REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2020/00051

In the matter between:

ADOUR MUTALIFE CHIKA	**1ST APPLICANT**
MARTIN TUBAUNDULE	**2ND APPLICANT**
FABIAN SIMIYASA	**3RD APPLICANT**

and

COMMISSIONER GENERAL RAPHAEL AMUNYELA: NAMIBIA CORRECTIONAL FACILITY	**1ST RESPONDENT**
THE MINISTER OF SAFETY AND SECURITY (CHARLES NAMOLOH)	**2ND RESPONDENT**
COMMISSIONER MALOBELA: IN THE OFFICE OF THE COMMISSIONER GENERAL	**3RD RESPONDENT**
OSCAR KASUKA NUNWA (CHAIRPERSON OF THE INTERNAL RELEASE COMMITTE)	**4TH RESPONDENT**
THE ATTORNEY GENERAL	**5TH RESPONDENT**

Neutral citation: *Chika v Commissioner General Raphael Amunyela: Namibia Correctional Facility* (HC-MD-CIV-MOT-GEN-2020/00051) [2022] NAHCMD 233 (10 May 2022)

Coram: ANGULA DJP

Heard: **3 December 2021**

Delivered: **10 May 2022**

Flynote: **Legislation – Parole** – Prisons Act 8 of 1959, Prisons Act 17 of 1998 and Correctional Service Act 9 of 2012 – Court to consider which of the three Acts applies in respect of the applicants' eligibility for parole consideration – Determinative date of eligibility for parole consideration is the date of sentence – Court finding that the Correctional Service Act 9 of 2012 having been in force on the date when the sentences were imposed on the applicants applies – In terms of s 114(1) of the Correctional Service Act 9 of 2012 applicants required to serve two-thirds of their sentence before becoming eligible for parole consideration.

Constitutional law – Fundamental rights – Discrimination – Applicants contending that s 114(1) of the Correctional Service Act 9 of 2012 violates Article 10(1) and (2), alternatively Article 12(3) of the Constitution – Section 114(1) requires offenders sentenced to a term of imprisonment of less than 20 years for any of the scheduled crimes or offences to serve two-thirds of their sentence before they become eligible for parole consideration – Court finding that the 2012 Act's classification of offenders based on the seriousness of the offences they have been convicted of and sentenced for in respect of their eligibility for parole consideration is not arbitrary and is rationally connected to a legitimate government purpose – Section 114(1) found not to be unconstitutional.

Summary: The applicants are inmates serving their respective long-term sentences which were imposed on them on 8 December 2015 – They were convicted for the offences of high treason, murder and attempted murder, which offences were committed on 2 August 1999. In total, the applicants were each sentenced to a cumulative period of imprisonment of ten years.

As part of the application, the applicants sought an order that they be considered eligible for parole consideration in accordance with the provisions of the Prisons Act, 1959, alternatively in terms of the Prisons Act, 1998.

In adjudicating the application the court was tasked with ascertaining which of three related statutes is applicable in determining when the applicants became (or will become) eligible for parole consideration. The three statutes under consideration are the Prisons Act 8 of 1959, (the '1959 Act') the Prisons Act 17 of 1998 (the '1998 Act')

and the Correctional Service Act 9 of 2012 (the '2012 Act'). The court also had to consider the determinative date for parole consideration, being either the date of sentencing or the date of commission of the offences, the latter being the determinative date as argued by the applicants.

The 1959 Act was repealed by the 1998 Act on 24 August 1998. The 1998 Act was subsequently repealed on 1 January 2014 when the 2012 Act came into force.

In terms of the 1959 Act and the 1998 Act an inmate qualified for parole consideration after having served half of his or her sentence. In terms of the 2012 Act however, an inmate who has been sentenced to a term of imprisonment of less than 20 years for any of the scheduled crimes or offences, is eligible for release on full parole after having served two-thirds of his or her sentence.

At the time of commission of the offences the 1998 Act was in force, however the 2012 Act was in force at the time of the applicants' sentencing.

Held that; the 1959 Act was not in operation on 2 August 1999 when the applicants committed the offences. The applicants therefore did not derive any right from the 1959 Act or Order 43.7.4.7 made under the regulations promulgated in terms of the Act. Accordingly, the applicants' contention that they should be considered for eligibility for parole based on the 1959 Act was rejected.

Held that; the determinative date for the eligibility for parole consideration is to be calculated from the date of sentence. This is apparent from the wording of s 97(8) of the 1998 Act which reads that 'a prisoner who after the commencement of the Act has been sentenced'. The Act does not speak of the date of the commission of the offence. It is common ground that the applicants were sentenced on 8 December 2015. Having been sentenced on 8 December 2015 the court held that the applicants did not qualify for eligibility for parole consideration under the 1998 Act because they were sentenced long after the 1998 Act had been repealed.

Furthermore, s 97(8) of the 1998 Act specifically states that a prisoner who has been sentenced to a term of imprisonment for any crimes or offences listed in s 92(2)*(c)* of the Act (which includes the offences of treason and murder) shall not be eligible for

release on parole under that section. Having been convicted and sentenced for treason and murder, the applicants equally did not qualify for consideration for parole under the 1998 Act.

The applicants further challenged the constitutionality of s 114(1) of the 2012 Act. Section 114(1) stipulates that no offender who has been sentenced to a term of imprisonment of less than 20 years for any of the scheduled crimes or offences may be eligible for release on full parole or probation, unless he or she has served, in a correctional facility, two-thirds of his or her term of imprisonment. It was the applicants' case that by virtue of the section they were being discriminated against on the ground of their social status. Such discrimination was in violation of Article 10(1) and (2), alternatively Article 12(3) of the Constitution and was thus unconstitutional.

