 had upon coming into operation of Act 9 of 2012 rendered non-existent the rights under Act 17 of 1998 – Consequently, court concluded that upon coming into operation of Act 17 of 1998 and Act 9 of 2012 no rights accrued within the meaning of s 11(2)*(c)* of Proclamation 2 of 1928 which the court may protect in the instant proceeding – Furthermore, court found that the colonial Cabinet Memorandum was not a delegated legislation which may bind the Government of Republic of Namibia upon the application of art 140(1) of the Namibian Constitution – It was also not a Government Policy and the fact that the Cabinet Memorandum was applied by some administrative bodies or officials was irrelevant – Court held that an act of an administrative body or administrative official which is done in not conformity with legislation, delegated legislation or a lawful Government policy does not bind any person or the court.

ORDER

The application is dismissed with costs.

JUDGMENT

PARKER AJ:

[1] The applicants have brought the present application on notice of motion and they seek relief in terms set out in the notice of motion. The applicants are Steve Ricco Kamahere and 25 others. The names of all the applicants are listed in 'Annexure 1' to the founding affidavit.

[2] The respondents moved to reject the application and raised some points *in limine*. The points *in limine* were not pursued by Mr Namandje, counsel for the respondents, during the hearing of the application. I understand it to mean that the respondents abandoned the points *in limine* except the one on mandamus. In any case, in my opinion the issue of mandamus goes to the merit of the application. In effect, only the points *in limine* relating to the 22nd applicant, Thomas Adolf Florin, and the point *in limine* on the 'non-joinder of the President' were abandoned.

[3] In para 7 of the relief sought by the applicants in the notice of motion, the applicants, in the alternative to paras 3 and 4 of the notice of motion, sought 'an order declaring Section 95 of the Prisons Act, 17 of 1998 to be unconstitutional'. This relief was not argued by Mr Rukoro, counsel for the applicants, during the hearing of the application. I take it that that alternative relief was abandoned by the applicants.

[4] I now proceed to determine the application on the merits in respect of paras 1, 2, 3, 4, 5 and 6 of the notice of motion.

Prayer 1: An order declaring 20 years to be the maximum term of imprisonment for any offender sentenced to life imprisonment in terms of the Prisons Act 8 of 1959.

Prayer 2: An order declaring 10 years to be the minimum period of imprisonment any offender sentenced to life imprisonment in terms of the Prisons Act No. 8 of 1959 should serve becoming eligible for parole.

[5] The first stop in the present enquiry is the repealed Correctional Service Act 8 of 1959 (whose amendments were referred to as the Prisons Amendment Acts) was on the statute books before its repeal, and was at times referred to as the Prisons

Act. Section 65 of Act 8 of 1959 provided for the release of prisoners and placement of prisoners on parole. Subsection 4(a) of s 65 concerned, among other things, prisoners serving a determinate sentence, and subsec 4(b) concerned, among other things, periodical imprisonment and imprisonment for corrective training. Act 8 of 1959 did not prescribe any minimum or maximum period which a prisoner who had been sentenced to life imprisonment should serve before he or she was eligible to be considered for release on parole.

[6] I, therefore, find that the applicants' contention that '[U]nder the Prisons Act No. 8 of 1958 life imprisonment meant a jail terms of minimum of 20 years and a person sentenced to life imprisonment in terms thereof was required to spend 10 years in jail before becoming eligible for parole' has no legal basis. The relief should fail on this basis alone.

[7] In any case, those applicants who allege that an act was done or omitted to be done in pursuit of a right they allege they had under the repealed Act 8 of 1959 can have no redress now under that repealed Act, read with the Interpretation of Laws Proclamation 2 of 1928, as I demonstrate. There is a limitation clause in s 90 to the effect that -

'(1) No civil action against the State or any person for anything done or omitted in pursuance of any provision of this Act shall be commenced after the expiration of six months immediately succeeding the act or omission complained of, or in the case of a prisoner, after the expiration of six months immediately succeeding the date of his release from prison, but in no case shall any such action be commenced after the expiration of one year from the date of the act or omission complained of.

