

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00326

In the matter between:

| | |
|-----------------------------|---------------------------------|
| RACHIMO HARADOEB | 1ST APPLICANT |
| VEIKKO SHALIMBA | 2ND APPLICANT |
| ANTON VENASI | 3RD APPLICANT |
| DAVID TSAMASEB | 4TH APPLICANT |
| SIMON JOSEF KANKONDI | 5TH APPLICANT |

and

| | |
|---|----------------------------------|
| MINISTER OF HOME AFFAIRS, IMMIGRATION, SAFETY AND SECURITY | 1ST RESPONDENT |
| COMMISSIONER GENERAL OF NAMIBIA CORRECTIONALSERVICES | 2ND RESPONDENT |
| CHAIRPERSON OF THE NATIONAL RELEASE BOARD | 3RD RESPONDENT |
| OFFICER IN CHARGE OF WINDHOEK CORRECTIONAL FACILITY | 4TH RESPONDENT |

Neutral citation: *Haradoeb v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-MOT-GEN-2022/00326) [2023] NAHCMD 709 (7 November 2023)

Coram: ANGULA DJP
Heard: 12 September 2023
Delivered: 7 November 2023

Flynote: Remission of sentence — Eligibility of offenders for remission under s 92 of the Prisons Act 17 of 1998 — Computation of remission in terms of s 92(4) of the Prisons Act — Procedure to be applied for the consideration of remission as provided for in s 92(2)(c)(aa) of the Prisons Act.

Summary: The applicants were sentenced to long terms of imprisonment at varying dates having been convicted of serious scheduled crimes after the enactment of the Prisons Act 17 of 1998. At the commencement of the hearing, the parties agreed that the Prisons Act 17 of 1998, specifically s 92(2)(c)(aa), was applicable to the applicant. What remained in dispute was the question of when an offender becomes eligible for consideration for remission. The applicants' stance was that the applicants are entitled to be considered for remission at any stage of their incarceration and do not have to wait to serve two thirds of their sentences before they may become eligible for consideration for remission. The respondents' stance was that the consideration for remission must be conducted 'closer' to the release of an offender not necessarily after such an offender has served two thirds of his or her sentence. The respondents also claimed that the reason why the applicants cannot be considered for remission is because, currently there is no specially dedicated process for the release on remission of offenders such as the applicants, as the repeal of the Prisons Act phased out granting of remission by the minister.

Held that; s 92(4) of the Prisons Act stipulates at what stage of the incarceration remission is to be computed, namely at the commencement of an offender serving his or her sentence. He or she is credited with full remission, that is to say, one third of his or her total period of imprisonment.

Held that; remission of sentence is an upfront reduction of an offender's period of sentence with a purpose of serving as an incentive for good behaviour during his or her incarceration.

Held that; all the functionaries who previously performed the functions relating to remission in terms of s 92 of the Prisons Act, such as the minister, the Commissioner-General and the National Release Board still exist within the structure

created by the Correctional Service Act. They can still perform the functions previously performed in terms of the Prisons Act in connection with the remission process of the applicants.

ORDER

1. It is declared that s 92(2)(c)(aa) of the Prisons Act 17 of 1998 applies to the applicants with regard to a consideration of their eligibility for remission.
2. It is declared that the applicants are eligible to be considered for remission of their respective sentences by the first respondent, the minister, on recommendation of the third respondent, namely the Chairperson of the National Release Board.
3. The second respondent, the Commissioner-General of Namibia Correctional Service, is directed to cause assessments of the applicants to be made within 60 days of this order regarding the applicants' meritorious conduct and industry, if any, and to report to the third respondent regarding the outcome of such assessment and for the third respondent to make recommendations to the minister.
4. There is no order as to costs.
5. The matter is removed from the roll and is regarded as finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] The dispute between the applicants and the respondents in this matter which this court is called upon to resolve is: At what stage of the applicants' incarceration may they become eligible for consideration for a remission of their sentences. The applicants contend that they can be considered for remission of their sentences at any stage during their incarceration. The respondents, for their part contend, that the applicants may only be considered for remission of their sentences closer to their release and not necessarily after they have completed one third of their sentences.

