REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **HC-MD-CIV-MOT-GEN-2021/00260**

In the matter between:

GEOFFREY KUPUZO MWILIMA **APPLICANT**

And

MINISTER OF HOME AFFAIRS, IMMIGRATION AND SAFETY AND SECURITY **1st RESPONDENT**

ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA **2nd RESPONDENT**

COMMISSIONER GENERAL OF THE CORRECTIONAL SERVICES **3rd RESPONDENT**

OFFICER IN CHARGE, WINDHOEK CORRECTIONAL FACILITY **4th RESPONDENT**

MEDICAL OFFICER, WINDHOEK CORRECTIONAL FACILITY **5th RESPONDENT**

Neutral citation: *Mwilima v Minister of Home Affairs, Immigration and Safety and Security* (HC-MD-CIV-MOT-GEN-2021/00260) [2022] NAHCMD 618 (14 November 2022)

Coram: Schimming-Chase J

Heard: **7 June 2022**

Delivered: **14 November 2022**

Flynote: Statute – Correctional Services Act 9 of 2012 – Sections 109 and 132 – Regulation 274 – Regulation made in terms of statute - Regulation *ultra vires* and null and void to the extent that it is in conflict with s109 read with section 132 of the Act.

Summary: The applicant, an inmate at the Windhoek Correctional Facility, applied for an order declaring reg 274 of the Namibian Correctional Service Regulations published in Government Notice 331 of 2013 (GG5365), *ultra vires* s 109 read with s132 of the Correctional Services Act 9 of 2012 ("the Act"). The main basis for the relief sought is that the introduction of the requirement of 'imminent death' into the regulations is *ultra vires* the provisions of s 109, and further that the regulations create additional legislative provisions that do not belong in the regulations. The first respondent argued in response that in terms of s 132(1)*(o)* and s 132(1)*(af)* of the Correctional Services Act, he is possessed wide powers to make any regulation in furtherance of the objects of the Act.

Held that, the introduction of the requirement of 'imminent death' (amongst others) in the reg 274 is *ultra vires* s 109 read with s 132 of the Correctional Services Act 9 of 2012.

Held that, accordingly reg 274 of the Namibian Correctional Services Regulations is set aside in its entirety.

ORDER

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[1] Regulation 274 published in Government Notice 331 of 2013, (GG5365) under the title Namibian Correctional Service Regulations, is declared to be *ultra vires* the provisions of s 109 read with s 132 of the Correctional Service Act 9 of 2012.

[2] Regulation 274, together with subregulations, of the Namibian Correctional Service Regulations published in Government Notice 331 of 2013, (GG5365) is hereby set aside.

1. The fifth respondent is ordered, within 15 days from the date of this order, to make a determination as to whether or not the disease(s) affecting the applicant is a dangerous disease, or whether or not the applicant's continued incarceration is detrimental to the applicant's health on the grounds of his physical condition in terms of s 109 of the Correctional Service Act 9 of 2012.

2. In the event that the fifth respondent determines that one or more of the disease(s) afflicting the applicant is a dangerous disease, or that the applicant's continued incarceration is detrimental to his health on the grounds of his physical condition as contemplated in s 109 of the Correctional Service Act 9 of 2012, he is ordered to make a recommendation to the first respondent in terms of s 109 within 20 days of this order.

3. In the event that the fifth respondent declines to make such a recommendation, he or she must inform the applicant and provide reasons therefor within 15 days of the date referred to in order [4] above.

4. There shall be no order as to costs.

5. The matter is removed from the roll and regarded as finalised.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

[3] The applicant is serving a lengthy imprisonment at the Windhoek Correctional Facility, having been convicted and sentenced on charges of *inter alia* high treason.[1] He is 67 years old. He seeks the following relief, namely:

[1] See *Lifumbela and Others v S* (SA 25/2016) [2021] NASC (22 December 2021) paras 340 and 360.

(a) an order declaring reg 274 of the Namibian Correctional Service Regulations ("the regulations") together with its sub-regulations published in Government Notice 331 of 2013, (GG 5365) *ultra vires* the provisions of s 109 and/or s 132 of the Correctional Service Act 9 of 2012 ("the Act"), and therefore unlawful, null and void, and of no force or effect.

(b) Alternatively, declaring reg 274 of the regulations together with its sub-regulations unconstitutional for being inconsistent with Article 6 and/or Article 44 of the Namibian Constitution.

(c) Directing the fifth respondent to make a determination on whether or not the disease(s), afflicting the applicant is/are dangerous disease(s) or whether or not the applicant's continued incarceration is detrimental to his health on grounds of his physical condition, in terms of s 109 *(a)* or *(b)* of the Act.

(d) Directing fifth respondent that, in the event he determines that on one or more of the disease(s) afflicting the applicant is/are dangerous disease(s), or that applicant's continued incarceration is detrimental to his health on the grounds of his physical condition, as contemplated in s 109 of the Act, to recommend applicant to first respondent, for consideration for release on medical grounds.