Held that; the scheme of the 2012 Act classifies different categories of offenders based on the seriousness of the offences they have been convicted of and sentenced for. It would be odious to treat an offender who has been sentenced for a non-scheduled offence, such as assault, on equal footing with an offender who has been sentenced for a scheduled offence such as murder. The classification is based on the length of the sentence the offender is required to serve before he or she becomes eligible for consideration for parole.

If the classification was not in place or applied, it would make the management of the parole system difficult and would leave the application of the system to arbitrariness of officials of the correctional concerned facility. That would amount to 'manifest naked preference' that serves no legitimate governmental purpose. The classification in terms of the Act is not arbitrary and is rationally connected to legitimate government purpose.

Insofar as the applicants argued that s 114(1) violated Article 10(2) of the Constitution, the court referred to the approach of the Supreme Court in *Muller v President of the Republic of Namibia and Another* 1999 NR 190*,* where it was held that not every differentiation based on the grounds enumerated in Article 10(2) will be unconstitutional but only those grounds which unfairly or unjustly discriminate against the complainant taking into account what has been held in that judgement.

Held that; although s 114 provides for different treatment of offenders, it does not amount to unfair or unjust discrimination.

Court *further held that*; parole is to be considered as part of an imposed sentence.

Court *further held that;* the applicants were excluded by the 1998 Act from being eligible for consideration for parole due to the nature of the offences they had committed and that there was no merit in their argument that s 114(1) is unconstitutional because it violates Article 12(3) by requiring the applicants to serve two-thirds of the sentence before they become eligible for parole consideration. This was because of the facts of their case that there was no lesser 'penalty' or 'punishment' applicable when the applicants committed the said offences. Instead the converse appeared to be the position in that under the 2012 Act the applicants became eligible for parole consideration after having served two-thirds of their sentence. In other words, under the 2012 Act the applicants acquired a right to being eligible for parole consideration which they did not have under the 1998 Act.

Accordingly, the court held that s 114(1) of the 2012 Act was not unconstitutional.

ORDER

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1. The application is dismissed.

2. There is no order as to costs.

3. The matter is removed from roll and is finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] This application concerns the determination as to which of three related statutes is applicable in determining when the applicants became (or will become) eligible for parole consideration. That is, to ascertain whether it was the Prisons Act 8 of 1959, (the '1959 Act') or it was the Prisons Act 17 of 1998 (the '1998 Act'), or the Correctional Service Act 9 of 2012 (the '2012 Act') which applies. In addition, the matter concerns the question as from what point the eligibility to parole should be considered, that is to say whether it should be considered from the date of the commission of the offence or from the date that the offender was sentenced.

The parties

[2] The three applicants are all inmates at the Correctional Facility at Walvis Bay. They are serving their respective long term imprisonment sentences imposed on them on 8 December 2015.

[3] The first respondent is the Commissioner General of the Namibian Correctional Services. The second respondent is the Minister of Safety and Security cited in his capacity as such. The third respondent is Commissioner Malobela employed in the Office of the Commissioner General. The fourth respondent is Mr Oscar Kasuka Nunwa cited in his capacity as the chairperson of the Internal Release Committee. The fifth respondent is the Attorney-General of the Republic of Namibia. He was joined to the proceedings for the reason that the applicants have raised a constitutional point on papers. The respondents are represented by the Office of the Government Attorney which is situated in Sanlam Building, Independence Avenue, Windhoek.

Relief sought

[4] The applicants seek the following relief:

> '1. The honourable court to condone our non-compliance with the rules of court where it appears apparent;

2. The honourable court to find and declare section 114(1) of the Correctional Service Act, of 2012 to be in conflict with Article 10(1)(2) of the Namibian Constitution. Or alternatively, uses its inherent powers as proved for in Article 25 (2)(a) to correct the above section.

3. The court to order the Namibian Correctional Services to consider placing the applicants on parole based on section 95 of the Prison Act No. 17 of 1998 as it was in operation at the time when the offences were committed.

4. The court orders that treating the applicants based on the parole [based on the] 2012 Act which was not in operation at the time when their crime were committed would result in contravention of Article 12(3) of the Namibian Constitution as guaranteed.'

[5] I should immediately mention that the applicants are acting in person. The applicants, being unrepresented lay persons, should explain the manner in which the relief sought has been drafted. Mr Chika, the first applicant, deposed to the founding affidavit. The second and third respondents filed confirmatory affidavits. At the hearing of the application, the first applicant also acted as the spokesperson for the applicants and argued their case with vigour. He had filed comprehensive heads of argument. The court wishes to thank him for his assistance in this regard.

[6] The application is opposed by the respondents. The Attorney-General deposed to the answering affidavit on behalf of the respondents. The respondents were represented by Mr Ncube from the Office of the Government Attorney, who likewise filed compressive heads of argument which were of assistance to the court and for which the court also wishes to thank him.

Factual background

[7] The facts which gave rise to this application are by and large common cause. It is the interpretation of the applicable statutes that is at the core of the dispute between the parties. I proceed to briefly set out the facts which are common cause between the parties.

[8] The offences for which the applicants were sentenced were committed on 2 August 1999. The applicants were sentenced on 8 December 2015 for the offences of high treason, murder (nine counts) and attempted murder (90 counts). In respect of the offence of high treason the applicants were sentenced to 30 years of which 20 years were suspended for five years on condition that the applicants are not convicted of the offence of high treason committed during the period of suspension. In respect of the offence of murder they were sentenced to 25 years imprisonment of which 15 years were suspended for five years on condition that the applicants are not convicted of murder during the period of suspension. As for the offence of attempted murder, the applicants were sentenced to eight years which were ordered to run concurrently with the portion of unsuspended sentences. In total the applicants were sentenced to a cumulative period of imprisonment of ten years.

