

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2023/00034

In the matter between:

GEOFFERY KUPUZO MWILIMA

APPLICANT

and

MINSTER OF HOME AFFAIRS,

IMMIGRATION AND SAFETY AND SECURITY

1ST RESPONDENT

**DR. TONY LUMBINDI N.O (MEDICAL OFFICER, WINDHOEK
CORRECTIONAL FACILITY)**

2ND RESPONDENT

**COMMISSIONER GENERAL OF
THE CORRECTIONAL SERVICES**

3RD RESPONDENT

OFFICER IN CHARGE, WINDHOEK

CORRECTIONAL FACILITY

4TH RESPONDENT

Neutral citation: *Mwilima v Minister of Home Affairs* (HC-MD-CIV-MOT-GEN-2023/00034) [2023] NAHCMD 573 (15 September 2023)

Coram: TOMMASI J
Heard: 31 July 2023
Delivered: 15 September 2023

Flynote: Civil procedure – Contempt of Court – Requirements to be satisfied by the applicant and respondent – Onus of proof beyond reasonable doubt.

Administrative law – Review of decision not to recommend release of the applicant to first respondent – Applicant calls for court to direct administrative official to comply with court order to recommend his release to the first respondent – Court to first determine whether court order not complied with.

Interpretation of Statute – S 109(a) of the Correctional Service Act 9 of 2012 (the Act). Applicant proposes literal interpretation – such interpretation would lead to absurd results – the intention of the legislature could not have been for the release of an offender merely on the ground that he/she suffers from a dangerous disease even where such disease can be managed or controlled with medication – S 109(a) to read as referring to cases where the offender suffers from dangerous infectious or contagious diseases (communicable) and not merely from a dangerous disease or simply an infectious or contagious disease – Further, the word “or” between s 109(a) and (b) disjunctive and not conjunctive.

Summary: The applicant prays for order that the second respondent be held in contempt of court and to be convicted of civil contempt of court for failing to make a recommendation to the first respondent as per this court’s order dated 14 November 2022 and for failing to give reasons why he declined to make a recommendation. It was not disputed that the order was granted and that the second respondent was aware of the order. The second respondent, although he did not address the communication to the applicant provided him with a letter addressed to the first respondent wherein, he determined that the applicant indeed suffers from two ailments which are classified by the World Health Organisation as dangerous diseases but that he is of the view that his continued incarceration would not be

detrimental to the physical health of the applicant. He further provided a more detailed description of the applicant's medical condition in a document wherein he found that the applicant was sick but stable. The court found that the second respondent made a determination as ordered by the court and the reasons for declining to recommend his release were evident from the letter he addressed to first respondent on 24 November 2021.

Held, that the applicant had to prove that the second respondent in fact failed to comply with court order. On the papers before this court, the applicant failed to discharge the onus that the second respondent was guilty of civil contempt of court beyond reasonable doubt.

Held, further that the second respondent sufficiently consulted with the applicant and provided him with reasons for his decision. The reason for refusing to recommend the release of the applicant in terms of s 109(a) justified in that the literal interpretation of s 109 (a) as proposed by the applicant would lead to absurd results. The court, having regard to the intention of the legislator concluded that the proper interpretation is that s 109(a) is that it is applicable to offenders who suffers from dangerous infectious or contagious diseases.

ORDER

1. The application is dismissed.
2. No order as to costs.

JUDGMENT

TOMMASI J:

Introduction

[1] As an introduction it seems fitting to repeat the pre-amble of Mr Muluti's Heads of Argument, quoting Jalila Jefferson-Bullock, Are You (Still) My Great and Worthy Opponent? Compassionate Release of Terminally Ill Offenders [2015] 83.3 UMKCLL Rev. 521, at 523 where she states:

'Compassionate release is justified by two philosophers, one legal and one medical. The legal justification is that impending death has cancelled a terminally ill prisoners' debt to society, thereby re-harmonising the scales of justice so that release, prior to the completion of the prisoner's sentence, is warranted. The medical virtue of compassionate release is grounded in basic humanity, and commends that we treat dying prisoners as people, worthy of a dignified death.

In such situation, the granting of compassionate release relies on a determination that the impending death extinguishes any threat that an otherwise dangerous offender might levy upon release on a society fundamental belief that, due to the inmate's altered circumstances, humanity and decency demand early release.'

