REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2020/00154

In the matter between

JOSEPHAT BOOIS **APPLICANT**

and

THE MINISTER OF SAFETY AND SECURITY **1ST RESPONDENT**

THE COMMISSIONER GENERAL OF NAMIBIA CORRECTIONAL SERVICE **2ND RESPONDENT**

WALVIS BAY CORRECTIONAL FACILITY: THE CHAIRPERSON OF NATIONAL RELEASE BOARD **3RD RESPONDENT**

Neutral citation: *Boois v The Minister of Safety and Security* (HC-MD-CIV-MOT-GEN-2020/00154) [2022] NAHCMD 141 (25 March 2022)

Coram: MASUKU J
Heard: **Decided on the papers**
Delivered: **25 March 2022**

Flynote: Criminal procedure – Parole – Eligibility for parole in terms of the Prisons Act 17 of 1998 and Correctional Service Act, 9 of 2012 discussed – Generally in terms of the 1998 Act a prisoner sentenced to imprisonment for three or more years is eligible to be considered for parole after serving half of the sentence – imprisonment of more than 3 years – Parole – Sentences imposed under Prisons Act 17 of 1998 – Minimum period of incarceration half of imposed sentence – in terms of section 95(1)(a) such prisoners are generally entitled to be considered for parole after serving half of such sentence – these provisions however do not apply to prisoners who were sentenced to a term of imprisonment for any of the crimes or offences referred to in sections 92(2)(a), (b) or (c) – such prisoners thus not eligible for release on parole or probation under section 97 as read with section 95.

Summary: The applicant was sentenced to 20 years' imprisonment respectively during March 2010 after a conviction on charges of murder and robbery at the time when the Prisons Act 17 of 1998 was still in force. In January 2014, the Correctional Services Act of 2012 in term of section 134 repealed the 1998 in its entirety. The Supreme Court in the case of *Kamahere and Others v Government of the Republic of Namibia and Others* 2016 (4) NR 919 (SC) found that the provisions of the repealed 1998 Act govern the parole regime of the prisoners sentenced during its operation. Subject to the above judgement and a memorandum issued by the second respondent, some offenders applied to the court to be considered for parole in terms of section 95 of the 1998 Act and their applications were granted without opposition by the respondents in this matter. Some of those respondents were convicted of murder and robbery. The applicant, relying on the above moves this court to order that the respondents in this matter consider him for parole as he has met the requirements of section 95 of the 1998 Act, which is the Act that was in force at the time of his sentence. The respondents oppose the application relying on the exclusion clause in section 97 (8) of the 1998 Act that denies parole to be granted to offenders of committed crimes stipulated in section 92 (2).

Held: Not all inmates sentenced to imprisonment of three years or more are eligible for parole after serving half of their sentence.

Held: Inmates convicted of offences listed in section 92 (2) of the 1998 Act are excluded from being considered for parole in section 97 (8) of the 1998 Act.

Held: Section 95 must be read together with section 97 (1); 97 (8) and 92 (2) of the 1998 Act.

Held that: In terms of the Kamahere judgement the Act applicable to the applicant is the 1998 Act, however since that Act excludes inmates who were convicted of murder and robbery in terms of section 97 (8), the applicant is eligible for parole in terms of section 115 of the 2012 Act.

ORDER

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1. The application is dismissed.
2. There is no order as to costs.
3. The matter is removed and regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Serving before me is an application for recommendation of release on parole in terms of s95 (1) of the Prisons Act No 17 of 1998.

[2] The applicant was sentenced to 20 years imprisonment upon a conviction on the charges of murder and robbery. The sentence was meted out to him at a time when the Prisons Act of 1998 was in operation. According to the applicant, despite

the 1998 Act being repealed by the Correctional Service Act No 9 of 2012, the 1998 Prison Act applies to him retrospectively.

[3] The application is opposed by the respondents on the basis that the applicant is applying for the recommendation of release on parole using the wrong Act. The correct Act applicable to the applicant, according to the respondents, is the Correctional Services Act No 9 of 2012 and more specifically s115 thereof.

[4] From the rendition of the disparate positions adopted by the protagonists above, it is clear that the central issue for determination is the statutory scheme applicable to the applicant's sentence by analysis is the interplay, if any, between the Prisons Act of 1998 and the Correctional Service Act No 9 of 2012.

[5] I will, for ease of reference, refer to the relevant pieces of legislation mentioned above as follows: the Prisons Act of 1998, will be called 'the 1998 Act'. The Correctional Services Act of 2012, will be called 'the 2012 Act.'

The parties

[6] The applicant is an adult male Namibian who is currently serving a sentence at the Walvis Bay Correctional Institutions. The first respondent is the Minister of Safety and Security, duly appointed by the President in terms of the Constitution. He is cited in his official capacity as such.

