

**REPORTABLE**

CASE NO: SA 64/2014

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

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

**Appellants**

and

**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**

**HEAD OF WINDHOEK CENTRAL PRISON**

**Sixth Respondent**

**NATIONAL RELEASE BOARD**

**Seventh Respondent**

**CHAIRPERSON OF THE INSTITUTIONAL**

**COMMITTEE**

**Eighth Respondent**

**Coram:** SHIVUTE CJ, MAINGA JA and SMUTS JA

**Heard:** 23 June 2016

**Delivered:** 19 August 2016

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**APPEAL JUDGMENT**

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SMUTS JA (SHIVUTE CJ and MAINGA JA concurring):

[1] At issue in this appeal is the regime applicable to offenders serving sentences of life imprisonment and in particular when they may be eligible for parole. The main question to be determined is whether Prison Service Order 43.7.4.7 issued under regulation 148 of the Prison Regulations<sup>1</sup> promulgated under the now repealed Prisons Act 8 of 1959 (the 1959 Act) applied to the appellants and would entitle them to be considered for placement on parole after completing 10 years in detention. Also in issue is whether certain of the relief is time barred by virtue of limitation provisions in the 1959 Act and its successors.

### Background

[2] The appellants are 26 offenders serving life imprisonment sentences. They were sentenced to life imprisonment at varying dates between 1992 and 2003. They brought an application to the High Court claiming the following relief:

- ‘1. An order declaring 20 years to be maximum term of imprisonment for any offender sentenced to life imprisonment in terms of the Prisons Act No 8 of 1959;
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 before becoming eligible for parole;
3. An order declaring 20 years to be the maximum term of imprisonment for any offender sentenced to life imprisonment in terms of the Prison Act No 17 of 1998;

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<sup>1</sup> In Government Gazette R2080 of 31 December 1965 as amended.

4. An order declaring 10 years to be the minimum period imprisonment any offender sentenced to life imprisonment in terms of the Prisons Act No 17 of 1998 should serve before becoming eligible for parole;
5. An order directing the 7<sup>th</sup> and 8<sup>th</sup> respondents to consider all the applicants for release on parole and to submit its recommendation to the 4<sup>th</sup> respondent within 30 days from the date of such order;
6. An order directing the 4<sup>th</sup> respondent to consider the recommendations from the 7<sup>th</sup> respondent within 30 days from the date of receipt of such recommendations and to inform the applicants accordingly;
7. In the alternative to 3 and 4 above an order to declare s 95 of the Prisons Act 17 of 1998 to be unconstitutional.’

[3] In their application, the appellants categorised themselves into three distinct groups. Twenty three of the appellants were sentenced prior to the repeal of the 1959 Act by the Prisons Act 17 of 1998 (the 1998 Act) on 15 August 1999 when the 1998 Act came into operation. The 1998 Act has since also been repealed by the Correctional Service Act 9 of 2012 (the 2012 Act) on 1 January 2014 when the latter Act was put into force. Two appellants, Thomas Adolf Florin (Florin) and Stefanus Skeyer were sentenced to life imprisonment on 22 December 1999 and 16 October 2003 respectively after the 1959 Act had been repealed and replaced by the 1998 Act which then applied. The third category comprises appellants in respect of whom the court sentencing them had made a specific recommendation that they should not be considered for parole before serving a specified period of time. The date of sentencing of one of the appellants, Ismael Jagger, is not however provided. It is not clear into which category he falls. His category would

depend on his date of sentencing and whether any judicial recommendation had been made.

[4] The appellants asserted in their application that a sentence of life imprisonment imposed during the applicability of the 1959 Act meant that they would serve a minimum of 20 years imprisonment and that they could be considered for parole after serving 10 years in prison. In support of this contention, they relied upon a policy document which they allege was embodied in a Cabinet Directive adopted in 1986 by the Cabinet of the erstwhile Interim Government appointed by the South African state in 1985. A copy of this directive was attached to their founding papers. The relevant portion is worded as follows:

- '(h) Prisoners sentenced for life (for which the minimum period of detention is regarded as twenty (20) years for administrative purposes) may be considered for parole as follows:
  - (i) A prisoner sentenced for life by a court may be considered for parole after having served at least half of the minimum period of detention of twenty (20) years, irrespective of whether it was his first offence or not.'

[5] The appellants contended that this directive was followed until recently – even after the repeal of the 1959 Act which became effective on 15 August 1999. Despite this directive, none of the appellants had been considered for parole. They sought a declaratory order to the effect that it applied to them and consequential relief (in the form of a mandamus) which would follow upon granting an order to that effect.

[6] In support of their contention of the continuous application of the directive, the appellants in the founding affidavit refer to evidence given in the trial of Florin concerning the practical effect of a sentence of life imprisonment which they say accords with the policy directive. The presiding judge in that trial stated the following after hearing that evidence and imposing a sentence of life imprisonment:

‘I recommend to the prison authorities that you ought not to be released on probation before the lapse of not less than 15 years imprisonment calculated from today, 22 December 1999.’