(e) Directing fifth respondent, in the event that he refuses or declines to make the recommendation(s) contemplated in s 109 of the Act, to provide reasons to applicant for so declining, within 14 days from date of such determination.

[4] The respondents oppose this application. The first respondent is the Minister of Home Affairs, Immigration, Safety and Security, appointed as such in terms of Article 32(3)(i)*(bb)* of the Namibian Constitution. The second respondent is the Attorney-General, appointed as such in terms of Article 32(3)(i)*(cc)* of the Namibian Constitution. The third respondent is the Commissioner-General of Correctional Service, appointed as such in terms of Article 32(4)*(c)(cc)* of the Namibian Constitution. The fourth respondent is the Officer in charge at the Windhoek Correctional Facility, appointed as such in terms of s 18(1) of the Act. The fifth respondent is the medical officer at the Windhoek Correctional

Facility, so appointed in terms of s 23(3) of the Act.

[5] The applicant is represented by Mr Muluti and the respondents by Mr Namandje.

[6] The main issue for determination by this court is whether or not reg 274 in its entirety, is *ultra vires* s 109 and/or s 132 of the Act. In the event that I find in the negative, the applicant seeks an order setting aside the regulation as unconstitutional on the grounds that it is inconsistent with Articles 6, 8, and 44 of the Namibian Constitution.[2] In any event, the applicant in the event of success on either prayer for relief, seeks orders as set out in prayers 3 - 5 of the notice of motion, as summarised in paras [1](c) - (e) above.

Applicant's contentions

[7] In his founding papers the applicant avers that prior to his arrest he was suffering from diabetes, which was manageable due to a strict diet regime. He provided an extensive medical report through his private specialist physician, the contents of which are not disputed by the respondents. Summarised, the report states *inter alia,* that the applicant has uncontrolled Type 2 Diabetes Mellitus, uncontrolled high blood pressure, uncontrolled epilepsy and end-stage renal disease (ESPD) with the need for frequent lifelong renal replacement therapy currently provided in the form of chronic Ambulatory Haemodialysis. As part of his treatment, the applicant undergoes dialysis three days every week.

[8] The applicant's ultimate intention from a perusal of the founding papers, is to seek medical parole in terms of s 109 of the Act, however, he submits that he is hampered from doing so, because reg 274 is *ultra vires* the Act, thereby preventing his request for proper consideration for release on medical parole by the first respondent, within the meaning and principles enshrined in s 109 of the Act.

[9] This the applicant established after launching an unsuccessful application to this court to compel the fifth respondent to consider his request for a recommendation to the first respondent to authorise his release on medical parole. The fifth respondent apparently informed the applicant that he did not meet the requirements contained in reg

[2] The Namibian Constitution, Act 1 of 1990.

274 to be released on medical grounds.

[10] In a judgment delivered on 17 May 2021, in *Mwilima v The Medical Officer Windhoek Correctional Facility and Others,*[3] this court, per Miller AJ, held that the fifth respondent had advised the applicant that in his view, the condition of the applicant did not meet the 'prescribed criteria' in reg 274 for his release on medical parole. On that basis, the court found that the relief sought by the applicant was misplaced resulting in the application being dismissed.

[11] This prompted the applicant to launch this application to declare reg 274 *ultra vires* the Act. The applicant asserts that reg 274 is not only *ultra vires* s 109 of the Act, but it offends the provisions of articles 6, 8, and 44 of the Constitution.

[12] The applicant submitted that the power of the first respondent to make regulations in terms of the Act is restricted to administrative matters only. He submitted further that the doctrine of *ultra vires* requires public bodies and officials to not exceed public powers conferred on them by enabling legislation.

[13] The applicant submitted that in terms of the Constitution, only Parliament is vested with plenary powers, subject only to the Constitution. The executive, including cabinet ministers do not have such plenary legislative powers. In order to ensure the implementation of an Act of Parliament, Parliament may delegate subordinate legislative authority to a public body or official, including a cabinet minister, to issue regulations in terms of the enabling Act, but the regulations must be compatible with the empowering provisions of the Act and must be consistent with the provisions of the Constitution. Reliance was placed on the doctrine of legality dealt with below.

[14] The applicant submitted further that reg 274 purports to introduce a completely new jurisdictional requirement from that set out in s 109 of the Act, in that, a medical officer may in terms of reg 274 recommend the release of an inmate on medical grounds for a dangerous disease only if failure to immediately release an inmate will lead to an inmate's death. This addition by the first respondent in reg 274 of the requirement for 'imminent

[3] *Mwilima v The Medical Officer Windhoek Correctional Facility and Others* (HC-MD-CIV-MOT-GEN-2019/00181) [2021] NAHCMD 233 (17 May 2021).

death' is, according to the applicant, a jurisdictional requirement not provided for in s 109 of the Act.

[15] In this regard, the applicant submitted that all that s 109 requires is that the first respondent may on the recommendation of the fifth respondent and after consultation with the third respondent, authorise the release from the correctional facility of an inmate, if that inmate is suffering from a dangerous, infectious or contagious disease; or whose continued incarceration is detrimental to his or her health on the grounds of his or her physical condition.