(2) Notice in writing of every such action, stating the cause thereof and the details of the claim, shall be given to the defendant one month at least before the commencement of the action.'

[8] Doubtless, the six months' or the one year's time limits have long expired and no such action was instituted and no such notice of such action was given; and what is more, Act 8 of 1959 had long been repealed in whole by Act 17 of 1998 which in turn has also been repealed by Act 9 of 2012. It follows that even assuming – for argument's sake – some of the applicants had some right under the 1959 Act, the enjoyment of that right was inextricably subjected to the limitation provision under

Act 8 of 1959. And if those applicants did not exercise that right by instituting action against the State within the statutory time limits, it cannot seriously be argued – as Mr Rukoro appears to do – that in March 2014 that right still existed in virtue of Proclamation 2 of 1928.

[9] When Act 17 of 1998 came into operation, repealing in whole Act 8 of 1959, those applicants could not have had 'any right … accrued under (the) any law so repealed' within the meaning of s 11(2)*(c)* of Proclamation 2 of 1928. Indeed, as s 11(2)*(a)* of that Proclamation provides, where a law repeals any other law the repeal 'shall not revive anything not in force or existing at the time at which the repeal takes place.…'

[10] These reasoning and conclusions apply with equal force to those applicants who claim rights under Act 17 of 1998 which contains a similar limitation clause in s 126 of that Act. Accordingly, I accept Mr Namandje's submission on the point. The 1959 Act and the 1998 Act, read with the Proclamation 2 of 1928, cannot assist the applicants. Their contention is singularly lacking on the merits in relation to these two repealed statutes.

[11] But that is not the end of the matter. The applicants have a second string to their bow. It is this. The applicants appear to rely on what they refer to as 'Cabinet Directive under File Number 10/8/B, dated 4 August 1986', and the applicants annex a copy of the document to the founding affidavit (marked 'A2'). They refer specifically to para 3.1.3.1(h) of Annexure 2.

[12] In my view, the applicants' reliance on Annexure 'A2' is equally misplaced. Annexure 'A2' is not a Cabinet Policy of a pre-Independence Government: it is rather a Cabinet Memorandum of that age. It is a submission of a recommendation by the then Department of Justice (Directorate of Prisons) to the Cabinet of the day. The memorandum contained proposals in para 3 thereof where the Department of Justice recommended to Cabinet to consider and approve. See para 1 of the memorandum which reads:

'1. OBJECTIVE

> In order to inform you of the various ways to release prisoners prior to the expiry of their sentences and to furnish you with a policy regarding parole *for consideration and approval*.…'

(Italicized for emphasis). In this regard, see also para 7 of the memorandum which is significantly entitled 'RECOMMENDATION', and the text reads:

> 'That-
> The parole policy as set out in paragraph 3 be *approved*.
>
> (Signature) COLONEL
> ……..
>
> COMMISSIONER OF PRISONS
>
> Comment of the Secretary of Justice:
> In general I agree with the statements and *recommendations* contained in this memorandum.'

(Italicized for emphasis).

[13] It is clear that Annex '2' was a Cabinet Memorandum and not a Cabinet Policy; and, *a fortiori*, the Cabinet Memorandum was never a delegated legislation, having legislative effect, in which case art 140(1) of the Namibian Constitution would have applied. For these reasons, Mr Rukoro's argument that it did not matter whether Annex '2' was called a Directive or a Memorandum cannot, with respect, take the applicants' case any further. With the greatest deference to Mr Rukoro, that argument carries no weight. The irrefragable and relevant fact is that Annex '2' was neither a Cabinet-made policy nor delegated legislation.

[14] In my view, therefore, Act 8 of 1959 did not provide that life imprisonment meant a 20 years' imprisonment or that a prisoner who was sentenced to life imprisonment was entitled to be considered for release on parole after he or she has served a minimum term of ten years in prison. It is with firm confidence, therefore, that I hold that Act 8 of 1959 and the Cabinet Memorandum (Annexure '2') cannot for these reasoning and conclusions assist the applicants. Accordingly, prayers 1 and 2 fail; and they are rejected.

Prayer 3: An order declaring 20 years to be the maximum term of imprisonment for any offender sentenced to life imprisonment in terms of the Prisons Act 17 of 1998.