Background

[2] The applicant is seeking an order declaring the second respondent to be in contempt of this court's order handed down on 14 November 2022¹ by declining to make a recommendation to the first respondent to authorise the release of the applicant on medical grounds and for refusing to inform the applicant of the reasons for declining to make the said recommendation; and to convict the second respondent of contempt of court. The applicant is further seeking an order for the court to direct the second respondent to properly comply with order four of the above-mentioned court order, by making a recommendation for the release of the applicant as contemplated by s 109(a) of the Correctional Service Act 9 of 2012 (the Act) within three calendar days of granting the order. The applicant further prays for this court to issue a warrant of arrest forthwith committing the second respondent to imprisonment for contempt of court until he

¹ *Mwilima v Minister of Home Affairs, Immigration and Safety and Security* (HC-MD-CIV-MOT-GEN-2021/00260) [2022] NAHCMD 618 (14 November 2022).

complies with order four above and that the said warrant only be executed after one calendar day after the expiry of the afore-mentioned three days. The final prayer is for the first respondent to authorise the release of the applicant on the recommendation of order 4 above as contemplated in s 109(a) of the Act within four calendar days.

[3] The court order of Schimming-Chase J of 14 November 2022 reads as follows:

‘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 sub-regulations, of the Namibian Correctional Service Regulations published in Government Notice 331 of 2013, (GG5365) is hereby set aside.

3. 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.

4. 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.

5. 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.

6. There shall be no order as to costs.’

[4] The applicant launched an urgent application consisting of part A and B, seeking a mandatory order in A and contempt of court proceedings and a review application in B. On 10 March 2023, this Court disposed of Part A of the application under case HC-MD-CIV-MOT-GEN-2023/00034 and this forms part of a separate judgement. Part B of the application as put herein above remained unaddressed and the applicant now sought the relief therein.

Contempt of court

[5] It is common cause that, subsequent to the judgment, on 24 November 2022 (eight days after the court order), the second respondent addressed a letter to the first respondent titled “Determination of the Medical Conditions of Offender”. Therein, the second respondent highlighted the diseases the applicant suffers from as diabetes mellitus, chronic kidney failure on dialysis, hypertension, epilepsy and hypercholesterolemia. The second respondent concluded that most of the medical conditions can be controlled by treatment except the kidney failure, which remain a great concern for the applicant’s health.

[6] On the question whether he suffers from a dangerous disease he answered as follows:

‘Yes, he suffers from a dangerous disease. The World Health Organization (WHO) considers dangerous diseases as the most deadly disease of the top ten leading causes of death globally. According to WHO Diabetes Mellitus ranked number 9 and kidney diseases are ranked 10 on the list of ten world leading causes of death. So, as far as death is concern Diabetes Mellitus and Kidney disease which the offender suffers from are considered dangerous’

[7] On the question whether his continued incarceration would be detrimental to his health he answered as follows:

‘No, for the simple reason that he has access to regular dialysis sessions and also to his private doctors when needed. His current blood results show improvement compared to the past results, which means that his incarceration does not affect his physical condition.’

[8] On 1 December 2022, the second respondent addressed a more comprehensive diagnosis document about the applicant’s health condition. This document contains the following subject heading: “Medical Examination for Recommendation for Release on

Medical Ground” (the recommendation document). It is not addressed to any person. The second respondent delivered this document to the fourth defendant. In this document the second respondent gives an overview of the applicant’s past and current medical and surgical history, a medical summary, his diagnoses or finding and a conclusion.

[9] On 12 December 2023, the first respondent replied to the letter of the second respondent dated 24 November 2022 stating that he noted the contents thereof and that he hoped that second respondent will inform the applicant accordingly.

[10] On 15 December 2022 the fourth respondent forwarded the recommendation document under cover of a letter to first respondent. In this letter he opined that it was the second respondent’s recommendation as requested by the court order. Fourth respondent subsequently indicated in his supporting affidavit, that this was a mistake. The first respondent was not in office and the recommendation document was simply returned to fourth respondent referring to first respondent’s earlier response of 12 December 2022.

The applicant’s case

[11] It is the applicant’s case that the second respondent, in violation of the court order, acted wilfully and *mala fide* in that he refuses to make a recommendation to the first respondent to authorise the applicant’s release despite his determination that the applicant suffers from two dangerous diseases, to wit Diabetes Mellitus and Kidney Failure as envisioned by s 109 of the Act. The applicant further states that the second respondent failed to comply with the court order by refusing to inform him that he is declining to make a recommendation and to provide him with reasons. He concludes

that the second respondent's demeanour as can be deduced from the language he used, is contumacious.

[12] Mr Muluti submits that the second respondent's conduct is contumacious because, although he concluded that the applicant suffers from a dangerous disease, he refuses to make the recommendation despite the provisions of s 109(a). He submits that second respondent complied with order one of the judgment dated 14 November 2022 but in a cantankerous fashion refuses to comply with order three.

[13] He submits that the recommendation document does not contain reasons why the second respondent declined to make the requisite recommendation but it contains his findings and opinions. The second respondent also avers that the applicant was given the recommendation document on 19 December 2022, but the applicant refused to accept it.