[16] I understand the applicant's argument to be that the Act does not refer to 'imminent death' as a requirement for release on medical parole and the addition of that requirement by the first respondent in reg 274 is *ultra vires* the Act.

[17] It is further argued that the only actors in terms of the Act that are involved in the process of determining whether an inmate may be released from a correctional facility on medical parole or not, are the first respondent, the third respondent and the fifth respondent. The regulation is therefore further *ultra vires* s 109 and/or s 132, in that it introduces additional satellite internal reviews of the recommendation of the fifth respondent.

Respondents' contentions

[18] The first respondent deposed to the answering affidavit on behalf of the first, second, and fourth respondents. This means that the first respondent deposes to the answering affidavit, also on behalf of the constitutionally appointed principal legal advisor to government,[4] who should, ideally, in that capacity, have assisted the court with the delivery of a separate affidavit.

[19] *In limine,* the first respondent argues that the fifth respondent already considered the condition of the applicant and this court already made a decision in the matter of

[4] The powers and functions of the Attorney-General in terms of Article 87, include being the principal legal advisor to the President and Government, and to take all action necessary for the protection and upholding of the Constitution.

Mwilima v The Medical Officer Windhoek Correctional Facility and Others,[5] referred to above. The first respondent states that that decision remains binding because the applicant had previously sought declaratory and mandatory orders, which were dismissed on 21 May 2021 already. There is therefore no good reason why the applicant could not pray for the relief he presently seeks in those proceedings. According to the first respondent, the failure by the applicant to do so, is at odds with the 'once and for all rule.'

[20] On the merits, the first respondent denies that reg 274 is *ultra vires* s 109 of the Act. It is also denied that the regulation introduces any conditional requirement that is *ultra vires* the provisions of s 109. The Constitutional challenge is also denied.

[21] According to the first respondent, the applicant does not have a right to be released on medical grounds. What reg 274 does, is that it affords the applicant a right to be considered for medical parole by a medical officer (the fifth respondent) and if the jurisdictional requirements are met, the medical officer makes a recommendation to him (first respondent). This recommendation, so the argument goes, is not decisive and is not binding on the first respondent. According to the first respondent, other factors, including security, particularly in view of the fact that the applicant was convicted of the serious offence of high treason, will come to into play in the final decision whether to release the applicant on medical parole.

[22] The first respondent further denies that reg 274 introduces any jurisdictional requirement that is unlawful. He avers that section 132 of the Act confers the widest possible power on him in his official capacity to make various regulations on any matter which is required by the Act to be prescribed, or which he considers necessary or expedient to prescribe in order to achieve the objects of the Act. Therefore, there is a wide discretion on his part when making regulations under ss 132(1)*(o)* and 132*(af)*. The first respondent further denies that the matters enumerated in s 132 are purely administrative and submits that those matters pertain to executive and discretionary powers given to the first respondent to regulate various aspects of the administration and operation of correctional and penal processes in terms of that section, read with Article 40 of the Constitution.

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[5] *Mwilima v The Medical Officer Windhoek Correctional Facility and Others* (HC-MD-CIV-MOT-GEN-2019/00181) [2021] NAHCMD 233 (17 May 2021).

[23] Finally the deponent denies that the applicant suffers from any kind of ailment on the basis of which he is entitled to a recommendation for his release for medical reasons. In any event the fifth respondent is *functus officio* in this respect, having already made a decision some time back.

Discussion

[24] As regards the point in *limine,* it is clear from the judgment of Miller AJ that the *vires* of reg 274 were not at all considered in that matter, and the finding by the court was made on the basis of the provisions of the regulation itself, which were not challenged then. What the first respondent averred, in that case, is that the fifth respondent had already considered the applicant's condition in terms of reg 274 and had made a decision. Further, it was stated that the applicant, as found by the court already, failed to impugn that decision.

[25] What fell for determination by Miller AJ, was an application for a declarator against the fifth respondent, to the effect that he failed to consider and render a decision with regard to the applicant's request to be considered by the first respondent for release on medical parole in terms of s 109 read with reg 274. The applicant also sought a declarator that the failure on the part of the fifth respondent to do so was a dereliction of his duties and a wilful disregard of the law, and he sought a mandamus compelling the first respondent to consider and render a decision.

[26] At paragraph 7 of the judgment, it was stated that it appeared from the facts that the fifth respondent as long ago as September 2018 advised the applicant, in correspondence addressed to the applicant's legal practitioners, he had in fact concluded and advised, that in his view the condition of the applicant did not meet the prescribed criteria for the release of the applicant on parole for medical reasons.[6]

[27] In this application, the applicant seeks to set reg 274, containing the 'prescribed criteria' for release aside, as *ultra vires* section 109 of the Act, thereby effectively rendering

[6] Reference was specifically made in para 7 to the provisions of reg 274, on which the decision in that matter was based.

the decision of the fifth respondent in that matter, invalid, as it were.

[28] Although a repetition of law suits, and any resultant harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions is to be deprecated, I do not see how the once and for all rule comes into play in these circumstances. In the result, the point *in limine* fails as the decision relied on is entirely distinguishable.