[7] There was also reference in the founding affidavit to what was merely termed the ‘Kareeboom trial’ presided over by Damaseb JP in which similar evidence was led, no doubt at the instance of the court. The founding affidavit further stated that ‘everything will be done to ensure that the records’ of (those) two matters would be made available when the application was heard in the High Court. Upon enquiry from this court, counsel for the appellants, Mr Rukoro, who also represented them in the High Court, said that those records were not made available to the High Court. Nor were they made available to this court when the matter was argued.

[8] Eight respondents were cited by the appellants in their application. They are the Government of Namibia, the Speaker of the National Assembly, the Chairperson of the National Council, the Minister of Safety and Security, the

Commissioner-General of Prisons, Head of the Windhoek Central Prison, the National Release Board and the Chairperson of the Institutional Committee. All the respondents opposed the application but opposition was subsequently withdrawn on behalf of the eighth respondent as the Institutional Committee had fallen away under the 2012 Act. The Commissioner-General of the Namibia Correctional Services, R T Hamunyela, deposed to the answering affidavit on behalf of the respondents.

[9] In respect of the paragraphs dealing with the directive raised, the Commissioner-General did not admit or deny its existence or even refer to it. Instead, it was stated that the 1998 Act repealed the 1959 Act and that the 1998 Act had since been repealed by the 2012 Act which governed the position and that no rights could be asserted under the 1959 or 1998 Acts. Mr Hamunyela added that once the earlier laws had been repealed, the appellants 'cannot and would not be able to be considered in terms of such repealed laws at this stage'. With reference to a draft affidavit in prior proceedings where there was reference to an approach along the lines set out in the directive, Commissioner-General Hamunyela stated that 'the respondents are not bound by any position taken or submission made in the past by any of the respondents on the basis of wrong advice'. The position of the respondents was not further explained. There was a studious avoidance to deal with the invoked policy directive.

[10] After noting their appeal, there was a need on the part of the appellants to apply for condonation for certain non-compliances with the rules of this court. In

the supporting affidavit to this condonation application, their legal representative attached a copy of Prison Service Order 43.7.4.7 which was purportedly issued under reg 148 of the Prison Regulations promulgated under the 1959 Act.<sup>2</sup> In the affidavit, it was asserted that 'all the appellants had been sentenced in terms of the 1959 Act' and that the order should apply to them. What was intended to be conveyed was an allegation that they were sentenced at a time when the 1959 Act applied. As is stated elsewhere, this assertion is not correct in respect of those sentenced after 15 August 1999. The terms of the Order are strikingly similar to the policy directive quoted above. It provided:

'A prisoner sentenced to imprisonment for life by a high court, which merely for the purposes of the calculation of the minimum period of detention is counted as 20 years, including a prisoner on whom the death penalty was imposed and whose sentence upon appeal was changed to life imprisonment, may be recommended for release on parole after he has completed at least 10 years of his sentence. Likewise, a prisoner on whom the death penalty was imposed and whose sentence was reduced to life imprisonment by the executive, may be recommended for release on parole after he has completed at least two-thirds of 20 years in the case of first offenders of three-quarters in the case of prisoners with previous convictions.'

[11] When this appeal was argued, this court enquired from Mr Namandje, counsel for the respondents, as to whether this Order applied prior to the repeal of the 1959 Act. His answer was in the affirmative, conceding that it had been issued under the 1959 Act but he added that it no longer applied following the repeal of that Act.

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<sup>2</sup> Prison Regulations, 1965 (as amended) promulgated under Government Notice R2080 of 31 December 1965.

[12] This court endeavoured to obtain the records of the *Florin* and '*Kareeboom*' trials prior to the hearing of the appeal. Only the evidence in the '*Kareeboom*' matter (*S v Neidel and others*) No CC 21/2006 was forthcoming and only after the appeal was argued.

[13] Commissioner-General Hamunyela, then an Assistant Commissioner, on 8 November 2011 testified in *S v Neidel and others* at the instance of the court. His evidence given then is contrary to that given in this appeal. He stated the following in *S v Neidel and others* when referring to life imprisonment under the then applicable 1998 Act:

'... in that under section 95(1)(a), it provides that a prisoner has to do at least half of his sentence, in order to be eligible for parole. And under 95(1)(b) it requires that a prisoner must have show or displayed meritorious conduct, self-discipline, responsibility or industry, during that period of half where he is servicing in the prison service. And the institutional committee must have been satisfied on his behaviour before they recommend such a prisoner to be on parole. The Act itself did not also specify as to the term of imprisonment of a person sentenced to life imprisonment. When administering the sentences of life, the Namibian Correctional Service is guided by the Correctional Service Standing Order B we which call, which is known as Correctional Service B Order. They call it Correctional Service B Order. Under that B Order, Order Number 43.7.4.7, assists or explains to the Namibian Correctional Service how to administer the life imprisonment sentence. That a person who is sentenced to life imprisonment has to do half of his sentence and it says for administration purposes in this regard, the sentence of life imprisonment is regarded as 20 years and the prisoner has to do half of that, which is 10 years. On the same footing, the Namibian is also guided by the Correctional Service parole policy and under paragraph 3.4.3.1 it is also stated that prisoners sentenced for life for which the minimum period of detention

is regarded as 20 years, for administration purposes, maybe considered for parole as follows: "A prisoner sentenced to life by a court, maybe considered for parole after having served at least half of the minimum period of detention of 20 years, irrespective of whether it was his first offence or not. When we then look on those two laws, the prison B Order and the Prison Parole Policy. It is clearly stating that a person who is sentenced to life imprisonment has then to be servicing 10 years before such a person is qualified or becomes eligible to be recommended for parole. And then should he complete that 10 years, provided, his behaviour was so good, his so conduct were so accepted, then such person would be recommended for parole and the institutional committee will then recommend to the National Release Board, the National Release Board recommend to the Commissioner and then the Commissioner gives such a recommendation to the Minister who will give then it to the President who has to approve for the release.' (sic) (Emphasis supplied).