[9] On 2 August 1999, when the applicants committed the offences, the 1959 Act was not in force. That Act was repealed by the 1998 Act which came into operation on 24 August 1998. The latter Act was repealed by the 2012 Act which came into operation on 1 January 2014.

[10] I should immediately interpose here to point out that in the *Kamahere*[1], Supreme Court judgment upon which the applicants heavily rely, the date of coming into operation of the 1998 Act has been erroneously indicated at para 3 as 15 August 1999. However in terms of Government Notice Number 206 of 1998 which appeared in Government Gazette Number 1927 of 1998, the 1998 Act came into operation on 24 August 1998. The date when the 1998 Act came into operation has a determining effect on the applicants argument that they should be considered eligible for parole consideration on the statute which was in operation at the date of their commission of the offences.

[11] The answer to the question as to which statute is applicable to the applicants is determinative as to when the applicants became eligible for parole consideration by the Correctional Facility Authority. The 1959 Act and 1998 Act qualified an offender for consideration for parole after having served half of his or her sentence. The 2012 Act on the other hand provides *inter alia* that an offender who has been sentenced to a term of imprisonment of less than 20 years for any of the scheduled

[1] *Kamahere and Others v Government of the Republic of Namibia and Others* 2016 (4) NR 919 (SC).

crimes or offences is to be eligible for release on full parole after having served two-thirds of his or her sentence. The applicants fall under that category.

The parties' respective submissions

The applicants' submissions

[12] The applicants want to be considered as being eligible for parole in accordance with the provisions of the 1959 Act, alternatively in terms of s 95 of the 1998 Act. The reason for that is because those two statutes qualify them for being eligible for parole consideration after having served half of their sentences as opposed to the 2012 Act which requires them to serve two-thirds of their respective sentences before being eligible for parole consideration. The applicants argue that in deciding which statute is applicable to them, the court should look at which statute was in force at the time when they committed the offences and not at the statute that was in force at the time they were sentenced. In this connection the applicants point out that ss 95 and 96 of the 1998 Act provide for an inmate to be eligible for parole consideration after having served half of his or her sentence. The applicants further point out in this regard that they have served half of their sentence by 7 December 2020 and are thus long overdue for being eligible for parole consideration.

[13] The applicants further point to two matters, *McNab*[2] and *Heita*[3] in which this court sanctioned that the inmates in those matters be considered for parole in terms of the 1998 Act. The applicants further argue that the inmates in those two matters had been convicted and sentenced for murder which offence is similar to the offence of murder for which the applicants have been sentenced.

[14] I should interpose here to mention that in those two matters the court orders were issued by consent or by agreement between the applicants and the Correctional Facility Authority, the latter exercising its discretion vested upon it by the 1998 Act. In the *Heita* matter a status report was filed which reads:

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[2] *Kain McNab v The Minister of Safety and Security* (A 120/2016).
[3] *Thomas K Heita v The Minister of Safety and Security* (HC-MD-CIV-MOT-GEN-2017/00068).

‘1. The respondents hereby wish to inform the Honourable Court that they no longer wish to oppose this application.

2. The respondents further wish to inform the Honourable Court that the Applicant will be considered for parole with immediate effect, this is in terms of a directive issued in March 2017 by the Ministry of Safety and Security that all offenders who were sentenced before the coming into operation of the Correctional Service Act, No. 9 of 2012 and who were eligible for release on parole or probation under the Prison Act, No. 17 of 1998 be considered for release on full parole.’

Resultantly, the agreement was made an order of court.

[15] Similarly in the *Kain McNab and Others* matter, the parties filed a joint status report which reads:

‘The parties have considered the judgment in *Steve ‘Ricco’ Kamahere and 25 Others v Government of the Republic of Namibia and Others*. As a result thereof it has been agreed that:

1.1 The applicants are eligible to be considered for placement on parole in terms of the Prison Act No. 17 of 1998;

1.2 It is further agreed that the relevant Institutional Committee (5th respondent) will act in accordance with section 95(1)(b) of the Prison Act No. 17 of 1998 and this they shall do within a period of 40 days from the date of this Order;

1.3 There shall be no order as to costs.’

The agreement was made an order of court.

[16] It is therefore clear that the court did not pronounce itself on the lawfulness or otherwise of the eligibility for parole of the offenders concerned in terms of the applicable law. The decision was made by the Correctional Facility Authority exercising its statutory discretion. Those matters cannot therefore not serve as authority or precedent for the proposition in this court that the applicants should be considered for eligibility for parole consideration. This is because this court does not

know what factors were taken into account by the Correctional Facility Authority in arriving at its decisions in those matter.

[17] The applicants further argue that the 2012 Act should not be made applicable to them in determining whether they qualify for eligibility for consideration for parole because that Act was not in force when they committed the offences. Moreover, s 114 of the 2012 Act prescribes a punishment which exceeds that which was applicable at the time when they committed the offences in violation of Article 12(3) of the Constitution. Relying on Article 12(3), the applicants contend that for them to be required to serve two-thirds instead half of their sentence before they become eligible for consideration for parole amounts to increasing their penalty and is thus in violation of Article 12(3). It is the applicants' submission that parole forms part of the penalty. For that reason – so it is contended – s 114 of the 2012 Act is unconstitutional is so far it is made applicable to them.

[18] The applicants further rely on the Supreme Court judgement of *Kamahere* for their contention that they qualify for parole having served half of their sentence based on Order 43.7.4.7 issued under the regulations promulgated under the 1959 Act which governed their parole regime prior to the repeal of the 1959 Act on 24 August 1998.