Correctional Service Act 9 of 2012 and the Namibian Correctional Services Regulations

[29] Section 109 of the Act provides that –

'The Minister may, on the recommendation of the medical officer and after consultation with the Commissioner-General, authorise the release from the correctional facility of an inmate serving any sentence in a correctional facility and-

(a) who is suffering from a dangerous, infectious or contagious disease; or

(b) whose continued incarceration is detrimental **to his or her health on** the grounds of his or her physical condition,

either unconditionally or on such conditions as to parole or probation or as to special treatment as the Minister may determine.' (emphasis supplied)

[30] Section 132 of the Act, which is quoted in full for purposes of this judgment, provides that –

'(1) The Minister may make regulations as to-

(a) the manner, including contracts of employment, of appointment, training, promotion, posting, retirement, resignation, discharge on account of ill health or otherwise, transfer and, subject to section 13 of the Public Service Act, 1995 (Act 13 of 1995), the conditions of service, of correctional officers;

(b) the retention of rank by a correctional officer on retirement or resignation and the award of honorary ranks;

(c) the supply of uniforms to correctional officers;

(d) the conduct, discipline and efficiency of correctional officers, including temporary correctional officers;

(e) the occupation of official quarters by correctional officers and staff members employed in the Correctional Service;

(f) the classification of correctional facilities, the general supervision and management thereof, the maintenance of good order and discipline therein and the treatment and conduct of inmates;

(g) the quorum, acting chairperson, procedure at meetings, form of minutes, reports or recommendation of the National Release Board;

(h) the mode of supplying food and the scales of diet and the quantity and quality of clothing and necessaries for inmates;

(i) the safe custody of inmates when performing work or otherwise;

(j) the receipt and safe custody at correctional facilities of money, valuables, or other articles belonging to any inmate, and the conditions and circumstances under which payment, deposit, or delivery of such money, valuables or other articles must be made during the period of detention of any inmate;

(k) the introduction into, or conveyance out of, any correctional facility of any food, drink, bedding, clothing, books, newspapers, letters, documents or any other articles;

(l) the searching of inmates and of correctional officers and of all quarters and other places within any correctional facility occupied or frequented by such inmates or correctional officers and, subject to Article 13 of the Namibian Constitution, the seizure and examination of any letter or communication addressed to or received by any inmate or correctional officer;

(m) the articles or objects which are prohibited articles for purposes of this Act, the confiscation or disposal of all articles unlawfully introduced into or being taken out of any correctional facility or found in or near any correctional facility and of all clothing belonging

to inmates which by reason of its condition or for any other valid cause it is undesirable to keep;

(n) the admission to any correctional facility of any person other than correctional officers, persons employed in or about a correctional facility and persons who are to be detained therein;

(o) the **procedure** for release of inmates, the obtaining and recording of information regarding behaviour of inmates on release and the supply of money, food, clothing or travelling allowance to inmates on their release; (emphasis added)

(p) the days and hours during which work by inmates may be suspended;

(q) the medical examination, measurement, photographing and taking of fingerprints and of particulars of persons confined in any correctional facility or otherwise detained in custody, including the obtaining of personal statistics and records;

(r) the provision and equipment of workshops for the training of inmates and the supply of machinery, tools, or materials necessary for the purpose;

(s) the manner in which sentences of imprisonment or any other sentences are to be carried out;

(t) the forms of mechanical restraint that may be used and the conditions and application of a mechanical restraint to any inmate;

(u) the earning of remission of sentence by inmates serving sentences of imprisonment;

(v) the procedures and inquiry relating to the death of an inmate, and the disposal of the body of any such inmate;

(w) the disposal by sale or otherwise of the personal effects of any inmate who has escaped or of the personal effects of any correctional officer who has deserted the Correctional Service, and the payment into the State Revenue Fund of any proceeds of any such sale to the extent of any debt owing to the State;

(x) the temporary detention of any sick inmate whose sentence has expired but whose release is certified by the medical officer to be likely to result in his or her death or in serious injury to his or her health or to be a source of infection to others;

(y) the care and maintenance of indigents or destitute persons temporarily received into a correctional facility;

(z) the subsidising and support of institutions, societies and individuals approved by the Minister as furthering the objects of this Act;

(aa) the charging of a correctional officer or inmate with a disciplinary offence and the procedure at disciplinary inquiries; the appearing of a correctional officer for an inquiry and the procedure thereof;

(ab) the attendance of witnesses at an inquiry, including a disciplinary inquiry, and the payment of witness fees and travelling expenses;

(ac) the implements that may be used by correctional officers or persons employed in a correctional facility as weapons for purposes of this Act;

(ad) the payment of monetary compensation to inmates whose earning capacity is affected as a result of an accident or injury received in a correctional facility;

(ae) the effective administration and implementation of community service orders, as contemplated in terms of section 276 of the Criminal Procedure Act, 1977 (Act 51 of 1977); and

(af) generally any other matter which is required by this Act to be prescribed or which the Minister considers necessary or expedient to prescribe in order to achieve the objects of this Act.' (emphasis added)

[31] Regulation 274 provides as follows –

'Recommendations by medical officers

(1) The medical officer may, in terms of section 109 of the Act, recommend an inmate for

release on medical grounds if the inmate-

(a) is suffering from-

(i) a dangerous disease for which the medical officer certifies that, **if not immediately released will lead to the inmate's death**; or

(ii) infectious or contagious disease for which the medical officer certifies that, there is no any other way to prevent the spread of the disease while the inmate is detained in a correctional facility and if not immediately released the disease will spread to the whole correctional facility; or

(b) due to his or her physical condition, is certified by the medical officer to be totally blind or crippled to such an extent that his or her continued incarceration is detrimental to his or her health.