[14] His *volte face* in these proceedings is unexplained except for the reference to 'wrong legal advice' or 'mistaken reliance' on the part of the Prison authorities in relying upon 'provisions of a repealed law after its repeal and that such conduct (of) following repealed provisions would amount to an 'illegality'. What had been previously relied upon is not referred to or explained despite the reliance upon the directive by the appellants in their founding papers to similar effect. The correctional service order (43.7.4.7) was however inexplicably not referred to by him in his affidavit. No reasons were given as to why and in what circumstances the authorities continued to apply it and quite why reliance upon it had ceased. Instead, it was left to the appellants to stumble upon the order by chance after their application was dismissed by the High Court and then place it before this court in their condonation application

[15] The order was made by the then Commissioner of Prisons under the power in reg 148 of the regulations promulgated under the 1959 Act which empowered the Commissioner to issue Prison Service Orders. This order plainly constituted a form of subordinate legislation made under the 1959 Act. It should have been placed before the High Court by Commissioner-General Hamunyela in his affidavit in these proceedings. As is explained below, this order is highly relevant. Its existence was well known to Commissioner-General Hamunyela as he expressly referred to it in his evidence in *S v Neidel and others* as recently as November 2011. His affidavit in these proceedings was deposed to in May 2014. The failure to refer to it and place it before court is most regrettable and warrants severe censure. If he acted upon advice, the suppression of this evidence was upon unsound advice. There was most clearly a duty upon him to disclose relevant evidence, as there is upon all litigants – even if, and especially if it is adverse to a party. This failure is exacerbated by its context and content. The terms of the order were after all expressly raised by incarcerated offenders with reference to a policy directive. That should have been corrected and the subordinate legislation put before court. Its content concerned the fundamental human rights of those incarcerated for terms of life imprisonment. The failure to have placed the order before court could have resulted in a failure of justice, had the appellants not by chance established the existence of the order after their reliance on the directive was roundly rejected by the High Court because of its uncertain status. Indeed the failure on the part of the Commissioner-General to disclose the order constitutes a

material non-disclosure and may also offend against the appellants' right to a fair trial<sup>3</sup> in the circumstances and could of itself result in a court rehearing the matter.<sup>4</sup>

[16] In addition to denying that the 1959 Act remained operative after its repeal (without referring to the subordinate legislation made under it) when the 1998 Act came into force, and stating that the 2012 Act governed the position after 1 January 2014, certain points in *limine* were also taken by the respondents. The only one of relevance is that the claims for the mandamus orders in paras 5 and 6 of the notice of motion had become prescribed by virtue of the provisions of s 126 of the 1998 Act. That section provided:

- '(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 or her 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 at least one month before the commencement of the action.'

[17] The respondents assert that the claims for the *mandamus* orders arose when the 1998 Act was applicable and that, by failing to bring an action claiming

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<sup>3</sup> *Prosecutor-General v Lameck and others* (POCA 1/2009) [2010] NAHC 2 (22 January 2010) (full bench) (per Damaseb JP).

<sup>4</sup> *R (on application of Bancoult (No 2)) v Secretary of State of Foreign and Commonwealth Affairs* [2016] UKSC 35.

orders to that effect within the one year period provided for, the claims had become prescribed.

### The approach of the High Court

[18] The learned acting judge *a quo* pointed out at the outset of his judgment that the constitutional challenge upon s 95 of the 1998 Act was not argued by the appellants' counsel. He found that it was thus abandoned. The appellants did not take issue with this finding on appeal. Nor was the point argued in this court. It need not further be addressed.

[19] The High Court rejected the declaratory orders sought. It found that the 1959 Act did not prescribe a minimum or maximum period to be served before a prisoner serving life imprisonment could be considered for parole. That court also found that s 90 of the 1959 Act in any event also precluded pursuing the relief sought as any action in respect of an act or omission under the 1959 Act was to be brought within the time periods contained in that section, even though that section had not been raised on the papers.

[20] The High Court also rejected reliance upon the policy directive asserted in the founding papers, referring to it as a 'submission of a recommendation by the then Department of Justice . . . to the Cabinet of the day'. The High Court found that the document attached to the founding papers constituted a mere memorandum and not policy and did not constitute 'delegated legislation having legislative effect'. The court concluded that neither the 1959 Act nor the Cabinet

memorandum could avail the applicants. As for the latter, the court further held that it was also 'not a colonial Government policy which would bind the Government of the Republic of Namibia and that even if the respondents had acted upon it in the past, it would not 'matter tuppence' as administrative action not done in conformity with legislation or delegated legislation or lawful Government policy would not be binding. The application was dismissed with costs.

