

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING *I.T.O.* PRACTICE DIRECTIVE 61**

CASE NO. HC-MD-CIV-MOT-GEN-2017/00229

In the matter between:

**IMMANUEL TJKUNGA**

**APPLICANT**

and

**MINISTER OF SAFETY SECURITY**

**1<sup>st</sup> RESPONDENT**

**THE COMMISSIONER GENERAL OF THE**

**NAMIBIAN CORRECTIONAL SERVICE**

**2<sup>nd</sup>**

**RESPONDENT**

**Neutral Citation:** *Tjikunga v Minister of Safety and Security* (HC-MD-CIV-MOT-GEN-2017/00229) [2018] NAHCMD 402 (6 December 2018)

**Coram:** Masuku, J

**Heard on:** 26 October 2018

**Delivered on:** 6 December 2018

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**ORDER**

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1. The application by the applicant for the relief sought in the notice of motion is hereby dismissed.
  2. There is no order as to costs.
  3. The matter is removed from the roll and is regarded as finalised.
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**REASONS FOR THE ORDER**

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MASUKU J:

[1] On 3 May 1995, applicant was sentenced to life imprisonment pursuant to a conviction on counts of murder and robbery, respectively.

[2] The applicant brought this application to court claiming relief in the following terms:

'...That a case of indefinite detention and/or deliberate protraction in the release of Applicant from incarceration after having served 23 years imprisonment be heard;

2. That 1st Respondent and 2nd Respondent be held guilty for their failure to comply with the Provisions of Act 8 of 1959 the Prison Act in that they failed to consider Applicant for parole when Applicant served half of the minimum period of detention of 20 years required of a prisoner sentenced to life;

3. That 1st Respondent and 2nd Respondent be held guilty for their failure to comply with the Provisions of Act 8 of 1959, the Prison Act. In that they failed to consider

Applicant for release on parole when Applicant had served the full minimum period of detention of 20 years, which is the requirement by law for a prisoner sentenced to life in terms of Act 8 of 1959, the Prison Act;

4. That the 1st Respondent be held guilty of contempt of court, in that they both failed to comply with the Supreme Court order delivered on 19 August 2016 in the matter Steve "Ricco" Kamahere and 25 Others, Case number SA 64/2014, to which Applicant was part;

5. That this Honourable Court order that Applicant be considered/ released on parole as soon as possible in that Applicant has now exceeded the minimum period of 20 years required of a life sentenced prisoner in that Applicant has currently served 23 years imprisonment;

6. That order be given against the 1st and 2nd Respondents that indefinite detention of Applicant is tantamount to the subjection of Applicant to inhumane, cruel and/or degrading treatment or punishment which is clearly in conflict with the provision of 8(2)(b) of the Namibian Constitution;

7. That this Honourable Court order 1st and 2nd Respondents not to hold Applicant indefinitely in that they must specify a clear and specific time and date as to when Applicant will be released from detention and further order that they are duty bound to uphold the specified time and date of Applicant's release;'

[3] It is common cause that at the time of his sentencing, the Prison Act, Act 8 of 1959 was in operation. Under the said Act, the applicant would have been eligible for consideration for release on parole after serving a minimum period of 10 years imprisonment.

[4] It is worth noting however, that the aforementioned Act has since been repealed by the Correctional Services Act, 9 of 2012 and thus, Act 8 of 1959, subject to the transitional provisions, no longer finds general application in this country.

[5] The applicant, in his address, submitted that since his sentencing in 1995, he had by 2005 served a period of 10 years in prison and was as a

result, eligible for consideration for release on parole. It was his contention that the respondents failed to place him on parole then and, that the said respondents turned a blind eye to the matter relating to his parole.

[6] By May 2015, applicant had served a period of 20 years in prison, which, according to him, was the minimum period of incarceration for those inmates serving life imprisonment and therefore, that he had again become eligible for parole which placement on parole, the respondents failed to implement.

[7] The respondents, in their address, submitted that the applicant, after becoming eligible for parole, was considered and in fact, was placed on parole. This he admits in his papers as well as in his submissions to this court. The applicant however, submits that he was only placed in consideration for parole after he, along with other inmates, took the respondents on appeal in the *Kamahere v Government of the Republic of Namibia and Others* case.<sup>1</sup>

[8] The question for consideration in this matter is therefore, whether applicant was eligible for consideration for placement on parole, and if in the affirmative, whether he was considered? If applicant was considered, then the relief he seeks falls away in its entirety.

[9] The respondents argued that they have given effect to the rights that applicant enjoys and namely the right to be considered for parole. It must be stated here that parole in itself is not a right and as was correctly stated by respondents, it is but a privilege extended to deserving individuals, taking into account criteria set out.

[10] From the papers and submissions made, it is clear that the possibility of release on parole for the applicant is present and applicant is not being detained indefinitely as he alleges. As rightly pointed out by the respondents, the fact that applicant is eligible for parole does not mean that he must perforce be released. The applicant was considered for possible release on

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<sup>1</sup> SA 64/2014 [2016] NASC (19 August 2016).

parole but it was concluded that further interventions were required and that he was not ready to take up his position to be reintegrated into society.

[11] Before the applicant can be favourably considered for release on parole, the National Release Board and the other statutory functionaries must be satisfied that the applicant has displayed industry and meritorious conduct. This, they are not satisfied with in relation to the applicant presently.

[12] Upon applicant's consideration by the respondents, it was found that he had failed to display the industry and meritorious conduct required and as a result, his release on parole was, for the time being, denied.

[13] It is required of the respondents to however, place the applicant in programmes designed for his reintegration and rehabilitation so as to enable him to demonstrate the requisite industry and conduct that may facilitate and permit for his release on parole.

[14] To sum up, the correctional service is vested with the exclusive power to rehabilitate and reform offenders and, they are the only competent authority to assess and determine if offenders are indeed reformed to requisite levels and are accordingly ready to take up their place in society again. As stated previously, the applicant has been considered for release on parole but same was unsuccessful. As a result, this prompted him to bring this application before this court.

[15] The court is of the view that for the aforementioned reasons, applicant's application for the relief he seeks cannot pass and should as a result, be dismissed. The court however, expects that the correctional facility will allow applicant to continue to participate in programmes designed for his reintegration and rehabilitation so as to enable him to demonstrate the required industry and meritorious conduct that may facilitate and permit for his release on parole.

[16] I should point out in this regard that the applicant's case is not one in which this court can intervene as the appropriate functionary has carried out its duties accordingly. The applicant is not saying that the said functionary is guilty of any reviewable conduct that this court can, in appropriate circumstances, correct or set aside.

[17] In the premises, the applicant's application stands to be dismissed. He should be encouraged to continue submitting himself to the rehabilitation and other programmes run by the correctional facility in the meantime until he is considered fit for release.

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TS Masuku  
Judge

## APPEARANCES

APPLICANTS: In person.

RESPONDENTS: N Kandovazu  
of the Government Attorney, Windhoek