(2) On making a recommendation for the release of an inmate on medical grounds, the medical officer must complete a prescribed form and indicate how the inmate will be affected with the continued incarceration and how the release of such inmate will help the inmate.

(3) The recommendation referred to in subregulation (2) must be submitted to the officer in charge who must, together with his or her comments, submit [it] to the Commissioner-General.

(4) Upon the receipt of the recommendation submitted under subregulation (3), the Commissioner-General must, together with his or her comments, submit [it] to the Minister for his or her decision.

(5) The officer in charge or the Commissioner-General, may, before submitting the recommendation under subregulation (3) or subregulation (4), respectively, seek clarity from the medical officer referred to in subregulation (1) or from any other person or medical practitioner on the recommendation submitted under subregulation (3).' [7] (emphasis supplied)

[32] It is by now trite that the interpretation of a written instrument (including legislation) falls to be determined in terms of a holistic approach whereby the grammar is considered

[7] Namibian Correctional Service Regulations (GN 331 in GG 5365 of 18 December 2013).

against the relevant background and importantly, the context and purpose behind the provisions.[8] In the decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[9] Wallis JA usefully summarised the approach to interpretation as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.'[10]

[33] In *Metropolitan Bank of Zimbabwe Ltd and Another v Bank of Namibia,*[11] the Supreme Court stressed the importance of the Constitution in interpreting statutory provisions as follows:

'[31] The Constitution and the values enshrined in it form the starting point in interpreting statutory provisions. An interpretation consistent with advancing and giving effect to the values enshrined in the Constitution is to be preferred where a statute is reasonably capable of such interpretation.'

[34] Bearing the above principles in mind, I now proceed to consider the relevant provisions of the Act and the regulations.

[35] Section 109 expressly provides that an inmate may be released on medical

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[8] See *Total Namibia v OBM Engineering and Petroleum Distributors* 2015 (2) NR 733 SC paras 18 and 23.

[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[10] *Endumeni* supra para 18.

[11] *Metropolitan Bank of Zimbabwe Ltd and Another v Bank of Namibia* 2018 (4) NR 1115 (SC). See also *Shoprite Namibia (Pty) Ltd V Namibia Food and Allied Workers Union and Another* 2022 (2) NR 325 (SC) paras 36-41.

grounds by the first respondent after consultation with the third respondent, on the recommendation of a medical officer (in this case the fifth respondent) to the effect that such inmate is suffering from a dangerous, infectious or contagious disease; or whose continued incarceration is detrimental to his or her health on the grounds of his or her physical condition.

[36] The word 'dangerous disease' is not defined in the Act. However, the section unambiguously provides for a situation whereby the continued incarceration of an inmate would be detrimental to his or her health owing to his or her physical condition.

[37] It is my considered view on a grammatical and contextual interpretation of the section that, the legislature did not intend imminent death to be a requirement for release on medical grounds as is required in terms of the reg 274. Had that been the intention of legislature, it would have been stated as such in s 109.

[38] Sections 132(1)*(o)* and 132(1)*(af)* dealing with the specific instances where the first respondent may make regulations, also do not confer on the first respondent the power to expand the ambit of what the statutory provision of the Act contains. In fact, s 132(1)*(o)* provides that the first respondent may make regulations for *inter alia* the procedure for the release of inmates. This in no way justifies the introduction by the first respondent in reg 274(1) of a new requirement of 'imminent death'. Further, s 132(1)*(af)* requires that the regulations made by the first respondent be made in order to achieve the objects of the Act. As such and for the reasons as set out below, ss 132(1)*(o)* and 132(1)*(af)* do not aid the first respondent's case nor do they justify the introduction in subordinate legislation, of the requirement for imminent death in reg 274(1).

[39] I am not satisfied that s 109 as it stands, requires imminent death to be a consideration before an inmate is recommended for medical parole. Nowhere is it provided in s 109 that the inmate be at death's door. I am fortified in my view through a comparative study of these provisions in South Africa, in particular the repealed Correctional Services (previously Prisons) Act 8 of 1959, where medical parole was dealt with in s 69 thereof, which bears the heading 'Placement on parole on medical grounds' and reads as follows:

> 'A prisoner serving any sentence in a prison –

[40] who suffers from a dangerous, infectious or contagious disease; or

(b) whose placement on parole is expedient on the grounds of his physical condition or, in the case of a woman, her advanced pregnancy, may at any time, on the recommendation of the medical officer, be placed on parole by the Commissioner: Provided that a prisoner sentenced to imprisonment for life shall not be placed on parole without the consent of the Minister.'