The parties

[2] The applicants are six in number. Their names appear at the heading of this judgment. They were convicted of scheduled offences and are all currently serving their sentences with varying durations at the Windhoek Correctional Facility.

[3] The first respondent is the Minister of Home Affairs and Immigration, Safety and Security under whose portfolio the Correctional Service in Namibia resorts. He is cited in that capacity. The second respondent is the Commissioner-General for Correctional Service, cited in that capacity as such. The third respondent is the Chairperson of the National Release Board of the Correctional Service which has been established by s 104 of the Correctional Service Act 9 of 2012 (Correctional Service Act). The Board's functions are, amongst others, to make recommendations to the Commissioner-General to release on full parole or probation, offenders serving sentences of imprisonment of five years or more for any of the scheduled crimes.¹ The fourth respondent is the Officer in Charge of the Correctional Facility at Windhoek. As mentioned earlier, the applicants are all presently serving their sentences at the Windhoek Correctional Facility.

Representation

[4] The applicants were represented by Mr Kasita who generously agreed to act *amicus curiae* – friend of the court. The court wishes to express its appreciation for his valuable assistance. The respondents were represented by Ms Van der Smit from the Office of the Government Attorney. Both counsel filed comprehensive heads of arguments for which the court thanks them.

¹ Section 105 of the Correctional Service Act, 2012.

Relief sought

[5] The applicants sought the following relief as set out in their notice of motion:

- ‘1. Declaring that section 92(2)(c)(aa) of the Prisons Act 17 of 1998 applies to the Applicants;
2. Declaring that the Applicants are eligible to be considered for remission of sentence by the First Respondent, on recommendation of the Third Respondent;
3. Declaring and ordering the Second Respondent to make an assessment, within 30 days of the Court Order of the meritorious conduct and industry, if any, of the Applicants, and to report to the Third Respondent regarding the assessment; and
4. Further and/or alternative relief.’

Factual background

[6] The applicants were sentenced to long terms of imprisonment at varying dates having been convicted of serious scheduled crimes such as murder, robbery and the like. The first applicant deposed to the main founding affidavit. The other applicants filed confirmatory affidavits.

[7] According to the applicants, they had previously applied to the second respondent to be considered for parole, however, the second respondent verbally informed them that they were not eligible to be considered for parole or remission of their sentences because they had not served two-thirds of their respective sentences as required by the Correctional Service Act.

[8] The first applicant deposed further that they were not satisfied with the second respondent’s response. Accordingly, they lodged an application to this court in which they sought a declaratory order that the Prisons Act 8 of 1959 applied to them and therefore, they should be declared to be eligible for parole consideration under that Act. They were, however, advised to withdraw their application for the reason that their application did not enjoy prospects of success as they were all sentenced after the enactment of the Prisons Act 17 of 1998 (‘Prisons Act’).

[9] The first applicant deposed further that after they had withdrawn their second application, they instituted the present application having been advised that the provisions of s 92(2)(c)(aa) of the Prisons Act applied to them because they were sentenced prior to the coming into operation of the Correctional Service Act; and that they had acquired rights in the Prisons Act for being eligible to be considered for remission of their sentence. This was further because s 107 of the Correctional Service Act, precludes them from earning remission of their sentences because it applies prospectively only and does therefore, not apply to the applicants.

[10] The applicants argued further that because they were sentenced before the coming into operation of the Correctional Service Act, s 92(2)(c)(aa) of the Prisons Act applies to them and therefore, they must be considered for remission under the provisions of that Act.