[7] The second respondent is the Commissioner-General of the Namibia Correctional Service, appointed in terms of the relevant law. He is cited in his official capacity as such. The third respondent is the Chairperson of the Walvis Bay Release Board, also cited in the official capacity.

Applicant's case

[8] At the time of lodging this application, applicant was 42 years old serving a sentence of 20 years imprisonment consequent to convictions on murder and

robbery on 19 March 2010. On 19 March 2017 the 2nd Respondent issued out a memorandum and the relevant portion of that memorandum, is as follows:

> '1. Offenders who were sentenced for committing offences before the commence of the Correctional Service Act, 2012 before 1 January 2014, and before such commencement were legible for release on parole but which offences are now scheduled offences as per the Correctional Services Act, 2012, such offenders can be considered for release on full parole after serving half of their sentences.
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> …..
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> 4. The legibility for release on full parole or probation for offenders sentenced to life imprisonment is to be determined as ordered by the Supreme Court of Namibia in the Appeal Case No. SA 64/2014 (Steve "Ricco" Kamahere & 25 Others vs the Government of Namibia & 7 Others)'".

[9] In September 2019, the applicant approached the chairperson of the Institutional Release Committee, Walvis Bay Correctional Facility claiming that he has served half his sentence and is thus eligible to be assessed for recommendation to be released on parole in terms of section 95 of the 1998 Act. Thereafter, the chairperson informed him that he was only legible for parole in terms of section 115 of the 2012 Act. In February 2020 he alerted his case management officer about his legibility to be considered for parole, however the officer reiterated what the chairperson told him in 2019.

The respondents' case

[10] The respondents' stance is that although the applicant was sentenced during the time when the 1998 Act was still in force, the 2012 Act repealed the latter in its entirety and as a result the applicant did not accrue any rights under the 1998 Act when the 2012 Act came into force on 1 January 2014. Therefore, the applicant is eligible for parole only in terms of section 115 of the 2012 Act.

The applicant's arguments

[11] The applicant argues that he was sentenced on 19 March 2010 when the 1998 Act was still in force. As a result, he must be considered for parole in terms of

that Act, which was in force at the time of his sentence. He further relies on the memorandum issued by the 2nd respondent in paragraph 5 above that offenders who were sentenced before the 2012 Act came into force on 1 January 2014 must be considered for parole under the 1998 Act and which memorandum led to some offenders applying to the High Court to order the respondents to consider parole. The respondents, contends the applicant, did not oppose the applications. As a result. The court granted the offenders' applications to be considered for parole in terms of the 1998 Act.

[12] The applicant submits that applying the 2012 Act will be to his detriment in that the said Act would apply to him retrospectively. It is his further case that applying the 2012 Act it will be contrary to the Supreme Court judgment of *Kamahere and Others v The Government of Namibia and Others* 2016 (4) NR 919 (SC).

The legislative scheme governing parole

[13] Section 95 of the Prisons Act 17 of 1998 dealt with parole or probation of prisoners serving imprisonment of three years and more. It is worth noting that it only did so with reference to sentences of finite duration. It did so in these terms:

> '(1) Where-
>
> (a) a convicted prisoner who has been sentenced to a term of imprisonment of three years or more has served half of such term; and
>
> (b) the relevant institutional committee is satisfied that such prisoner has displayed meritorious conduct, self-discipline, responsibility and industry during the period referred to in para (a),
>
> that institutional committee may submit a report in respect of such prisoner to the National Release Board, in which it recommends that such prisoner be released on parole or probation and the conditions relating to such release as it may deem necessary.
>
> (2) The National Release Board may, after considering the report and recommendations referred to in subsection (1) submit a report to the Minister recommending the release on

parole or probation of the prisoner concerned and the conditions relating to such release as the National Release Board may deem necessary.'

[14] Relevant for present purposes is s115 of the 2012 Act, which provides for release on full parole or probation for offenders sentenced to more than 20 years for scheduled crimes or offences. In order to be eligible to qualify for this, offenders would need to have served two-thirds of their terms of imprisonment and the Board would need to be satisfied after a hearing that:

'(i) the offender has displayed meritorious conduct, self-discipline and industry during the period served in the correctional facility;
(ii) the offender will not be re-offending and place an undue risk to society;
(iii) the release of the offender would contribute to his or her re-integration into society as a law abiding citizen.'[1]

[15] It is thus clear from the 2012 Act that parole does not automatically apply after an offender has served two-thirds of the sentence. The Board must, in addition be satisfied that the three further criteria mentioned in the immediately preceding paragraph have been are met.

[15] If the Board is satisfied that the three criteria are met, it would recommend the release of the offender on parole or probation in a report to the Commissioner-General. The latter would, for his part refer the report to the Minister responsible for Correctional Services, who may then authorise the release of the offender on parole or probation as the case may be.