[41] I must point out that s 69(*a*) of the South African Act is practically identical to the provisions of s 109(*a*) of the Namibian Act. Section 109(*b*) of the Act and s 69(*b*) of the South African Act, both require that the physical condition of the inmate be a consideration in the determination of his or her release on parole. This is clear from the words 'expedient on the grounds of his physical condition' in s 69(*b*), and the words 'is detrimental to his or her health on the grounds of his or her physical condition' in s 109(*b*).

[42] In interpreting s 69, the Western Cape High Court, per Van Zyl J in *Stanfield v Minister of Correctional Services and Others,*[12] had the following to say –

'It seems clear from the relevant wording of section 69 that the Commissioner (or his duly appointed delegate - the third respondent in the present matter) has a discretion at any time to place on parole a prisoner serving any sentence in a prison, provided his placement on parole is expedient on the ground of his physical condition and further provided it is preceded by the recommendation of the medical officer. It is hence irrelevant what the nature of his conviction and the length of his sentence of imprisonment might be. It is equally irrelevant what period of imprisonment he has actually served. The only requirements for release on parole on medical grounds are that the medical officer should recommend it and that it should be "expedient" having regard to his "physical condition".[13] (emphasis supplied)

[43] In this regard, that court defined physical condition as – ' "Physical" (medieval Latin: *physicalis*) is that which pertains to material nature, as opposed to the psychic, mental or spiritual realm. In anatomical sense it relates to the body and may hence be rendered as "bodily" or "corporeal". In the medical sphere it relates to medicine and the healing of diseases, whence the term "physician". In *The New Shorter Oxford English Dictionary* the

[12] *Stanfield v Minister of Correctional Services and Others* 2004 (4) SA 43.

[13] *Stanfield* supra para 82.

primary sense of "physical" is rendered as "[p]ertaining to medicine" or "[p]ertaining to matter" in the sense of "material" rather than mental or spiritual, or "bodily" rather than moral.'[14]

[44] In the *Stanfield* matter, the High Court was faced with a refusal to release an inmate on medical parole, on account that certain 'Guidelines' were prescribed, one of which that an injudicious placement or release on parole may foil the penal objectives of the sentencing authority. Another was that, in all cases where there was no doubt as to the terminal nature of the illness and where the life expectancy was short, it was advisable that placement or release on parole for medical reasons be effected on a conditional basis. Van Zyl, J opined that:

'[85] It should be noted that the provisions and requirements of s 69 of the Act differ in marked respects from the proposed amendment thereto by virtue of s 79 of the Correctional Services Act 111 of 1998. It appears under the heading 'Correctional supervision or parole on medical grounds', but has not yet been proclaimed and is hence not yet operative. It reads thus:

> "Any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death."

Although the requirement that the prisoner should be 'in the final phase of any terminal disease or condition' features strongly in the proposed amendment, it is not, and never has been, a requirement in terms of s 69 of the current Act. This may account for the reference to terminal illness in the Standing Correctional Order B and the circular of 21 December 2001 (paras [24] - [25] above).

[86] It should be noted further that there are no requirements in s 69 relating to life expectancy, a state of being bedridden or the imminence of death. There is likewise no suggestion that the prisoner should be (physically or otherwise) unable to commit any crime should he be released on parole for medical reasons'.

[45] I am in respectful agreement with the South African High Court's interpretation of

[14] *Stanfield* supra para 85.

section 69 of the 1959 Act, which is substantially similar to the provisions of s 109 of the Act.

[46] I must point out that in the South African Correctional Services Act 111 of 1998, s 79 replaced s 69 of the Correctional Service Act of 1959. With s 79, the legislature in detail set out the requirements and procedure to be followed in respect of recommendations for release on medical grounds. Section 79 provides as follows:

> '79 Medical parole
>
> (1) Any sentenced inmate may be considered for placement on medical parole, by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if-
>
> (a) such inmate is suffering from a terminal disease or condition or if such inmate is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;
>
> (b) the risk of re-offending is low; and
>
> (c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released.
>
> (2) (a) An application for medical parole shall be lodged in the prescribed manner, by-
>
> (i) a medical practitioner; or
>
> (ii) a sentenced inmate or a person acting on his or her behalf.
>
> (b) An application lodged, by a sentenced inmate or a person acting on his or her behalf, in accordance with paragraph (a) (ii), shall not be considered by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if such application is not supported by a written medical report recommending placement on medical parole.
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> (c) The written medical report must include, amongst others, the provision of-

(i) a complete medical diagnosis and prognosis of the terminal illness or physical incapacity from which the sentenced inmate suffers;

(ii) a statement by the medical practitioner indicating whether the inmate is so physically incapacitated as to limit daily activity or inmate self-care; and

(iii) reasons as to why the placement on medical parole should be considered.