[19] The applicants further rely for their submission in this regard on *Phaahla v Minister of Justice and Correctional Services and Another*[4], a judgment of the Constitutional Court of South Africa where it was held *inter alia* that where the punishment for an offence is changed between the commission of the offence and the date of sentence, the least severe punishment shall apply.

[20] The applicants further argue that to classify the inmates or convicted persons as 'scheduled' and 'non-scheduled' inmates as the 2012 Act does, amounts to discrimination, contrary to Article 10 of the Constitution, which guarantees equality before law and prohibits discrimination on the 'grounds of social status or economic status'. In this regard s 114(1) stipulates that no offender who has been sentenced to a term of imprisonment of less than 20 years for any of the scheduled crimes or

[4] *Phaahla v Minister of Justice and Correctional Services and Another* (Tlkakanye Intervening) [2019] ZACC 18.

offences may be eligible for release on full parole or probation, unless he or she has served, in a correctional facility, two-thirds of his or her term of imprisonment. The applicants assert that they are being discriminated on the ground of their social status.

[21] Finally the applicants argue that by applying s 114 of the 2012 Act to their situation amounts to a retrospective application of that statute. Applicants submit in this respect that retrospective application of a statute is not permissible. They contend in this regard that retrospective application of a statute is only permissible in instances where that statute does not take away a vested right of the affected person.

The respondents' submissions

[22] Initially the respondents raised two points in law *in limine* relating to prescription and the alleged failure by the applicants to have given the prescribed statutory notice to the respondents of their intention to bring these proceedings as required by s 113(4) of the 2012 Act. Mr Ncube for the respondents did not pursue the points at the hearing and wisely so in my view. Nothing more need be said about those points *in limine*.

[23] As regards the merits, the respondents' case is that the applicants were not eligible for release on parole under the 1998 Act. In this regard the respondents point out that the 1998 Act came into operation on 24 August 1998 while the applicants committed the offences on 2 August 1999 when that Act was already in operation. Furthermore, the applicants were sentenced on 8 December 2015 when the 2012 Act was in operation which excludes the possibility of retrospective application.

[24] The respondents further argue that the applicants are only eligible for release on parole under the 2012 Act. Furthermore, that the 1998 Act excluded the offences of treason and murder from offences that could be considered for parole. The respondents further point out that although the offences of treason and murder are scheduled offences in terms of the Criminal Procedure Act, No. 51 of 1977, the 2012 Act does not exclude the offenders who have been sentenced for scheduled offences from being considered for parole. However the applicants can only become

eligible for release on full parole after having served two-thirds of their sentences as prescribed by s 114 of the 2012 Act.

[25] The respondents further point out that s 114(1) of the 2012 Act has in-built mechanisms in which internal processes are to be exhausted before the National Release Board is engaged which has the relevant expertise in assessing each application for release on parole. It is the respondents' submission that the internal remedies in place ensure that s 114 is not unconstitutional in its application. The respondents contend that the applicants failed to exhaust these internal remedies. In addition, the applicants' right to equality before law guaranteed by Article 10 of the Constitution is protected by the internal mechanisms that are provided for under s 114. Accordingly, the respondents plead that s 114 should not be declared unconstitutional.

Discussion

Do the applicants fall under the 1959 Act for eligibility for consideration for parole?

[26] The 1959 Act was not in operation on 2 August 1999 when the applicants committed the offences. The 1959 Act having been repealed by the 1998 Act on 24 August 1998. Therefore the argument by the applicants that they should be eligible for parole consideration under the 1959 Act or any subordinate legislation made under the Act is misplaced. Unlike the applicants in the *Kamahere* matter, the applicants in the present matter did not derive any right from the 1959 Act or Order 43.7.4.7 made under the regulations promulgated in terms of that Act. Accordingly, the applicants' contention that they should be considered for eligibility for parole based on the 1959 Act is rejected.

Do the applicants fall under the 1998 Act for eligibility for consideration for parole?

[27] The applicants contend in the alternative that they do resort for eligibility for parole consideration under the 1998 Act. The respondents on the other hand contend that the applicants do not fall for eligibility for parole consideration under the 1998 Act, but rather under 2012 Act. The applicants base their contention on the date of the commission of the offences relying on the *Phaahla* judgment (*supra)*.

[28] Section 95 (1) of the 1998 reads as follows:

> ‘Parole or probation of prisoners serving imprisonment of three years and more
>
> 95. (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
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> (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 paragraph (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…’ (Underlining supplied for emphasis)

[29] In my view, on a proper reading of s 97(8) of the 1998 Act, it is clear that the determinative date for the eligibility for parole consideration is to be calculated from the date of sentence. This is apparent from the following wording, ‘a prisoner who after the commencement of the Act has been sentenced’. The Act does not speak of the date of the commission of the offence. It is common ground that the applicants were sentenced on 8 December 2015. For this reason alone, I hold that the applicants do not qualify for eligibility for parole consideration under the 1998 Act because they were sentenced long after the 1998 Act had been repealed.

[30] The foregoing interpretation, in my view, accords with the interpretation of the Supreme Court in the *Kamahere* matter at paras 48 and 49 where the court used the date of sentencing as the determinative date. The court reasoned at para 48 that: ‘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. This is because the 1959 Act governed the position at the time of sentencing.’ (Underlining is supplied for emphasis).

[31] It is common cause that the applicants were sentenced on 8 December 2015 long after both the 1959 Act and the 1998 Act had been repealed. The applicants therefore did not gain or acquire any vested right from the provisions of those two Acts.