[11] The deponent then proceeded to set out the bases why they asserted that they qualify to be considered eligible for remission of their sentences. The deponent proceeded and pointed out that s 92(2)(c)(aa) of the Prisons Act, stipulates that an offender may receive a remission of sentence if he or she has demonstrated meritorious conduct and industry during his or her incarceration. He pointed out further that the rationale for receiving a remission of sentence is to serve as an incentive to an offender to behave in a disciplined manner while serving his or her sentence. Remission further encourages an offender to be proactive in gaining useful skills such as upgrading his or her education or acquiring vocational skills which would enable him or her to be a productive member of the society after he or she had been released from incarceration.

[12] The first applicant then proceeded to set out his own actions and achievements which he claimed, demonstrated his meritorious conduct and industry achieved while incarcerated. I deem it unnecessary to set out his allegations in any detail in this regard for the reason that if it is found that the applicants are eligible for remission consideration, it would be for the relevant authority to consider the veracity of such allegations.

[13] Finally, the deponent stated that he had been advised that the Institutional Committee that was created under the Prisons Act no longer exists under the

Correctional Service Act. Furthermore, he deposed that that committee was tasked, in terms of the repealed Prisons Act, to prepare a report for the third respondent's consideration whether an offender was eligible for remission. The deponent however, argued that, should the declaratory orders sought be granted, a body functioning under the Correctional Service Act, can perform the functions previously performed by the Institutional Committee under the Prisons Act.

[14] The application is opposed by the respondents. Mr Michael Louis Tsuseb deposed to the opposing affidavit on behalf of the respondents. He claimed to have been authorised by his fellow respondents to depose to the answering affidavit on their behalf. He stated that he is a deputy commissioner and in that capacity he is the head of the division for Legal Services in the Directorate of Legal Services and Discipline of the Correctional Service which resorts under the Office of the Commissioner-General of the Namibian Correctional Service.

[15] A great part of the answering affidavit has been devoted to the applicability or otherwise of the provisions of the Prisons Act as well as the Correctional Service Acts dealing with the remission of sentences as well as reference to decided judgments on the issue of remission. I should point out in this connection that a deponent is required to only depose to facts in his or her affidavit and not to advance legal arguments. I will therefore, only summarise the factual allegations of the affidavit that were directed to traverse the factual allegations in the founding affidavit. The legal arguments advanced in the answering affidavit, where necessary, shall be considered at an appropriate stage later as the judgment unfolds.

[16] The deponent set out the applicants' respective crimes for which they were convicted as well as their respective sentences. This is common cause but relevant to provide context:

- (a) The first applicant was convicted for murder and arson committed during November 1998. He was sentenced on 27 February 2006 to a period of 35 years imprisonment.

- (b) The second applicant was convicted of robbery with aggravating circumstances which was committed during April 2001. He was sentenced on 9 July 2002 to 36 years imprisonment.
- (c) The third applicant was convicted of crimes of murder, robbery with aggravating circumstances, possession of a fire arm without a license, negligent driving and of driving of a motor vehicle without a license. Those crimes were committed on or about October 1999. He was sentenced on 23 November 2001 to 39 years imprisonment.
- (d) The fourth applicant was convicted of robbery with aggravating circumstances and housebreaking committed during March/April 2001. He was sentenced to 39 years imprisonment on 5 December 2003.
- (e) The fifth applicant was convicted of murder, arson, assault with intent to cause grievous bodily harm which were committed during October 2000. He was sentenced on 25 September 2003 to a period of 35 years and 5 months imprisonment.

[17] The deponent continued and argued that all the offences for which the applicants have been convicted were committed after 24 August 1998 when the repealed Prisons Act of 1998 was in operation. Therefore, the remission of sentences for which the applicants are seeking, have to be dealt with in accordance with the repealed Prisons Act.

[18] According to the deponent, the applicants are disqualified by s 92(2) of the Prisons Act from being considered for remission for the reason that they are serving scheduled offences such as murder and robbery. However, the applicants may be granted a remission by the minister on recommendation of the National Release Board in terms of s 92(2)(c)(aa) of the Prisons Act.