(3) (a) The Minister must establish a medical advisory board to provide an independent medical report to the National Commissioner, Correctional Supervision and Parole Board or the Minister, as the case may be, in addition to the medical report referred to in subsection (2) (c).

(b) Nothing in this section prohibits a medical practitioner or medical advisory board from obtaining a written medical report from a specialist medical practitioner.

(4) (a) The placement of a sentenced inmate on medical parole must take place in accordance with the provisions of Chapter VI and is subject to-

(i) the provision of informed consent by such inmate to allow the disclosure of his or her medical information, to the extent necessary, in order to process an application for medical parole; and

(ii) the agreement by such inmate to subject himself or herself to such monitoring conditions as set by the Correctional Supervision and Parole Board in terms of section 52, with an understanding that such conditions may be amended and or supplemented depending on the improved medical condition of such inmate.

(b) An inmate placed on medical parole may be requested to undergo periodical medical examinations by a medical practitioner in the employ of the Department.

(5) When making a determination as contemplated in subsection (1) (b), the following factors, amongst others, may be considered:

(a) Whether, at the time of sentencing, the presiding officer was aware of the medical condition for which medical parole is sought in terms of this section;

(b) any sentencing remarks of the trial judge or magistrate;

(c) the type of offence and the length of the sentence outstanding;

(d) the previous criminal record of such inmate; or

(e) any of the factors listed in section 42 (2) (d).

(6) Nothing in this section prohibits a complainant or relative from making representations in accordance with section 75 (4).

(7) A decision to cancel medical parole must be dealt with in terms of section 75 (2) and (3): Provided that no placement on medical parole may be cancelled merely on account of the improved medical condition of an inmate.

(8) (a) The Minister must make within six months after promulgation of this Act regulations regarding the processes and procedures to follow in the consideration and administration of medical parole.

(b) The regulations referred to in paragraph (a), must be submitted to Parliament for approval-

(i) at least one month before promulgation, if Parliament is in session; or

(ii) if Parliament is not in session, within one month after the next ensuing session starts.'

[47] Section 109 of the Act does not contain any such detail. It is apparent that the first respondent's contentions stem from a reading of s79 of the South African Correctional Services Act 111 of 1998, which repealed *inter alia* s69 of the Correctional Service Act of 1959.

[48] From a reading of s 109 of the Act, it appears to me further that the intention of legislature was that a duly registered physician would be the person responsible to make a recommendation for the release of an inmate on medical grounds. This is apparent from

the provisions of ss 23(3) and 24 of the Act.[15] It is the medical officer that is responsible for the health care of all inmates in the correctional facility for which he or she is appointed or assigned.

[49] It is only the medical officer who may make a recommendation for the release of an inmate from a correctional facility on medical grounds and such inmate may be released by the first respondent only after consultation with the third respondent, subject to such conditions as the first respondent may require, if any. Such a recommendation may be made in respect 'of an inmate serving any sentence in a correctional facility.' Serving any sentence, to me means, regardless of the offence for which the inmate is now serving time. The only consideration is, whether the inmate suffers from a dangerous, infectious or contagious disease, or where his or her continued incarceration is detrimental to his or her health, not necessarily life, on account of a physical condition.

[50] I also understand the intention of the legislature to be that the mere recommendation by the medical officer does not in and of itself mean that the inmate may simply pack his bags and leave the correctional facility. This is why the Act provides expressly for a recommendation to be made by the medical officer, only in instances where the jurisdictional facts set out in the section prevail, and for the first respondent to consult with the third respondent. After all, the determination by the first respondent of whether or not to release an inmate on medical parole is an administrative decision, to be made in terms of the provisions of s 109, which falls within the prescripts of Article 18 of the Namibian Constitution, which is the Supreme Law of Namibia.

[51] It is also to be borne in mind that sentenced prisoners are still entitled to dignity. Section 3(*a*) of the Act provides that the functions of the correctional service include ensuring that every inmate is secured in safe and humane custody within a correctional facility, until lawfully discharged or removed.

[52] The principle at play in instances where a discretionary power is conferred on a functionary was ably described by Damaseb DCJ in *Medical Association of Namibia & Another v Minister of Social Services and Others,*[16] as follows:

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[15] See in particular ss 23(3) and 24(1)(*a*)(*v*)

[16] *Medical Association of Namibia & Another v Minister of Social Services and Others* 2017 (2) NR 544.

'Conferment of discretionary power to be exercised by administrative bodies or functionaries is unavoidable in a modern state. However, where the legislature confers a discretionary power, the delegation must not be so broad or vague that the body or functionary is unable to determine the nature and scope of the power conferred. That is so because it may lead to arbitrary exercise of the delegated power. Broad discretionary powers must be accompanied by some restraints on the exercise of the power so that people affected by the exercise of the power will know what is relevant to the exercise of the power and the circumstances in which they may seek relief from adverse decisions. Generally, the constraints must appear from the provisions of the empowering statute as well as its policies and objectives.'[17]

[53] In *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*,[18] the following was stated:

'[23] The rule of law is one of the foundational principles of our State. One of the incidents that follows logically and naturally from this principle is the doctrine of legality. In our country, under a Constitution as its 'Supreme Law', it demands that the exercise of any public power should be authorised by law — either by the Constitution itself or by any other law recognized by or made under the Constitution. 'The exercise of public power is only legitimate where lawful. If public functionaries purport to exercise powers or perform functions outside the parameters of their legal authority, they, in effect, usurp powers of State constitutionally entrusted to legislative authorities and other public functionaries. The doctrine, as a means to determine the legality of administrative conduct, is therefore fundamental in controlling — and where necessary, in constraining — the exercise of public powers and functions in our constitutional democracy.'