[14] He argues that contempt of court is a constitutional matter and more so when the alleged contempt was committed by a public official, entrusted with the health of inmates. He submits that the applicant has proven that there was an order of court; that the second respondent was served with the order; and that the second respondent refused to comply with the order. He submits that the applicant discharged the onus on him and has proven that the second respondent acted wilfully and *mala fide*.

[15] He submits that the second respondent, clearly understood what was expected of him as the court warned him not to take other considerations into account, yet he went ahead and fraudulently took into consideration foreign and/or extraneous obligations contrary to the jurisdictional facts as contemplated by s 109(a) of the Act. In addition hereto he had the benefit of legal advice but he disobeyed the court order without any honest belief that his conduct is justified. Mr Muluti argues that the second

respondent's action is based on bad faith and fraud and it was designed to reach an objective other than envisaged in s 109(a) as entrusted to him.

[16] Mr Muluti asks for a coercive order as was granted in the case of *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others*²

Second Respondent's case

[17] The second respondent denied that he disobeyed the court order. He stated in his first affidavit that he swiftly acted in terms of the court order with the exception that it was unclear to him whether or not he should first inform the first respondent of the outcome of his examination. This he stated, caused a bit of confusion and the delay in providing the applicant with detailed reasons but he acted with no wilfulness nor did he want to frustrate any court process. The confusion, according to him was created by the fact that, usually, all official correspondences are communicated through the headquarters.

[18] The second respondent stated that he examined the applicant again and confirmed that the applicant is suffering from two diseases namely diabetes and kidney disease, classified by the World Health Organisation (WHO) as part of the ten most dangerous diseases. This he also stated in his letter to the first respondent dated 24 November 2022 and his "Determination Report" dated 1 December 2022. He further referred to this document as his "detailed reasons".

[19] According to the second respondent there are a number of offenders who suffer from what is classified by WHO as dangerous diseases and he maintains that their conditions, like that of the applicant, are managed by the Correctional Services in terms of its obligations arising from the provisions of the Act. He mentioned that some of the

² *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC).

offenders come into the correctional facility already suffering from those diseases which are classified as dangerous. He maintains that he has a discretion when acting under s 109 of the Act. He stated that, if the applicant thinks that a dangerous, infectious or contagious disease under s 109(a) of the Act should simply lead to the ticking of a box and that no application of the mind was required, that this may result in almost emptying the correctional facilities.

[20] The second respondent confirms that his test results reveal that the applicant's health has improved in the last two years, and that his condition was stable and at a manageable level. He did not find any reason to fear that the applicant's continued incarceration, whilst suffering from these diseases, would more than necessary impair his dignity or place him at risk as far as deterioration of his condition is concerned. He stated that he found no justification for him to make a recommendation as the applicant's health condition would, in his view, neither improve nor deteriorate if he were to be released.

[21] Mr Namandje, counsel for the respondents, argued that the claim for contempt of court is bad. The second respondent was ordered to make a determination and not a recommendation within 15 days. He submits that the second substantive order was that, if the second respondent determines that one or more of the disease(s) afflicting the applicant is dangerous or that the applicant's continued incarcerated is detrimental to his health on the grounds of his physical condition, then he had to make a recommendation to the first respondent in terms of s 109 of the Act within 20 days of the court order.

[22] Mr Namandje argues that whilst the World Health Organisation 'considers' diabetes and kidney disease as dangerous diseases or as some of the top leading causes of death globally, the second respondent went on to consider the question whether his continued incarceration would be detrimental to the applicant's health.

[23] He points out that the standard of proof for a civil contempt of court conviction is proof beyond reasonable doubt and since the applicant is seeking final orders, the *Plascon-Evans*³ test will be applicable. He submits in this matter, the applicant denied contempt of court and stated that he did not have the intention to disobey the court order. He stated that he acted swiftly but was unsure whether to first inform the first respondent or the applicant of the outcome of his determination. It was the second respondents' ignorance and lack of clarity as to whom he had to inform first which caused a bit of delay in providing the applicant with detailed reasons. He highlights the following statement of the second respondent:

'I understood the Court Order to require me to examine whether, with due regard to s 109(a) and (b), the applicant's health condition justifies a recommendation to the 1st Respondent to be released.'

[24] Mr Namandje argues that if the court finds that the second respondent notionally erred in his belief that he has a discretion under s 109 of the Act, that this does not mean that he is in contempt of court. He submits that the court must consider that second respondent stated he acted on the advice of counsel at the meeting of 23 November 2023. In conclusion he argued that the applicant failed to make out a case that the second respondent, beyond reasonable doubt, committed contempt of court.

Discussion

[25] The parties are *ad idem* when it comes to the legal principles to be applied in the case of civil contempt of court but differ on the application thereof. Although counsel cited different cases, I am of the view that the law in respect of civil contempt has been solidified in this jurisdiction in the *Teachers Union of Namibia v Namibia National Teachers Union and Others*⁴ where the court stated the following:

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁴ *Teachers Union of Namibia v Namibia National Teachers Union and Others* 2020 (2) NR 516 (SCA).