### The appeal

[21] The appellants appealed against the High Court's judgment. Certain delays necessitated a condonation application. Attached to the condonation application was Prison Service Order 43.7.4.7. The condonation application was not opposed. Nor did the respondents oppose the receipt of Order 43.7.4.7. In fact Mr Namandje conceded that it had previously applied prior to the repeal of the 1959 Act.

### Submissions on appeal

[22] Mr Rukoro submitted that those prisoners sentenced prior to the repeal of the 1959 Act retained the rights which accrued to them under Order 43.7.4.7 by virtue of s 11(2)(c) of the Interpretation of Laws Proc, 1920.<sup>5</sup> This provision states:

'(2) Where a law repeals any other law, then, unless the contrary intention appears, the repeal shall not –

(a) . . .

(b) . . .

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<sup>5</sup> Proc 37 of 1920.

- (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any law so repealed; or
- (d) . . .
- (e) . . . .’

[23] Mr Rukoro also argued that the limitation of actions provisions in s 90 of the 1959 Act and s 126 of the 1998 Act did not apply as the appellants’ application raised a continuing wrong which would not and did not become prescribed.

[24] Mr Namandje for the respondents argued that the absence of transitional provisions in the 1998 Act which continued the operation of subordinate legislation under the 1959 Act, meant that the repeal of the latter Act resulted in the repeal of subordinate legislation such as orders issued under it. He further contended that the resultant lacuna which then existed (because the 1998 Act did not deal with eligibility for parole for those sentenced to life imprisonment) could conceivably have given rise to a constitutional challenge prior to the 2012 Act coming into operation. The latter Act had s 117 dealing with the issue. But once the 2012 Act came into operation, any cause of action or challenge to the 1998 Act fell away. He further argued that s 117 of the 2012 Act is retrospective in its operation by reason of the use of past participle ‘has been’ with reference to those sentenced to life imprisonment. Mr Namandje also referred to the different nomenclature and statutory bodies under the 2012 Act in support of his contention.

[25] It follows that the issue to be determined is the statutory scheme applicable to the appellants’ respective sentences of life imprisonment. In order to address

this, an analysis of the applicable statutory provisions is required. A further issue concerns whether the mandamus relief is time barred. This latter aspect is first dealt with.

Mandamus relief time barred?

[26] Before turning to the statutory scheme and its implications upon the relief sought by the appellants, the question arises as to whether the relief in the form of mandamus orders sought in paras 5 and 6 of the notice of motion was time barred by virtue of the provisions of s 126 of the 1998 Act (or the similarly worded s 90 of the 1959 Act *mero moto* raised by Parker AJ in the High Court). Both these sections are similarly worded to ss 133(3) and (4) of the 2012 Act.

[27] Mr Namandje confirmed that this point was only taken in respect of the *mandamus* relief. Mr Rukoro argued that the failure to recognise the appellants' rights under order 43.7.4.7 amounted to a continuing wrong and that prescription would not commence to run by reason of the continuing wrong. He also said that the further point that the application had not been preceded by a notice a month before hand, as is required by s 126(2), was not squarely taken in the answering affidavit and could not be raised in argument on appeal for the first time. Mr Rukoro is correct that para 11 of the answering affidavit only takes issue with the claims for mandamus relief not being brought within the relevant time where it is contended that the claim for that relief had become prescribed for that reason. No point is taken in the answering affidavit that the application should have been preceded by a notice a month before as is required by s 126(2). Had that point

been taken, the appellants would have been at liberty to address the issue in reply, if so advised, including by providing copies of notices or letters if in existence and arguing that there was compliance with the provision.<sup>6</sup> That point should have been raised in the answering affidavit or notice given under the rules that the point was being taken so that the appellants would have the opportunity to address it evidentially. It is not open to the respondents to raise it for the first time in argument. The point is not further considered.

[28] The thrust of Mr Namandje's argument was however directed at the mandamus relief being time barred. In response to a question by the court, Mr Namandje argued that the term 'action' employed in s 126 was not confined in its meaning to proceedings commenced by summons or writ, as defined in Rule 1 of the High Court Rules. He argued that it would apply to claims made against the State arising from the legislation in question. That contention is in my view sound. Whilst these provisions in the respective Acts would in most instances contemplate claims for damages, this would not necessarily be the case. A similarly structured limitation provision in local government legislation (although entailing different forfeiture periods but also requiring that an 'action' be brought within a specific time) was interpreted to include an interdict.<sup>7</sup>

[29] The constitutionality of s 126 was not raised by Mr Rukoro. That question is left open and is in any event not necessary to determine in view of the conclusion reached below.

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<sup>6</sup> See *Pule v Minister of Prisons* 1982 (2) SA 598 (E) at 602.

<sup>7</sup> *Dorpsraad van Schweizer Reineke v Van Zyl* 1966 (4) SA 115 (T) (Full Bench) at 116F-H.