[54] The boundaries of the first respondent's discretion have been set out in s 132 of the Act, which provides that the first respondent may make regulations *inter alia* as to the procedure for release of inmates (set out above), and generally for any other matter which is required by the Act to be prescribed, or which the first respondent considers necessary or expedient to prescribe in order to achieve the objects of the Act *(*emphasis supplied).

[55] Regulation 274 (1) provides that the medical officer may, in terms of section 109 of

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[17] *Medical Association of Namibia* supra para 63, approving *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) paras 33-34.

[18] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) para 23.

the Act, recommend an inmate for release on medical grounds if the inmate is suffering from a dangerous disease for which the medical officer certifies that, if not immediately released will lead to the inmate's death; or infectious or contagious disease for which the medical officer certifies that, there is no any other way to prevent the spread of the disease while the inmate is detained in a correctional facility and if not immediately released the disease will spread to the whole correctional facility; or due to his or her physical condition, is certified by the medical officer to be totally blind or crippled to such an extent that his or her continued incarceration is detrimental to his or her health.

[56] In my considered view, the provisions contained in reg 274 are most certainly not mere procedural provisions, nor are they provisions that assist in attaining the objects of the Act, which clearly provide for the considerations that must be applied when medical parole is to be considered in terms of s 109, as well as who is to make the decision and how, namely by the first respondent, on recommendation of the medical officer after consultation with the Commissioner-General. Regulation 274 introduces additional substantial provisions that are not envisaged by or contained in s 109. The first respondent essentially introduces another requirement of ‘imminent death and total blindness crippled to such an extent that his or her continued incarceration is detrimental to his or her health’. Those requirements are not what the legislature provided for in s 109.

[57] This new requirement fetters the discretion that the medical officer was given by the Act, because it limits the grounds for release on parole to the conditions set out in the regulation when, that was not the intention of the legislature. The legislature foresaw that it could not predict what conditions the inmates might suffer and how those conditions would be influenced by their continued incarceration. It therefore, left that duty to rest with the medical officer who will treat the inmates and who is knowledgeable in medicine, to make a recommendation to the first respondent, who must exercise a constitutionally mandated discretion.

[58] Even the correctional officer’s input is not at all required in terms of s 109. Regulation 274 therefore goes manifestly further than to simply prescribe a procedure, or provide greater particularisation for the administration and implementation of s 109. Additional legal considerations, not provided for in s 109 of the Act were created instead, and this is clearly *ultra vires* the provisions of the Act. The only regulation that might be

saved would be reg 274(2). However, the first respondent made no submissions to assist the court further in this regard, and maintained the stance taken in his answering papers that he has a wide discretion which allows him to make regulations that introduce new requirements additional to those set out in s 109.

[59] Therefore, the introduction in reg 274 of the requirement of imminent death is clearly *ultra vires* s 109 of the Act. Having found as I did, I will not consider the constitutionality challenge.

Conclusion

[60] In light of the foregoing, the applicant has made out a case for the relief sought and the following order is made:

[61] Regulation 274 published in Government Notice 331 of 2013, (GG5365) under the title Namibian Correctional Service Regulations, is declared to be *ultra vires* the provisions of s 109 read with s 132 of the Correctional Service Act 9 of 2012.

[62] Regulation 274, together with subregulations, of the Namibian Correctional Service Regulations published in Government Notice 331 of 2013, (GG5365) is hereby set aside.

1. The fifth respondent is ordered, within 15 days from the date of this order, to make a determination as to whether or not the disease(s) affecting the applicant is a dangerous disease, or whether or not the applicant's continued incarceration is detrimental to the applicant's health on the grounds of his physical condition in terms of s 109 of the Correctional Service Act 9 of 2012.

2. In the event that the fifth respondent determines that one or more of the disease(s) afflicting the applicant is a dangerous disease, or that the applicant's continued incarceration is detrimental to his health on the grounds of his physical condition as contemplated in s 109 of the Correctional Service

Act 9 of 2012, he is ordered to make a recommendation to the first respondent in terms of s109 within 20 days of this order.

3. In the event that the fifth respondent declines to make such a recommendation, he or she must inform the applicant and provide reasons therefor within 15 days of the date referred to in order [4] above.

4. There shall be no order as to costs.

5. The matter is removed from the roll and regarded as finalised.

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EM SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANT:	P Muluti Of Muluti & Partners, Windhoek.
FIRST TO FIFTH RESPONDENTS:	S Namandje Instructed by Government Attorney, Windhoek.