[32] There is a further reason why the applicants do not qualify for eligibility for parole consideration under the 1998 Act. This is because s 97(8) specifically states that a prisoner who has been sentenced to a term of imprisonment for any crimes or offences listed in s 92(2)*(c)* shall not be eligible for release on parole under that section. The crimes and offences listed in para (c) include treason and murder for which the applicants have been convicted and sentenced. For this further reason, the applicants do not equally qualify for consideration for parole under the 1998 Act.

[33] In an attempt to distance themselves from the provisions of s 97(8) of the 1998 Act which excluded them from being eligible for parole consideration because of having been sentenced in respect of the offences which include treason and murder, the applicants advance a rather untenable interpretation of s 97(8). They contend that: 'The section says that "subject to s 98" meaning that you must fall under s 98 and then commit the offences listed in para (c) of s 92 for you not to qualify for parole.'

[34] In order to provide context to the applicants' argument it is necessary to reproduce s 97(8) here. It reads as follows:

'Notwithstanding the provisions of this section, but subject to section 98, a prisoner who after the commencement of the Act has been sentenced as contemplated in paragraph (a) and (b) of subsection (2) of section 92, or who has after the said commencement committed and has been sentenced to a term of imprisonment for any of the crimes or offences referred to in paragraph (c) of that subsection shall not be eligible for release on parole or probation under this section: Provided that this subsection shall not apply to juveniles.'

[35] The purpose of the phrase 'subject to' has been explained as follows:

'The purpose of the phrase "subject to" in such a context is to establish what is dominant and what is subordinate or subservient; that to which a provision is "subject", is

dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be "subject to" the other specified one. As Megarry J observed in *G and J Clark v Inland Revenue Commissione*rs [1973] 2 All ER 513 at 520:

> "In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision the phrase shows what is to prevail." '[5]

[36] Applying the foregoing interpretation of the phrase ‘subject to s 98’ to my understanding, means that s 98 is subject to the provisions of s 92. In other words the dominant section is 92 whereas s 98 is subservient. In the event of a conflict between the two sections; s 92 shall prevail. In other words s 98 is not intended to override s 92. It follows thus that the interpretation proffered by the applicants in respect of s 97(8) is wrong and perhaps self-serving. On a proper interpretation of the phrase ‘subject to s 98’ does exclude those sentenced for treason or murder from being eligible for parole consideration. In my view, the rationale for exclusion is apparent in that it excludes the category of persons who have been sentenced for having committed serious offences and are serving long term of imprisonment.

[37] Section 98 deals with the release of prisoners who have been declared habitual criminals. Such prisoners would not qualify for parole unless they have served at least 7 years of their sentence. Subsection 92(2)*(a)* provided that remission shall not apply to an offender who has been declared a habitual criminal. Subsection (b) applied to an offender who has been sentenced to life imprisonment. He or she did not qualify for eligibility for parole consideration. Subsection (c) applied to an offender who has been sentenced for offences consisted *inter alia* treason and murder. The section clearly provides that persons who have been declared habitual criminals, or sentenced to life imprisonment or sentenced to amongst of offences such as treason and murder shall not be eligible for release on parole under that section.

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[5] *S v Marwane* 1982 (3) SA 717 at 747 G-H.

[38] It follows therefore that for the reasons articulated in the foregoing paragraphs the applicants did not qualify for eligibility for parole consideration under the 1998 Act. Their contention in this regard fails.

Is s 114 of the 2012 Act discriminatory in violation of Article 10 and thus unconstitutional?

[39] The applicants seek an order declaring s 114(1) unconstitutional because it violates their rights to equality and non-discrimination guaranteed by Article 10 of the Constitution. Section 114(1) provides as follows:

> '114. Release on full parole or probation of offenders serving imprisonment of less than twenty years for scheduled crimes or offences:
>
> (1) Notwithstanding the provisions of this Act, no offender who has been sentenced to a term of imprisonment of less than twenty years for any of the scheduled crimes or offences may be eligible for release on full parole or probation, unless he or she has served, in a correctional facility, two thirds of his or her term of imprisonment…' (Underlining added for emphasis)

[40] Article 10 of the Constitution reads as follows:

> 'Equality and Freedom from Discrimination:
>
> (1) All persons shall be equal before the law.
>
> (2) No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

[41] The applicants contend that s 114 discriminated against them on the basis of their social status by compelling them to serve two-thirds of their sentences before being eligible for parole consideration because they have been sentenced for scheduled offences whilst other prisoners who have not been sentenced for scheduled offences are only required to serve half of their sentences before they can

become eligible for parole consideration. The applicants therefore argue that s 114(1) is discriminatory in that it violates Article 10(1) and (2) of the Constitution.

[42] Before I consider the applicants' contentions it is necessary to refer to what this court said with regard to the approach the court has to take in respect of the alleged infringements of rights guaranteed by the Constitution. This court in *Disciplinary Committee for Legal Practitioners v Slysken Makando and the Law Society*, *Slysken Makando v Disciplinary Committee for Legal Practitioners and Others*[6] explained the approach to be adopted as follows:

'[9] In considering the first respondent's constitutional challenge based on Article 12(1) and Article 18, I keep in my mental spectacle the following trite principles of our law concerning (1) constitutional challenge in general and (2) constitutional challenge of a provision of a statute in particular. Under item (1), it has been said that the person complaining that a human right guaranteed to him or her by Chapter 3 of the Constitution has been breached must prove such breach (*Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC). And before it can be held that an infringement has, indeed, taken place, it is necessary for the applicant to define the exact boundaries and content of the particular human right, and prove that the human right claimed to have been infringed falls within that definition (*S v Van den Berg* 1995 NR 23). Under item (2), the enquiry must be directed only at the words used in formulating the legislative provision that the applicant seeks to impugn and the correct interpretation thereof to see whether the legislative provision – in the instant case, Article 12(1) and Article 18 of the Namibian Constitution – has in truth been violated in relation to the applicant (*Jacob Alexander v Minister of Justice and Others* Case No. A 210/2007 (HC)).'