[30] Although Mr Rukoro did not expressly refer this court to *Slomowitz v Vereeniging Town Council*, 1966 (3) SA 317 (A) it would seem that the approach in that matter would apply to the assertion of mandamus relief in this matter. That case concerned a local authority being sued for the wrongful closure of a street for a period of 10 months. The defendant local authority raised a special plea in bar that the action had not been commenced within 6 months of the cause of action having arisen as was required by legislation then governing local authorities. The court found that the closing of the road was not a single wrongful act but a continuing injury causing damage from day to day, following earlier cases in support of this principle.<sup>8</sup> The cause of action would remain vested throughout the entire period the road remained closed. The legislative provisions served to bar a portion of the claim which arose prior to the six month period. This principle has correctly been found to apply to claims for wrongful detention.<sup>9</sup>

[31] The failure to consider the appellants as being eligible for placement on parole, is likewise an ongoing wrong if there were a duty upon the officials in question to do so and as long as the duty were not to be exercised. It follows that the mandamus relief is not time barred under s 126 raised by the respondents and s 90 *mero motu* raised by the court below.

### The statutory scheme

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<sup>8</sup> *Symonds v Rhodesian Railways Ltd* 1917 AD 582; *Oslo Land Co Ltd v The Union Government* 1938 AD 584.

<sup>9</sup> *Mbuyisa v Minister of Police, Transkei* 1995 (2) SA362 (Tk GD) at 364–365.

[32] The 1959 Act applied until its repeal when the 1998 Act came into operation on 15 August 1999. The provisions of the 1959 Act which deal with the effect of a sentence of life imprisonment were analysed in *S v Tcoelib* 1999 NR (SC) which concerned a constitutional challenge to the imposition of a sentence of life imprisonment *per se*. This court found that the effect of a sentence of life imprisonment was not unconstitutional. It did so with reference to the statutory mechanisms dealing with life imprisonment contained in the 1959 Act, reasoning:

‘Section 2(b) of the Prisons Act expressly identifies the treatment of convicted prisoners with the object of their reformation and rehabilitation as a function of the Prison Service and s 61 as read with s 5*bis* provides a mechanism for the appointment of an institutional committee with the duty to make recommendations pertaining to the training and treatment of prisoners upon whom a life sentence has been imposed. Section 61*bis* as read with s 5 of that Act creates machinery for the appointment of a release board which may make recommendations for the release of prisoners on probation and s 64 (as amended) *inter alia* empowers the President of Namibia acting on the recommendation of the release boards to authorise the release of prisoners sentenced to life and there are similar mechanisms for release provided in s 67. It therefore cannot properly be said that a person sentenced to life imprisonment is effectively abandoned as a “thing” without any residual dignity and without affording such prisoner any hope of ever escaping from a condition of helpless and perpetual incarceration for the rest of his or her natural life. The hope of release is inherent in the statutory mechanisms. The realisation of that hope depends not only on the efforts of the prison authorities but also on the sentenced offender himself. He can, by his own responses to the rehabilitative efforts of the authorities, by the development and expansion of his own potential and his dignity and by the reconstruction and realisation of his own potential and personality, retain and enhance his dignity and enrich his prospects of liberation from what is undoubtedly a humiliating and punishing condition but not a condition inherently or inevitably irreversible.

The nagging question which still remains is whether the statutory mechanisms to which I have referred, constitute a sufficiently “concrete and fundamentally realisable expectation”.

[33] This court answered this question in the affirmative after reference to a prisoner’s rights to fair and reasonable administrative action protected under Art 18 of the Constitution, concluding this aspect of the enquiry:

‘Properly considered, therefore, the statutory mechanisms to which I have referred and which pertain to the release of prisoners sentenced to life, do not in fact permit the relevant officials charged with the onerous functions of administering these mechanisms, arbitrarily to decide which such prisoners they would consider for release and when they would do so. The objection based on the assumption that they can act so arbitrarily cannot therefore be upheld.’

[34] The court concluded its detailed and careful analysis:

‘For the reasons which I have articulated I am unable to hold that life imprisonment as a sentence is *per se* unconstitutional in Namibia, regard being had to the fact that the relevant legislation permits release on parole in appropriate circumstances.’

[35] Prison Order 43.7.4.7 was not placed before the court in *Tcoeib*. Its validity (during the currency of the 1959 Act) is not in issue. The power to make regulations (which vested in the President) under the 1959 Act is contained in s 94. Regulation 148 of the consolidated regulations promulgated under s 94 included the power delegated to the Commissioner (of Prisons) to issue prison service orders. Such orders could amongst other matters be issued in respect of:

‘Directives and guidance to institutional committees and release boards in the execution of their business [operations], in view of uniformity in the execution of their duties in accordance with departmental policy and the effective and productive use of the service of members, either official or non-official, of all the institutional committees and release boards.’<sup>10</sup>

[36] Order 43.7.4.7 was issued under this power. As was correctly conceded by Mr Namandje, it constituted subordinate legislation. The question arises as to whether the appellants derived any rights under that order after the repeal of the 1959 Act by the 1998 Act. Section 127 of the 1998 Act provided for this repeal of the 1959 Act and certain savings in the following way:

- ‘(1) The laws specified in the Second Schedule are repealed to the extent specified in the third column thereof.
- (2) Anything done under any provision of any law repealed by subsec (1) and which could be done under a provision of this Act shall be deemed to have been done under the last mentioned provision.’

[37] The first statute repealed in the Second Schedule is the 1959 Act. The extent of the repeal is stated to be the whole Act.

