

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2021/00151

In the matter between:

ISMAEL GARISEB

1ST APPLICANT

BEN AFRIKANER

2ND APPLICANT

and

MINISTER OF HOME AFFAIRS, IMMIGRATION,

SAFETY AND SECURITY, FRANS KAPOFI

1ST RESPONDENT

COMMISSIONER-GENERAL, RAPHAEL

HAMUNYELA CHAIRPERSON OF THE NATIONAL

RELEASE BOARD

2ND RESPONDENT

Coram: MASUKU J

Heard: 27 May 2021

Delivered: 22 July 2021

Neutral Citation: *Gariseb v Minister of Home Affairs and Immigration, Safety and Security* (HC-MD-CIV-MOT-GEN-2021/00151 [2021] NAHCMD 344 (22 July 2021).

Flynote: Urgent Application – Legislation - Correctional Services Act No.8 of 2009 - Section 112 – The mandate of correctional officers to comply with section 112 – the effects of non-compliance with section 112.

Summary: The applicants having been convicted of stock theft, were sentenced to a term of imprisonment. Having served half of their sentence applicants now seek an order for their immediate release. They rely on section 112 of the Act in this regard.

It is common cause that when the applicants became eligible for parole, the relevant correctional officer in charge failed to submit the report required for determination before the national release board. The applicants contend that this failure results in them being incarcerated for longer periods than may be necessary.

Held: that the provisions of section 112 of the Act are an important cog in rehabilitation and re-integration of offenders into society. The authorities in charge should therefor closely monitor cases of the individual inmates who have served half of their sentence in to draft the necessary report required by the national release board timeously.

Held that: Section 113 is the avenue open to offenders should they not be satisfied with the decision taken in terms of section 112.

Held further that: any delay to carry out the provisions of section 112 has a prejudicial effect on an offender resulting in him or her spending more time in incarceration in the event that the offender is subsequently successfully released on parole.

Held: There are various other issues such as liberty, funding and rehabilitation that are negatively affected when section 112 is not timeously adhered to.

Held that: the report referred to in terms of section 112 should be submitted regardless of whether the inmate has a positive or negative track record. This is reinforced by section 113, should the inmate be dissatisfied with the outcome of the report in terms of section 112.

Held further that: the court does not have the authority to release inmates from custody, rather that power rests with the National Release Board, with appellate powers escalated up to the Office of the President of the Republic.

The court delivered the judgement to clarify the role of the correctional services regarding the provisions of the Act. In the result, the applicants' prayers were dismissed.

ORDER

1. The applicants' application is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised

JUDGMENT

MASUKU J:

Introduction

[1] This is an application in which the applicants, who are self-actors and in-mates at the Hardarp Correctional Institution approached this court on an alleged urgency basis, seeking the following relief:

- '1. Condoning the Applicants' non-compliance to the Court Rules including irregularities, if any, in servicing this matter.
2. Declare the unlawful infringements on the right and freedoms of the Applicants unconstitutional and its bearing on the damages caused since 8 March 2021 on the ordinary scale.
3. Reprimand the Respondents and call upon administrative officers involved to show cause why this Honourable Court should not order costs involved on account of the depraved conduct to be on the punitive scale instead of taxpayers, including unpaid gratuities since June 2020.
4. The immediate release of the Applicants.

5. Costs of suit.

6. Further and/or alternative relief.'

[2] It will be immediately plain that the relief sought by the applicants is not clearly articulated in the notice of motion. This is due to the fact that the applicants acted in person and for the most part, did not properly advance their case. There were also a few procedural issues that were not in line with the rules. I need not deal with them in this matter.

[3] As a result, the court decided, notwithstanding some shortcomings, to proceed to deal with this matter, a course to which Mr. Ludwig, for the respondents was not averse. The pragmatic and goal-oriented approach by the court should not be regarded as a precedent that the court will allow the rules some leave of absence for persons in the applicants' position to fracture the rules with reckless abandon.

[4] It is with an eye to a very important issue that touches on the applicants' rights that the court, despite the shortcomings, decided nonetheless to overlook these and deal with the matter on the merits.

[5] The applicants were convicted of stock theft and were each sentenced to 4 years' imprisonment. After having served half of their respective sentences, the applicants made enquiries regarding their possible release on parole. They claim that their enquiries fell on deaf ears as they did not receive any meaningful responses. As a result, they further complain, they have had to spend more time in custody than they would, had the relevant officers fully and timeously complied with the relevant provisions of the Act.

[6] Shorn of all the frills and detours apparent from the applicants' papers, which as I have said, are not the model of clarity, at the heart of the dispute are provisions of section 112 of the Correctional Services Act, Act No. 8 of 2009.