Analysis

[16] The question as to which legislative scheme is applicable was answered in the Supreme Court appeal matter of *Kamahere and Others v Government of the Republic of Namibia and Others* 2016 (4) NR 919 (SC) where the court had stated that:

'[48] 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

[1] Section 115 (1) (a)

parole under that Act and the subordinate legislation issued under it.[2] This is because the 1959 Act governed the position at the time of sentencing. When the 1959 Act was repealed by the 1998 Act, there was no contrary intention expressed in the 1998 Act or in the 2012 Act or any implication which served to indicate the intention to take away that right, as provided for in the Interpretation Proclamation. In the absence of a contrary intention expressed or implied in a transitional provision or elsewhere in the 1998 Act, the repeal of the 1959 Act would not affect the right in respect of eligibility for placement on parole acquired under the regime provided for in the 1959 Act'...[3] (Emphasis added).

[17] From a mere reading of section 95 of the 1998 Act, it would appear that generally, when an offender has been sentenced to a prison term of three years or more; he or she has served half of the sentence imposed, and the institutional committee is satisfied that the offender has displayed good conduct and discipline during that period, the institutional committee may submit a report in respect of that offender to the National Release Board in which it recommends that such prisoner be released on parole or probation, subject to conditions that may be deemed necessary. The National Release Board, after considering the recommendations in the report submitted by the institutional committee, has to submit the report to the minister, recommending the release on parole.

[18] The parole process does not end in section 95. It continues in section 97 (1) of the 1998 Act, which states that:

> 'After considering the report and recommendations referred to in –
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> (a) section 95 (2), the Minister; or
> (b) section 96 (2), the Commissioner,
>
> may authorise the release on parole or probation of the prisoner concerned upon such condition as the Minister or Commissioner, as the case maybe, may determine and specify or cause to be specified in the warrant of release in question'.

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[2] See *Mohammaed v Minister of Correctional Services and others* 2003 (6) SA 169 (E) at 188.

[3] This also accords with the common law presumption against retrospection, powerfully underpinned by the Constitution in embodying the rule of law in Art 1. See *Pharmaceutical manufacturers Association of South Africa and others: In re Ex Parte Application of the President of the RSA and others* 2000 (2) SA 674 (CC) para 39; *Veldman v Director of Public Prosecutions* 2007 (3) SA 210 (CC) para 26.

[19] It must be mentioned however that section 97 (8) of the 1998 Act closes the door on some offenders who are mentioned in section 92 (2) of 1998 Act, and of which the applicant is one. Section 97 (8) states that:

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

[20] Section 92 (2) referred to above and specifically in (2) (c) lists crimes and offences committed after the commencement of the 1998 Act to include murder and robbery, of which crimes the applicant was convicted. It states in clear and unambiguous terms that a person sentenced for the offences such as those the applicant was found guilty of, is not eligible for remission and this is so notwithstanding meritorious conduct and industry.

[21] The report referred to in section 95 (2) is subject to section 97 (1) (a) and the release in terms of section 97 (1) is limited by section 97 (8).

[22] It appears that section 97 (8) is the dominant section in the determination of parole in terms of the 1998 Act. Since it does not permit offenders convicted of murder and robbery amongst other crimes listed in section 92 (2), I find that the applicant did not accrue any right to parole in terms of the 1998 Act because that very Act closed that door to the applicant, regard had to the crimes for which he was convicted and sentenced.

[23] Geier, J, held as follows in *Shigwedha v The Commissioner General Namibia Correctional Service: Raphael Tuhafeni Hamunyela* (HC-MD-CIV-MOT-GEN-2019/00087) [2020] NAHCMD 389 (3 September 2020)[4]:

[4] Paragraph 32

> 'It so emerges that the legislature did not intend these general parole provisions to apply to all convicted prisoners serving sentences of three years or more, having served half of their sentences. They simply do not apply those convicted for robbery or murder and the other serious offences listed in section 92 (2) (c) or to habitual criminals'- section 92 (2) (a)….'

[24] I have no reason to differ from the finding of the learned Judge as his conclusion, in my considered view, is unimpeachable and is consistent with the plain reading of the applicable provision. I am therefor bound to follow his view, as it has not been shown to be clearly wrong in any respect, material or otherwise.

[25] It is clear in light of the above, that the Act applicable at the time when applicant was sentenced, does not, in terms of section 97 (8) render the applicant eligible for release on parole. As I result I find that the respondents' submission that applicant did not accrue any rights in terms of that 1998 Act compelling. As a result applicant would be eligible for parole only in the terms stipulated in the provisions of the 2012 Act.

[26] This finding, in my view, obviates the need to deal with and consider the point *in limine* relating to judicial deference, which the respondents had raised. It is thus rendered otiose.

Conclusion

[27] It would appear to me, considering the considerations and conclusions recorded above that the application should be dismissed. I accordingly do so.

Order

[28] In the result, the following order commends itself as appropriate in the present matter:

1. The applicant’s 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

APPLICANT:	J. Boois
	The Applicant in person
RESPONDENTS:	W. Uakuramenua
	Of the Office of the Government Attorney