[38] In the definitions section of the 1959 Act, the Act is defined to include the regulations promulgated under it. There was no savings provision in respect of the regulations promulgated under the 1959 Act or orders issued under reg 148 in s 127 of the 1998 Act. When the Minister made regulations under s 124 of the 1998 Act on 8 November 2001<sup>11</sup>, those regulations did not repeal the regulations made

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<sup>10</sup> Regulation 148(1)(b) of the Prison Regulations, 1965 as consolidated and amended.

<sup>11</sup> See Government Notice 226 of 2001 published in Government Gazette dated 8 November 2001.

under the 1959 Act, further demonstrating that those regulations had been repealed by s 127 of the 1998 Act.

[39] Unlike the 1959 Act, there was surprisingly no reference in the 1998 Act to prisoners serving sentences of life imprisonment. Section 95 dealt with parole or probation of prisoners serving imprisonment of three years and more but only did so with reference to sentences of finite duration. It did so in these terms:

‘(1) Where-

- (a) a convicted prisoner who has been sentenced to a term of imprisonment of three years or more has served half of such term; and
- (b) the relevant institutional committee is satisfied that such prisoner has displayed meritorious conduct, self-discipline, responsibility and industry during the period referred to in para (a),

that institutional committee may submit a report in respect of such prisoner to the National Release Board, in which it recommends that such prisoner be released on parole or probation and the conditions relating to such release as it may deem necessary.

- (2) The National Release Board may, after considering the report and recommendations referred to in subsec (1) submit a report to the Minister recommending the release on parole or probation of the prisoner concerned and the conditions relating to such release as the National Release Board may deem necessary.’

[40] Nor was service of life imprisonment sentences dealt with in the regulations eventually promulgated under that Act in 2001. Mr Namandje correctly

acknowledged that a lacuna existed as far as life imprisonment was concerned. He pointed out that there was a possibility of reprieve by the President under s 93 for them and asserted that offenders serving life sentences could apply for reprieve under that section (read with the power vested in the President under Art 32(3)(d) of the Constitution). Section 93 provides:

- ‘(1) In the exercise of his or her powers to pardon or reprieve offenders under Sub-Art (3)(d) of Art 32 of the Namibian Constitution, the President may call upon the Minister to recommend to him or her any offender for such pardon or reprieve, and may invite the comments of the Minister of Justice thereon.
- (2) The Minister shall give notice in the Gazette of the names of every offender pardoned or reprieved by the President under Art 32(3)(d) of the Namibian Constitution.’

[41] But there was no provision for those offenders to become eligible for consideration for parole. There was an absence of an empowering statutory provision to that effect.

[42] In view of what was stated in *Tcoeib*, the omission to have provided for the possibility for parole for offenders serving sentences of life imprisonment may have given rise to a constitutional challenge or a mandamus directed at making subordinate legislation during the currency of the 1998 Act. No such challenge was made. This application was brought after the 2012 Act was put into operation.

[43] Mr Rukoro understandably did not pursue the relief directed at attacking the constitutionality of s 95 of the 1998 Act. This was no doubt because that Act was

repealed in its entirety by the 2012 Act and the position of parole for those sentenced to life imprisonment is now addressed in the more comprehensive provisions of the new (2012) Act. Section 117 entitled, 'Release of offenders sentenced to life imprisonment', it is a detailed provision with 19 subsections. Relevant for present purposes are subsecs (1) to (6):

- '(1) An offender who has been sentenced to life imprisonment can be released from the correctional facility only on such conditions as to full parole or probation.
  
- (2) Notwithstanding subsec (1), no offender who has been sentenced to life imprisonment is eligible to be released on full parole or probation, unless he or she has served the minimum prescribed term of imprisonment and the National Release Board, after conducting a hearing -
  - (a) is satisfied that-
    - (i) there is a reasonable probability that such offender will abstain from crime and is likely to lead a useful, responsible and industrious life;
    - (ii) such offender has displayed a meritorious conduct during such minimum term of imprisonment and no longer has a tendency to engage in crime; and
    - (iii) the release of the offender will contribute to reintegration of the offender into society as law abiding citizen; or
    - (iv) it is desirable for any other reason to release such offender on full parole; and

- (b) submits a report to the Commissioner-General in which it recommends such offender's release on full parole or probation and the conditions relating to such release, as it considers necessary.
- (3) Upon the receipt of the report referred to in subsec (2), the Commissioner-General must forward it, together with his or her comments, to the Minister.
- (4) On consideration of the report and comments referred to in subsec (3), the Minister must forward the report, together with his or her comments, to the President.
- (5) The President, on consideration of the report and comments referred to in subsec (4), may authorise the release on full parole or probation of the offender on the date and conditions recommended by the Minister or on such date and conditions as the President may determine.
- (6) An offender released on full parole or probation in terms of subsec (5), is on full parole or probation for life, unless the President determines otherwise.'

[44] The minimum period referred to in s 117(2) is prescribed in regulation 281 of the regulations simultaneously promulgated with the coming into operation of the 2012 Act<sup>12</sup>. Regulation 281 provides:

- '(1) Subject to subreg (2), an offender who has been sentenced to life imprisonment is eligible to be considered for release on full parole or probation pursuant to s 117 of the Act after serving at least 25 years in a correctional facility without committing and being convicted of any crime or offence during that period.