[7] Section 112 of the Act, reads as follows:

'Where a convicted offender who has been sentenced to a term of imprisonment has served in a correctional facility half of such term and the officer in charge is satisfied that –

- (a) such offender has displayed meritorious conduct, self discipline and industry during the period served;
- (b) such offender will not, by re-offending, present an undue risk to society before the expiration of the sentence he or she is serving, and
- (c) the release of the offender will contribute to the reintegration of the offender into society as a law abiding citizen,

that officer in charge must submit or cause to be submitted a report in respect of such offender to the National Release Board, in which he or she recommends that such offender be released on full parole or probation and the conditions relating to such release as he or she may consider necessary.'

[8] It is necessary to state for the sake of completeness that s 113 of the Act creates a route for offenders who are aggrieved by the decision of the National Release Board, the Commissioner-General or the Minister regarding his or her release on full parole to appeal against that decision. This will, it would seem to me, be in situations where the application for release on parole has been refused.

[9] The complaint by the applicants is that once they were eligible for consideration for parole in terms of s 112 of the Act, namely, after serving half their sentences, the officer in charge did not submit or cause to be submitted a report in respect of the applicants as required by law. This, the applicants point out, results in them spending more time in the correctional service than would have been the case had the officer-in-charge made the report in good time.

[10] It is the applicants' case that when complaints are made regarding the delay in making the necessary reports in terms of s 112, the respondents normally inform them that release on parole is a privilege and not a right. As a result, the provisions of the Act are not treated with the seriousness they deserve.

[11] I am of the view that the provisions of s 112 of the Act are very important in the rehabilitation and eventual reintegration of offenders into the society they wronged in the first place. It is thus important that the relevant officers should closely monitor the

cases of the individual inmates so that when they reach half of the sentence, the necessary recommendations are made to the appropriate authority.

[12] Any delay in this regard, it must be understood, has the prejudicial effect that an inmate may spend more time than he or she would have in a correctional facility. This, it seems to me, goes against the very reason parliament promulgated the provision in question. It is designed to serve the interests of the inmate, the society and of course the correctional institution as well. There may be issues of liberty, funding and rehabilitation that may be negatively affected if the officer-in-charge does not ensure that timeous reports are made regarding admission of inmates on parole.

[13] One may argue that when reading s 112 of the Act, it appears that the only cases where a report has to be made is in respect of inmates whose cases meet the sub-provisions of (a) to (c). This would mean that if an inmate is not considered suitable for consideration of being released on parole, he or she is not entitled to a report. Is that tenable?

[14] I think not. It is in my considered view proper that a continuous assessment of the inmates is done, especially when they approach half of the sentence that was imposed on them. In this regard, a report should be made to the National Release Board. This should be so, regardless of whether the report in relation to the particular inmate is positive or negative.

[15] It would be wrong to let those who are not deemed worthy of release to stay for prolonged periods without getting an assessment as to where they lack regarding possible release. The reason for the assessment, especially in respect of those who may be considered ineligible for parole, although they have served half of their sentence, is that they should not their shortcomings and work towards correcting them.

[16] I am of the considered view that the interpretation given to s 112 as stated above, is reinforced by the provisions of s 113. As stated above, the said provisions allow an aggrieved inmate to appeal against a decision refusing to allow them to be released on parole. If the report made was only in respect of those who meet the

criteria set out in s 112(1)(a)-(c), there would not be any grievance as the inmates would be regarded as those who qualify for release on parole.

[17] The applicants have sought amongst other things, an order that they should be released by this court on parole. That is not permissible territory for the court to traverse. This is so because the court is not the custodian of the behavioural patterns of inmates and it does not have any material upon which it could order an inmate to be released. In any event, when proper regard is had to s 113, the appellate powers end with the President of the Republic and the court is not afforded any power to deal with any grievances. To this extent, the applicants are barking the wrong tree.

[18] It must be stated that thankfully, during the hearing, the 1st applicant's application for release was issued by the necessary authorities. As a result, he went home after the hearing. It would seem that the case of the 2nd respondent, was also under consideration.

[19] I must emphasise that the relevant officials must take their statutory duties seriously. It should not be necessary for inmates to approach the court before the provisions of the Act are given effect to. As stated, these matters, if not timeously attended to, have the potential to cause inmates to be released on parole much later than they would have, to the detriment of the tax-payer, their families and their liberty.

[20] In the premises, I am of the considered view that it is important that the provisions of the Act be placed in proper perspective to offer guidance to the officers in charge of correctional facilities in this Republic. Any other reaction to the above provisions would not be acceptable.

[21] I do not find it proper to grant any relief that the applicants may have prayed for. At the end, the court was requested to deliver a judgment clarifying the role of the correctional services regarding issues relating to parole as provided for in the Act.

Conclusion

[22] In view of what is stated above, I am of the considered view that the applicants have not shown that they are entitled to any of the orders they seek. As a result, the order that follows below, will be their just dessert. I will, however, order that a copy of this judgment be circulated to all the correctional facilities within the Republic as a means of sensitizing officials as to their statutory duties imposed on them by the Act.

Order

1. The applicants' application is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

T. S. Masuku
Judge

APPEARANCES:

APPLICANTS: In Person

RESPONDENTS: J. Ludwig
Of Government Attorney