[19] Initially the respondents adopted the stance in their answering affidavit that the basis upon which the applicants were seeking the relief based on the provision of s 92 (2)(c)(aa) of the Prisons Act 'has no proper lawful basis whatsoever and should be refused by this Honourable Court'. The court was however, informed at the

commencement of the hearing that the respondents were prepared to concede to the relief sought in prayers one and three of the notice of motion. In view of that concession it becomes unnecessary to set out the allegations made in the answering affidavit in opposition to the granting of those reliefs. The matter therefore, proceeded with the second relief being a bone of contention between the parties and for determination by the court.

[20] The gravamen of the respondents' opposition with regard to relief number two which sought a declaratory order that the applicants are eligible to be considered for remission of sentence by the Minister on recommendation of the chairperson of the National Release Board, was that such consideration would be premature as the applicants were required to have first served two thirds of their respective sentences before they would become eligible for consideration for remission. I should mention that this stance also shifted during oral arguments as it will become apparent later in the judgment.

Submissions on behalf of the parties

Submissions on behalf of the applicants

[21] *Amicus*, Mr Kasita, submitted both in his heads of argument and during oral submissions that the applicants are entitled to be considered for remission at any stage of their incarceration and do not have to wait to serve two thirds of their sentences before they may become eligible for consideration for remission. In this regard, counsel pointed out that nowhere does the Prisons Act state that an offender may only become eligible for remission consideration after he or she has served two thirds of his or her sentence. Counsel further pointed out that the applicants do not have the right to demand that they be granted remission but they have the right to be considered for remission.

Submissions on behalf of the respondents

[22] Having conceded that s 92(2)(c)(aa) of the Prisons Act applies to the applicants, Ms Van der Smit, for the respondents pointed out that currently, under the Correctional Service Act, there is no structure for consideration of remission by

the minister on recommendation of the Commissioner-General; and that remission is conducted by an Internal Release Committee of a correctional facility where an offender is being incarcerated.

[23] Ms Van der Smit submitted in part, at paragraph 3.6 of her written submissions that: 'Given that the minister currently does not deal with remission in terms of the Correctional Service Act, we submit that the applicants should be considered and treated as being on the same footing as other offenders sentenced to more than 20 years imprisonment who became eligible for release after serving two thirds of their sentences in terms of s 115 of the Act. The Prisons Act is silent on the exact administrative process to be followed in arriving at a recommendation of the National Release Board to the minister in relation to granting remission to an offender in terms of section 92(2)(c)(aa).'

[24] Ms Van der Smit submitted further at paragraph 3.9 of her written submissions that '[T]here is no reason why the Applicants' release on remission should be expedited to the effect that they are considered years ahead of their eligible dates of release on such remission. The release of offenders in the same position (those eligible for parole in terms of s 115 of the Correctional Service Act) as that of applicants is dealt with only months before the eligible date of release.

[25] During oral arguments Ms Van der Smit changed her stance with regard to the stage at which an offender should be considered for being eligible for remission and submitted that the consideration for remission must be conducted 'closer' to the release of an offender not necessarily after such an offender has served two thirds of his or her sentence. Counsel could, however, not provide a statutory provision upon which this submission was predicated.

Issue for determination

[26] Counsel were *ad idem* that the only issue for determination was: when does an offender become eligible for consideration for remission. Put differently, how much of his or her sentence should an offender serve before he or she becomes eligible for consideration for remission of his or her sentence.

The law

[27] Since the parties are in agreement that s 92(2)(c)(aa) of the Prisons Act applies to the applicants' situation, I deemed it apposite to quote the section in order to provide context for the reader. It reads:

'(2) Subsection (1) shall not apply to a prisoner who, after the commencement of this Act –

(c) has been sentenced to serve a term of imprisonment for any of the following crimes or offences committed after that commencement:

(i)

to

(xv)

but such prisoner may be granted a remission of sentence referred to in subsection (1) –

(aa) by the Minister on the recommendation of the National Release Board, where such prisoner is serving a sentence of imprisonment of three years or more.'