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<sup>12</sup> See Government Notice 330 of 2013 [published in Government Gazette dated 18 December 2013].

- (2) The counting of the period referred to in subreg (1) is restarted whenever the offender is, after being sentenced to life imprisonment, convicted of any crime or offence committed after such sentencing.'

[45] Under the new regime brought about by the 2012 Act, those serving sentences of life imprisonment are entitled to be eligible for consideration for parole after 25 years of incarceration and provided the other conditions specified are met.

[46] Mr Namandje argued that the use of the term 'has been' in ss 117(1) and (2) would mean that s 117 applies to all those serving life sentences as the section would thus apply to those serving such sentences upon the date of the 2012 Act coming into operation. The use of the past participle certainly means the applicability of the provision to offenders serving life sentences upon the date upon which the 2012 Act came into operation. The legislature was no doubt aware of the lacuna and failure to deal with the release of offenders sentenced to life imprisonment on parole under the 1998 Act and the regulations promulgated under it. Section 117 clearly addressed that lacuna by providing for a regime for offenders who had been sentenced to life imprisonment during the period when the 1998 Act applied.

[47] Mr Namandje argued that s 117 should also apply to those sentenced during the applicability of the 1959 Act. I do not agree.

[48] Those offenders who had been sentenced to life imprisonment at the time when the 1959 Act applied acquired the right under that Act to be considered for placement on parole under that Act and the subordinate legislation issued under it.<sup>13</sup> This is because the 1959 Act governed the position at the time of sentencing. When the 1959 Act was repealed by the 1998 Act, there was no contrary intention expressed in the 1998 Act or in the 2012 Act or any implication which served to indicate the intention to take away that right, as provided for in the Interpretation Proclamation. In the absence of a contrary intention expressed or implied in a transitional provision or elsewhere in the 1998 Act, the repeal of the 1959 Act would not affect the right in respect of eligibility for placement on parole acquired under the regime provided for in the 1959 Act.<sup>14</sup> Indeed the 1998 Act was inexplicably silent on the issue which caused an hiatus for those sentenced to life imprisonment during its currency. But this has now been addressed by the use of the past participle in s 117 of the 2012 Act.

[49] It follows in my view that Order 43.7.4.7 would continue to govern the position of those appellants sentenced prior to the repeal of the 1959 Act which become effective upon 15 August 1999. They would have the right to be eligible for parole after serving 10 years in detention. Being considered for placement on parole would be in accordance with the appropriate statutory mechanism created for that purpose under the 2012 Act. Those sentenced to life imprisonment after 15

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<sup>13</sup> See *Mohammaed v Minister of Correctional Services and others* 2003 (6) SA 169 (E) at 188.

<sup>14</sup> This also accords with the common law presumption against retrospection, powerfully underpinned by the Constitution in embodying the rule of law in Art 1. See *Pharmaceutical manufacturers Association of South Africa and others: In re Ex Parte Application of the President of the RSA and others* 2000 (2) SA 674 (CC) para 39; *Veldman v Director of Public Prosecutions* 2007 (3) SA 210 (CC) para 26.

August 1999 would, after the coming into operation of the 2012 Act on 1 January 2014, have the right to be eligible for parole accorded to them under s 117 of the 2012 Act. That would entail the lapse of 25 years before qualifying for eligibility.

Relief claimed by appellants

[50] In para 1 of the notice of motion, the appellants claimed a declaratory order to the effect that 20 years be declared the maximum term for any offender sentenced to life imprisonment during the applicability of the 1959 Act (and not in terms of that Act as is wrongly asserted).

[51] The terms of Order 43.7.4.7 are set out above. They do not set a maximum term for life imprisonment. On the contrary 20 years is expressed as a minimum term. No maximum is understandably set. That would depend upon whether offenders meet the requisites for parole. They may not be found to do so after the minimum period and may only at a later stage. Thus a maximum is not expressed and only a minimum.

[52] The appellants have not established any basis at all for the declaratory order in para 1. On the contrary, their basis for contending for the declaratory Order (order 43.7.4.7) is emphatically against its grant.

[53] As for the relief sought in para 2, declaring that offenders sentenced during the applicability of the 1959 Act may be eligible for parole after serving 10 years, the appellants have established their entitlement to an order to that effect although

not in the terms of the loose wording sought for that order. But an order to that effect is to be made, subject to any recommendation made by a sentencing court for a greater period of time to lapse prior to the consideration of placement on parole.

[54] The relief sought in paras 3 and 4 is premised upon the regime under the 1959 Act continuing to apply to those offenders sentenced during the applicability of the 1998 Act. As is demonstrated above, it is based upon an incorrect premise. The repeal of the 1959 Act without any savings or transitional provisions preserving the prior regime meant that it did not apply to those sentenced after 15 August 1999 – the date of the repeal. The 1998 Act applied to life imprisonment imposed upon offenders after 1998. Despite the lacuna in that Act and the inexplicable failure on the part of the legislature to make specific provisions other than the very limited right to be considered for reprieve under s 93, this would not mean that those offenders acquired rights under the repealed 1959 Act because that regime no longer applied. If the right to reprieve was insufficient to give effect to their rights as articulated in *S v Tcoelib*, their recourse would have been to address that during the currency of that Act. This they did not do. It serves no purpose to express any view on that issue seeing that the 1998 Act has been repealed and the lacuna in respect of life imprisonment has now been addressed by virtue of the way in which s 117 is worded. The declaratory relief sought in paras 3 and 4 must thus fail.