[43] Against the background of those interpretative guidelines, I proceed to consider the applicants' contention that s 114(1) is discriminatory and should be declared as unconstitutional.

[44] As regards the alleged violation of Article 10(1) the applicants point out that the sub-article requires that everyone be treated as equal before the law. Therefore, so the argument goes, requiring some offenders to serve half of their sentences before they become eligible for parole consideration and while on the other hand requiring other offenders to serve two-thirds of their sentence before they become

[6] *Disciplinary Committee for Legal Practitioners v Slysken Makando and the Law Society*, *Slysken Makando v Disciplinary Committee for Legal Practitioners and Others*, Case No. A 216/2008.

eligible for parole consideration amounts to treating persons unequally before the law.

[45] As regards the violation of Article 10 the applicants submit that s 114(1) is discriminatory toward them on the basis of their social status in that they are scheduled crimes offenders as opposed to the treatment meted out to offenders who have been sentenced for non-scheduled offences.

[46] The Supreme Court has had occasion to consider the provisions of Article 10 in *Muller v President of the Republic of Namibia and Another*[7] being the leading judgment on the subject matter. At page 200 A-D the court set out the approach to be adopted by the courts as follows:

'The approach of our Courts towards Art 10 of the Constitution should then be as follows -

(a) Article 10(1)

The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose. (See Mwellie's case supra at 1132E - H and Harksen's case supra (54).)

(b) Article 10(2)

The steps to be taken in regard to this sub-article are to determine –

(i) whether there exists a differentiation between people or categories of people;
(ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article;
(iii) whether such differentiation amounts to discrimination against such people or categories of people; and
(iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of art 23 of the Constitution.'

[7] *Muller v President of the Republic of Namibia and Another* 1999 NR 190.

[47] In respect of Article 10(1) it was held in *Mwellie v Minister of Works, Transport and Communication and Another* [8], that:

'. . . Article 10(1) . . . is not absolute but . . . it permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection takes cognizance of "intelligible differentia" and allows provision therefor.'

[48] Furthermore the court in *Muller* at page 199 C-E with regard to Article 10(1) stated the following:

'Article 10(1) requires the Court to give content to the words 'equal before the law' so as to give effect to the general acceptance that:-

> ". . . in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality, and freedom. . . . 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" that serve no legitimate governmental purpose for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. . . . Accordingly, before it can be said that mere differentiation infringes s 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."
>
> (See Prinsloo's case supra paras [24] - [26].)'

[49] In the present matter, the applicants are correct that the 2012 Act differentiate between categories of offenders for eligibility for consideration for parole. Section 112 deals with offenders who have been sentenced for non-scheduled offences. It provides that where a convicted offender who has been sentenced to a term of imprisonment has served in a correctional facility half of such term, subject to the

[8] *Mwellie v Minister of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 at 113E-H.

National Release Board being satisfied about specified conditions, such offender may be released on full parole.

[50] Section 114, for its part, deals with the release on full parole of offenders serving imprisonment of less than twenty years for scheduled crimes or offences. Such offenders, have to serve two-thirds of their sentences before they become eligible for consideration for release on full parole. The applicants fall under this category.

[51] Section 115 on the other hand deals with the release on full parole of offenders serving imprisonment of 20 years or more for scheduled crimes or offences. Such offenders have to serve two-thirds of their terms of imprisonment before they become eligible for consideration for release on full parole. Section 116 deals with the release of offenders who have been declared habitual criminals. They only become eligible for release on full parole after having served the prescribed minimum term of imprisonment. Lastly, s 117 deals with the release of offenders who have been sentenced to life imprisonment. They only become eligible after having served the minimum prescribed term of imprisonment.

[52] The scheme of the Act classifies different categories of offenders based on the seriousness of the offences they have been convicted of and sentenced for. It would be odious to treat an offender who has been sentenced for a non-scheduled offence, such as assault, on an equal footing with an offender who has been sentenced for a scheduled offence such as murder. It would also appear to me that the classification is based on the length of the sentence the offender is required to serve before he or she becomes eligible for consideration for parole.

[53] In my view, if the classification was not in place or not applied, it would make the system of parole unmanageable and would leave the application of the parole system to arbitrariness of officials of the correctional facility concerned. That would, according to *Muller* judgment, amount to ‘manifest naked preference’ that serves no legitimate governmental purpose.

[54] For all the reasons articulated above, I am of the considered view that the classification of offenders in categories of those who have been sentenced for

scheduled offences and those who have been sentenced for non-scheduled offences, is not arbitrary and is rationally connected to legitimate government purpose.

[55] As regards the alleged discrimination, the court in *Muller (supra)* explained what the word 'discrimination against' in Article 10(2) means, at page 200 at H in the following terms:

'It seems to me that inherent in the meaning of the word discriminate is an element of unjust or unfair treatment. In South Africa, the Constitution clearly states so by targeting unfair discrimination, and thus makes it clear that it is that particular type of discrimination that may lead to unconstitutionality. Although the Namibian Constitution does not refer to unfair discrimination, I have no doubt that in the context of our Constitution that is also the meaning that should be given to it.'