[28] Subsection (1) is subjected to ss (2), (3) and (5). Subsection 1 provides that a person sentenced to a period or periods of imprisonment may, by reason of meritorious conduct and industry, during his or her period of imprisonment earn remission of part of such period equivalent to one third of the total of the period of his or her imprisonment. Subsection (3) excludes from consideration of remission a prisoner who has been found guilty *inter alia* of escaping from custody. In terms of s 5, a period during which a prisoner is being hospitalized as a result of his or her own negligence or is undergoing confinement in a single cell as a penalty, such prisoner shall not earn any remission.

[29] Having regard to the sole remaining issue for determination, namely, when an offender should become eligible for remission consideration, it is critical to state that s 92(4) of the Prisons Act, is instructive. It reads:

'For the purpose of computing the remission due, every person eligible for remission under this section shall on the commencement of his or her sentence be credited with the full remission period to which he or she would be entitled at the end of such period if no remission was forfeited.' (Underlining supplied for emphasis)

Discussion

[30] As mentioned in paragraph 19 above, the respondents conceded that the provisions of the Prisons Act apply to the applicants' situation regarding their eligibility for consideration for remission as contended by the applicants all along.

[31] I am of the view that the respondent's concession is well made. I say so for the reasons, that: firstly, the crimes for which the applicants were convicted were committed when the Prisons Act of 1998 was in operation and they were further sentenced when the Prisons Act of 1998 was still in operation. Secondly, the applicants acquired rights to be considered for remission as provided for in the Prisons Act. Therefore, in terms of s 112(c) of the Interpretation of the Laws Proclamation 37 of 1920, the fact that a law has been 'repealed shall not ... affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any law so repealed'. The Supreme Court in *Kamahere*² had occasion to interpret at para 48 of the judgment the provision of s 112(c) in the context of the 1959 Prisons Act, and stated that 'those offenders who had been sentenced to life imprisonment at the time when the (Prisons Act) 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'. It follows thus, that by parity of reasoning, the applicants in the present matter had acquired rights to be considered for remission under the repealed Prisons Act.

[32] As pointed out above, the only issue which remains for determination is at what stage of the offender's incarceration does he or she become eligible for consideration for remission. In considering the issue at hand, I think that the starting point is first to clarify the system of remission as opposed to the parole system. In

² *Kamahere v Government of the Republic of Namibia* (SA 64-2014) [2016] NASC (19 August 2016) Smuts JA at para [48] states 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'.

*Florin*³, Ueitele J at paragraph 17 of the judgment referred, with approval to the distinction between remission and parole set out in the South African case of *Sebe*⁴. The distinction has been explained as follows:

‘Historically, parole is a prisoner’s promise, of good behaviour in return for release before the expiration of a custodial sentence or, in the 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 the prisoner being conditionally released from goal against an undertaking to abide by specific terms and conditions...

Remission of sentence, on the other hand, is a privilege and not a right, the purpose of which is to serve as an incentive to encourage, if nothing else, good, disciplined behaviour and adherence to prison procedures. This form of remission or standard remission as it is known (as opposed to special remission) applies to both determinate and indeterminate sentences.’

[33] I have earlier paraphrased s 92(1) of the Prisons Act, which provides that an offender is to be granted remission equivalent to one third of the period of his imprisonment. It is further to be noted that s 92(4) of the Prisons Act stipulates at what stage of the incarceration remission is to be computed namely at the commencement of an offender serving his or her sentence. He or she is credited with full remission, that is to say, one third of his or her total period of imprisonment.