[55] In paragraph 5 of the notice of motion, the appellants seek orders against the 7<sup>th</sup> and 8<sup>th</sup> respondents to consider the appellants for parole within 30 days and provide a recommendation to the 4<sup>th</sup> respondent. In para 6, an order is sought against the 4<sup>th</sup> respondent to consider the 7<sup>th</sup> respondent's recommendation within 30 days. These orders sought are in the form of mandamus relief against the respective respondents available at common law to compel a functionary to perform an administrative act when that statutory functionary is under a statutory duty to do so and has failed to do so within a reasonable time.<sup>15</sup> The respondents opposed that relief on the grounds that the appellants were not entitled to it. The respondents did not however address the time periods proposed in the orders although Mr Namandje did point out in a different context that different statutory functionaries were established under the 2012 Act with regard to the consideration of parole. The reference to the 8<sup>th</sup> respondent in para 5 of the notice of motion would in any event fall away as there is provision for the Institutional Committee under the 2012 Act.

[56] The refusal to treat any of the offenders as being eligible for placement on parole on legal grounds has been the cause of the fact that this has not occurred and not any delay in dealing with the consideration of parole itself. That would mean that no entitlement to an order under para 6 has been established. In view of the number of appellants who may now be eligible for parole, as a consequence of this judgment the time periods proposed in para 5 may not be sufficient or

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<sup>15</sup> *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115 per Innes CJ. See generally De Ville *Judicial Review of Administrative Action in South Africa* (revised 1st ed, 2003) at 369-372 and the authorities collected there. See also *Tumas Granite v Minister of Mines and Energy* 2013(2) NR 383 (HC).

reasonable for the detailed and multifaceted assessment which the process necessarily entails. It would seem that an order directing the consideration for parole in respect of qualifying appellants should permit a further period than the mere 30 day period in para 5. A period of 90 days would, in the exercise of discretion, appear to be more apposite.

### Conclusion

[57] It follows that for the large part the appeal succeeds. It further follows that the order of the High Court is to be set aside and that certain relief should have been granted to the appellants.

### Costs

[58] The appellants are represented by counsel appointed by the Directorate of Legal Aid. They rightly did not seek costs.

### The order

[59] The following order is made:

1. The appeal succeeds in part.
  
2. The order of the High Court is set aside and replaced with the following order:

- (a) Save in the cases of a sentencing court recommending consideration of parole after expiration of a period longer than 10 years, appellants sentenced during the time when Act 8 of 1959 applied may be recommended for placement on parole after completion of at least 10 (ten) years of their respective sentences. Where sentencing courts have recommended periods longer than 10 years before an offender sentenced during the currency of the 1959 Act may be eligible for parole, such further period(s) would apply.
- (b) The seventh respondent is to consider those appellants eligible for placement on parole within a reasonable time and within 90 days from the date of this order.
- (c) The further relief sought in the notice of motion is dismissed.
- (d) No order is made as to costs.'

3. No order is made as to the costs of the appeal.

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**MAINGA JA**

SHIVUTE CJ:

[60] I have had the privilege of reading in draft judgment prepared with the usual erudition by my Brother Smuts JA. I respectfully agree with him that the appellants sentenced to life imprisonment at the time when the Prisons Act 8 of 1959 was of application have vested rights to be considered for possible placement on parole. That is so, because as Smuts JA correctly finds, there is no explicit or implied intention in the repealed Prisons Act 17 of 1998 or the Correctional Service Act 9 of 2012 to displace the rights so acquired. Section 2 of the Interpretation of Laws Proclamation, 1920 is thus of application.

[61] I agree furthermore that the offenders sentenced to life imprisonment when the 1998 Act was of application are on entirely different footing. With the 1998 Act surprisingly not having had a provision dealing with offenders sentenced to life imprisonment, the affected offenders have not acquired any right to be considered for placement on parole under the 1998 Act simply because that Act did not contain a provision dealing with their situation. That is, however, not the end of the road as far as this group of offenders is concerned. In light of the use of the past participle 'has been' in s 117 of the 2012 Act, the provisions of this section apply to this category of offenders' right to be considered for parole or probation.

[62] I have considered the argument advanced on behalf of the respondents that the retrospective implementation of the parole policy as reflected in Order 43.7.4.7

would be impractical because some of the structures then involved in the implementation of the parole regime no longer exist. In my respectful view, the implementation of the parole policy has to be done through the equivalent structures in the 2012 Act. Nothing in law or logic precludes such an approach.

[63] For the reasons given by Smuts JA, I agree that the appeal should succeed in part. I further concur with him in the orders he has proposed and more so for the reasons he has given for the grant of those orders.

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**SHIVUTE CJ**

APPEARANCES

APPELLANTS:

S Rukoro

Instructed by Legal Aid

RESPONDENTS:

S Namandje

Instructed by the Government Attorney