[56] The court continued and summed up the position at page 202E and said the following:

'To sum up, I am of the opinion that the words 'discriminate against' in art 10(2) were intended to refer to the pejorative meaning of the word 'discriminate', and not to its benign meaning. This stems from the fact that the grounds enumerated in art 10(2) are all grounds which in the past were singled out for discrimination and which were based on personal traits where the equal worth of all human beings and their dignity was negated.'

[57] Against that background the court went on to say that not every differentiation based on the grounds enumerated in Article 10(2) will be unconstitutional but only those grounds which unfairly or unjustly discriminate against the complainant.

[58] I respectfully agree with the approach by the court in *Muller*. In the present matter I am of the view that, although s 114 provides for different treatment or classification of offenders, it does not amount to unfair or unjust discrimination.

[59] The approach advocated by the court in *Muller* was followed by the court in *Kennedy and Another v Minister of Safety and Security and Others*[9]. In that matter the applicants, as trial-awaiting inmates sought an order to declare the differential

[9] *Kennedy and Another v Minister of Safety and Security and Others* 2020 (3) NR 731.

treatment of trial-awaiting inmates as opposed to convicted inmates as discriminatory on the basis of their social status as a violation of their right guaranteed by Article 10(2). On the authority of *Muller* the court dismissed the applicants' challenge, holding at para 43 – and correctly so in my view – that the applicants had failed to show that the differentiation of treatment of applicants as trial awaiting inmates from convicted inmates was unfair or unjust. Therefore the differential treatment did not amount to discrimination.

[60] For all the reasons articulated above the applicants' contention that s 114(1) is discriminatory by providing for differential treatment between scheduled and non-scheduled offenders, is dismissed.

Does s 114 offend against Article 12(3) of the Constitution?

[61] The applicants allege that s 114 of the 2012 Act is unconstitutional because it was not applicable to them when they committed the offences which is contrary to the provisions of Article 12(3) of the Constitution which prohibits, amongst other things, the imposition of penalty exceeding that which was applicable at the time the offence was committed.

[62] The applicants' above contention is linked to the further contention that parole is part of the 'penalty'. The applicants contend in this regard that their right to be eligible for parole consideration at the time they committed the offences was half of their sentence in terms of the 1998 Act and not two-thirds as per the 2012 Act. They contend that they should not be sentenced to a harsher punishment than that which was applicable at the time they committed the offences.

[63] Part of Article 12(3) upon which the applicants' contention in this regard is based reads as follows:

'[N]or shall a <u>penalty</u> be imposed exceeding that which was applicable at the time the offence was committed.' (Underlining supplied for emphasis)

[64] As mentioned earlier, the applicants contend that parole is part of the penalty. The applicants rely for this contention on the *Phaahla* judgment. In my view, that

judgment dealt with the South African system of punishment which is slightly different to our system of punishment and should therefore not be blindly applied.

[65] For instance, that judgment dealt with the interpretation of s 35(3)*(n)* of the South African Constitution. The court found that that section distinguishes between sentence and punishment indicating that in the eyes of the drafters of the South African Constitution the two are distinct concepts. Our Article 12(3) simply stipulates in part that 'nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed'. Unlike s 35(3)*(n)* of the South African Constitution our Article 12(3) does not distinguish between sentence and punishment. One has to keep in mind that even though our system of punishment and that of South Africa were similar at our independence, the South African system has over the years moved away from our system of punishment and for that reason their system should not be willy-nilly compared to our system.

[66] Our system of parole has recently been aptly explained by the court in *Florin v The Government of the Republic of Namibia and Others*[10]*.* At para 17 the court citing with approval from the judgment of *Sebe v Minister of Correctional Services and Other*[11]said the following:

'Historically, parole is a prisoner promise, of good behaviour in return for release before the expiration of a custodian sentence or, in modern usage, the granting of a convicted prisoner a conditional release on the basis of a promise to adhere to stipulated conditions in return. The phrase 'on parole' is therefore, the situation of a prisoner being conditionally released from goal against an undertaking to abide by specific terms and conditions …'

The court went on to explain parole further at para 20 as follows:

'Parole on the other hand is a mechanism that allows for conditional release of a sentenced offender from a correctional facility into community prior to the expiration of their sentences of imprisonment, as imposed by a court of law.'

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[10] *Florin v The Government of the Republic of Namibia and Others* [2020] NAHCMD 91 (4 March 2022).
[11] *Sebe v Minister of Correctional Services and Other* 1999 (1) SACR 244 (Ck).

[67] At para 35 of the *Phaahla* judgment the court reasoned that parole is a manner of serving sentence. It is therefore a punishment although a lesser one than imprisonment. It still amounts to a deprivation of liberty for a set period, albeit outside of prison. The court went on and pointed that parolees remain subject to the supervision and authority of the Correction Authority for the remainder of their sentence.

[68] I respectfully fully agree with the conclusion by the court that parole is part of sentence. In my view the holding in *Phaahla* does not advance the applicants' case. I say this for the reason that, as I have already earlier in this judgment found that at the time when applicants committed the offences of treason and murder they would not have been eligible for parole consideration. This is because the applicants were totally excluded by the 1998 Act from being eligible for consideration for parole because they had been sentenced for treason and murder.

[69] It follows therefore that there is no merit in the argument that s 114(1) of the 2012 Act is unconstitutional because it violates Article 12(3) by requiring the applicants to serve two-thirds of the sentence before they become eligible for parole consideration. There was no lesser 'penalty' or punishment applicable when the applicants committed the said offences. Instead, the converse appears to be the position in that under the 2012 Act they became eligible for parole consideration after having served two-thirds of their sentence. In other words, under the 2012 Act the applicants acquired a right for being eligible for parole consideration which they would not have had under the 1998 Act. It thus follows in my judgment that s 114(1) of the 2012 Act does not violate the applicants Article 12(3) rights. I move to consider the alleged unlawful retrospective application of the 2012 Act to the applicants.