[34] Stated differently, remission of sentence is an upfront reduction of the offender’s period of sentence with a purpose of serving as an incentive for good behaviour during his or her incarceration. In this regard, the first applicant points out for instance that if he were to be granted one third remission of his 35 years imprisonment he would only serve 23 years.

[35] Having regard the clear provisions of s 92 of the Prisons Act, together with the authoritative interpretation referred to above relating to how remission is applied and computed, the submission advanced by and on behalf of the respondents to the effect that remission should not be implemented at the commencement of the

³ *Florin v The Government Of the Republic of Namibia and 9 Others* [2020] NAHCMD 91 (04 March 2022) para 17.

⁴ *Sebe v Minister of Correctional Services and Others* 1999 (1) SACR 244 (CK).

offender serving his or her sentence but 'closer' to the end of his or her release, is wrong as it is in conflict with the clear provisions of the Prisons Act. Counsel for the respondents was unable to refer the court to any authority, whether in a form of a provision of the Prisons Act or case law which stipulates that an offender only becomes eligible for consideration for remission closer to their release.

[36] It follows therefore, that the applicants are correct in their request that the respondents be directed to consider their eligibility for remission. In this connection, the applicants are at pains to stress that '[W]e do not seek... to be released on remission of our respective sentences. What we seek is for the respondents to be ordered by this Honourable Court to compute the period of remission of sentences that we . . . may have earned during our incarceration at the correctional facility.'

[37] In my view, taking into consideration the clear provisions of s 92(4) of the Prisons Act, which provides that the computing of the remission due shall be done 'on the commencement' of an offender's sentence, the applicants' demand is legitimate and is grounded in the provisions of the Prisons Act. In plain language, the calculation of remission must be done as soon as an offender is admitted to a correctional facility 'or as soon as possible thereafter'. On the facts of the present matter the time period within which the applicants should have been considered for remission, is long overdue, contrary to the provisions of s 92 of the Prisons Act.

[38] I now turn to consider the respondents' apparent excuse why the applicants cannot be considered for remission because there is currently 'no specially dedicated process for the release on remission of offenders such as the applicants as the repeal of the Prisons Act phased out granting of remission by the minister.'

[39] In my view, this is not a valid reason to absolve the respondents from performing the duties imposed on them by statute to consider the applicants' eligibility for remission. A remedy has to be fashioned to fulfill the applicants' right to be considered for remission. As the old legal adage goes: where there is a right there is a remedy. The respondents have now correctly acknowledged the applicants' right to be considered for remission, they have a corresponding duty to devise a means by which to realise the applicants' right to be considered for remission.

[40] In any event, all the functionaries who previously performed the functions relating to remission in terms of s 92 of the Prisons Act, such as the minister, the Commissioner-General and the National Release Board still exist within the structure created by the Correctional Service Act. They can still perform the functions previously performed in terms of the Prisons Act in connection with the remission process of the applicants. Such acts shall be deemed 'as if the repealing (ie the 2012 Act) law had not been passed'⁵.

Conclusion

[41] It thus follows from the considerations, findings and conclusions made herein before, that the applicants stand to be granted the relief prayed for in their notice of motion.

Costs

[42] In view of the fact, that the applicants were represented by an *amicus curiae* and have therefore, not incurred any costs occasioned by this application, there would be no order of costs as much as they have been successful.

The order

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

1. It is declared that s 92(2)(c)(aa) of the Prisons Act 17 of 1998 applies to the applicants with regard to a consideration of their eligibility for remission.
2. It is declared that the applicants are eligible to be considered for remission of their respective sentences by the first respondent, the minister, on recommendation of the third respondent, namely the Chairperson of the National Release Board.

⁵ Section 11(2) of the Interpretation of Laws Proclamation 37 of 1920.

APPEARANCES:

APPLICANTS:

T KASITA

Acting as *amicus curiae*, Windhoek

RESPONDENTS:

C T VAN DER SMIT

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