Prayer 4: An order declaring to be minimum period of imprisonment any offender sentenced to life imprisonment in terms of the Prisons Act No. 17 of 1998 should serve before becoming eligible for parole.

[15] The provisions in Act No. 17 of 1998 which dealt with parole (or probation) were in s 95(1) and (2) of that Act. And, significantly, those provisions did not concern prisoners serving imprisonment for life. It is, therefore, not surprising that the regulations made by the Minister of Prisons and Correctional Services and published in the Government Gazette under Government Notice No. 226 of 8 November 2001 had no provision respecting a minimum or a maximum period a prisoner serving life imprisonment should serve before he or she was eligible to be considered for release on parole. The respondents are, accordingly, not entirely correct when they say that no regulations were made in terms of s 124 of Act No. 17 of 1998. Regulations were made but they did not provide for a minimum or maximum period a prisoner serving life imprisonment should serve before he or she was eligible to be considered for release on parole. Thus, neither the enabling Act nor the regulations made thereunder prescribed any such minimum or maximum prison terms.

[16] The matter does not rest there, though. The applicants contend further that 'the 4th to the 8th respondents have relied on the aforementioned Annexure '2' for 'the administration of the prison and in particular for the computation of sentences and the release of prisoners sentenced to life imprisonment on parole'. I have previously held that Annexure '2' was not a delegated legislation and so art 140(1) of the Namibian Constitution did not apply. It was also not a colonial Government Policy which could bind the Government of the Republic of Namibia. In this regard, I should signalize this. The fact that, as the applicants aver, the 4th to 8th respondents have relied on and applied Annex '2' does not matter tupence. Their act has no relevance in these proceedings. An act of an administrative body or administrative official which is done in conformity with no legislation, delegated legislation or a lawful Government policy does not bind any person or the court. Indeed, the court would be acting unjudicially if the court gave judicial blessing to any such act. If the court

accepted such act and acted on it, the court would be perpetuating an illegality; and the court is not entitled to do that. I, accordingly, accept Mr Namandje's submission on the point.

[17] Based on these reasons, prayers 3 and 4, too, fail; and, they are rejected.

[18] In prayers 1, 2, 3 and 4 the applicants seek declaratory orders. The power of the court to grant declaratory orders is governed by s 16 of the High Court Act 16 of 1990 which provides that the Court has power -

'(d) … in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

In virtue of the aforegoing reasoning and conclusions I hold firmly that the applicants have failed to establish a right which this court, in the exercise of its discretion, may protect by granting declaratory orders. Keeping this holding in my mind's eye, I move on to consider prayers 5 and 6.

Prayer 5: An order directing the 7th and 8th respondents to consider all the applicants for release on parole and to submit its recommendations to the 4th respondent within 30 days from the date of such order.

Prayer 6: An order directing the 4th respondent to consider the recommendations from the 7th respondent with 30 days from the date of receipt of such recommendations and to inform the applicants accordingly.

[19] I have held previously that the applicants have failed to establish a right which this court may protect by granting declaratory orders. It follows inevitably and irrefragably and as matter of course that prayers 5 and 6 cannot succeed. The granting of prayers 5 and 6 depends indubitably on the granting of the declaratory orders sought in prayers 1, 2, 3 and 4 of the notice of motion. Having rejected prayers 1, 2, 3 and 4, it must follow irrefragably and inexorably that prayers 5 and 6 cannot succeed. Accordingly, the relief sought in prayers 5 and 6 should also fail, and is rejected.

[20] The burden of the court in the instant proceeding is to determine application A 58/2014 brought on notice of motion which contains the dispute that the court is entitled to hear and adjudicate in terms of art 80(2) of the Namibian Constitution. I have heard and adjudicated the dispute and I have refused to grant the orders sought in the notice of motion. That should be the end of the matter; whereupon I make the following order:

The application is dismissed with costs.

C Parker

Acting Judge

APPEARANCES

APPLICANTS:	S Rukoro Instructed by Directorate of Legal Aid, Windhoek
RESPONDENTS:	S Namandje Instructed by Government Attorneys, Windhoek