Is the 2012 Act being retrospectively applied to the applicants?

[70] Before I consider the point, I should mention that this point was raised for the first time in the applicants' heads of argument. It is trite law that an applicant must make out his or her case in the founding affidavit. In the present matter nowhere in the founding affidavit and not even in the replying affidavit does the word 'retrospective' appear. This is generally not permissible. The point is taken for the first time in the heads of arguments. It reads as follows, in part:

'We submit that where the law does not seek to remove a right, then it is constitutionally allowed under Article 12(3) for the law to apply retrospectively. In this case, applying section 114 of the 2012 Correctional Service [Act] to the applicants is retrospective application which is not allowed by the law because it increases the non-parole period and we submit that it should not be allowed.'

[71] Earlier in this judgment, I referred to the judgement of *The Disciplinary Committee of the Law Society* which held, amongst other things, that the person complaining that a human right guaranteed to him or her by the Constitution has been breached must prove such breach before it can be held that an infringement has, indeed, taken place. And that it is necessary for the applicant to define the exact boundaries and content of the particular human right, and prove that the human right claimed to have been infringed falls within that definition. In my view, the applicants have failed to meet the requirements set in that judgment. They have failed to prove both the breach and the right which have been infringed. Failure by a party to plead his or her case according to the dictates of that judgment makes it difficult if not impossible for the court to effectively consider the alleged violation of his or her constitutional guaranteed right.

[72] Taking into account the fact that the applicants are laypersons as regards legal procedures and for the sake of establishing certainty whether their rights have indeed been violated, I decided to consider their point of alleged retrospective application of s 114 in violation of Article 12(3).

[73] The legal principle against retrospective application of the laws is well-established[12]. At the core of this principle is the rule of law which requires that laws should be capable of being known in advance so that people subject to those laws can exercise their choices and arrange their affairs in accordance with existing laws.

[74] In my view the applicants' argument that s 114(1) of the 2012 Act offends against the principle of retrospective application of the law, is in substance, similar to the applicants' argument that that section violates Article 12(3). I have already found that s 114 does not offend against Article 12(3).

[12] *Communication Regulatory of Namibia v Telecom Namibia Ltd* 2018 NASC 18 delivered on 11 June 2018.

[75] In order to consider the applicants argument whether s 114(1) indeed applies retrospectively to them, it is again necessary to have regard to the common cause facts. It is common cause that the applicants committed the offences which included amongst others treason and murder on 2 August 1999; that at that time the statute which was in operation was the 1998 Act which came into operation on 24 August 1998. The 1998 Act was repealed by the 2012 Act which came into operation on 1 January 2014. Lastly, it is common cause that the applicants were sentenced on 8 December 2015 when the 2012 Act was already in operation.

[76] I have earlier found that the applicants were not eligible for parole consideration under the 1998 Act for the reason that they had been sentenced for the offences including treason and murder. They were required to serve their full sentence without being eligible for parole consideration. It was only the 2012 Act which, so to speak, offered them a lifeline by vesting them with the right to be eligible for consideration on full parole after having served two-third of their sentences.

[77] In my view, the applicants' argument that s 114 was made to apply retrospectively to them, is misplaced. The determinative date is the date of sentence and not the date of the commission of the offence. The applicants were sentenced when the 2012 Act was in operation.

[78] As I pointed out earlier, the applicants gained a benefit from the application of s 114 application by being accorded a right to be eligible for parole consideration after serving two-thirds of their sentences which right they would not have had under the 1998 Act. On the applicants' case, they should be considered for eligibility for parole based on the law in operation at the time of the commission of the offence.

[79] For the reasons advanced in the immediate paragraph above, I came to the conclusion that s 114 does not offend against Article 12(3) because its application did not result in a penalty being imposed on the applicants that exceeded that which was applicable at the time when the offences were committed. To the contrary its application brought about a less severe sentence to the applicants, namely of being required to only serve two-thirds of their sentence before being eligible for consideration for full parole as opposed to the situation under the 1998 Act where

they were not at all eligible for parole because of having committed amongst other offences, the offences of treason and murder.

[80] It thus follows that the applicants' contention that s 114(1) of the 2012 Act is unconstitutional because of its retrospective application to the applicants, must fail.

Conclusion

[81] In summary, I have found that the 1959 Act did not apply to the applicants. I have further found that under the 1998 Act the applicants would not have been eligible for parole consideration after they had served half of their sentence because they had been sentenced for scheduled offences such as treason and murder. I have further found that s 114(1) of the 2012 Act does not unfairly or unjustly discriminate against the applicants because of the differentiation between offenders who have been sentenced for scheduled offences and those offenders who have been sentenced for non-scheduled offences. Therefore s 114(1) does not offend against Article 10 of the Constitution. Finally, I have found that the 2012 Act does not violate Article 12(3) of the Constitution.

Costs

[82] In my view, the normal principle that costs should follow the result cannot be applied in the present matter because it will be academic. The applicants would not be in position to pay the respondents' costs for the reason that they have been incarcerated for a long period and have no income.

[83] In the result I make the following order:

1. The application is dismissed.

2. There is no order as to costs.

3. The matter is removed from roll and is finalised.

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H Angula

Deputy-Judge President

APPEARANCES:

FIRST APPLICANT:	A M CHIKA In person *(representing second and third applicants)*
SECOND APPLICANT:	MARTIN TUBAUNDULE
THIRD APPLICANT:	FABIAN SIMIYASA
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