[11] Accordingly, the court⁵ held as follows: that the civil contempt procedure was a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny; that the respondent in such proceedings is not an accused person, but he or she is entitled to analogous protections appropriate to motion proceedings; the test for contempt of court is that an applicant must prove the elements of contempt of court beyond reasonable doubt; once the applicant has proved the order, its service or notice to the respondent as well as non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides. Should the respondent fail to advance evidence establishing a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt. A declarator and other remedies are still available to a civil applicant on a balance of probabilities.

[12]

[13] I respectfully agree that this approach did not accord sufficient protection to the alleged contemnor. The new approach that fully takes into account the reality that civil contempt has the characteristics of both the civil and the criminal law and that it should therefore be fully compliant with the constitutional provisions of a fair trial is to be preferred. The approach adopted in the majority judgment — rendered with characteristic clarity of thought and forceful reasoning — resonates with the values set out in our Constitution, and also with art 12 thereof. As such, it is a sound approach that should be followed by our courts.'

Contempt - Failure to recommend the release

[26] It is not disputed that the court granted the order and that same was served on the second respondent. There is no dispute between the parties that the second respondent made a determination that the disease(s) affecting the applicant is considered to be dangerous according to the classification by WHO. There is however a dispute between the parties whether the court ordered the second respondent to make a recommendation to the first respondent for the release of the applicant once the conclusion is reached that the applicant suffers from a dangerous disease. The applicant says that once this jurisdictional fact has been satisfied, the second respondent must recommend the release of the applicant. The second respondent's

⁵ Referring to *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) ([2006] ZASCA 52).

position is that he has a discretion whether or not to recommend the release of the applicant in terms of the provisions of s 109.

Did the applicant make a determination?

[27] The fact of the matter is that order 3 orders the second respondent 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. The second defendant in fact made such a determination as ordered by the court. He gave his determination on both whether or not the diseases affecting the applicant are dangerous diseases as well as his determination as to whether or not the applicant's continued incarceration would be detrimental to the applicant's health on the grounds of his physical condition. It must be borne in mind that the court order specifically states that the determination must be made in terms of s 109 of the Correctional Service Act 9 of 2012. There has thus been compliance with the court order that the second respondent must make a determination.

Has there been compliance with order 4

[28] The second respondent made a determination that the diseases affecting the applicant are considered to be dangerous as was required by the court but he did not make the recommendation for the applicant's release because, according to his understanding, that he had a discretion not to do so in terms of his finding in respect of s 109(b).

[29] The applicant's interpretation is, that once the second respondent made the determination that the applicant suffers from dangerous diseases he must in terms of s 109(a) recommend the release of the applicant to the first respondent or else he would be in contempt of the court order.

[30] It must once again be borne in mind that the court order 4 also reads “as contemplated in s109 of the Correctional Service Act 9 of 2012”. The second respondent clearly has a different understanding of what is required of him in terms of s 109.

[31] Not unlike the situation in the case of the *Teacher’s Union* matter, *supra*, where the court found that it was reasonable to infer that the decision not to comply with the court order was either taken on legal advice or at any rate was based on a different understanding or interpretation of the agreement. This court, in a like manner, concludes that, on the papers, the respondent refused to recommend the release of the applicant to the first respondent because he disagrees with the applicant’s interpretation of order 4 and he also acted on the advice of his legal counsel.

[32] This court is not satisfied that the applicant made out a case beyond reasonable doubt that the second respondent, by failing to recommend the release of the applicant, is in contempt of court. Whether or not the second respondent’s understanding and interpretation of the court order is correct, will be determined below.

Failure to provide reasons

[33] The second respondent admitted to having delayed in providing the “reasons” outside the timeframe provided for by the court order. The second respondent makes the averment that he understands that there was an attempt at providing the applicant with the “reasons” on 19 December 2022 and that he refused to accept it. This was not denied in the applicant’s replying affidavit. There is thus no dispute that the second respondent provided the applicant with his letter to the first respondent dated 24 November 2022 and the recommendation document of 1 December 2022 well within the 15 days as envisaged in paragraph 5 of the court order. The only issue taken by the applicant is that the recommendation document does not contain reasons why the

second respondent would not recommend his release. This issue would be considered under the grounds for review.

[34] The letter to the first respondent contains very brief reasons but they are reasons all the same. The recommendation document does not give reasons despite the fact that the second respondent refer to them as detailed reasons. It is a detailed report of the medical condition of the applicant which explains the brief reasons provided in the letter to the first respondent. The applicant, by way of correspondence, acknowledged that these two documents do not constitute a recommendation. The applicant was thus aware of the fact that the second respondent declined to recommend the applicant's release to the first respondent.

[35] It is my considered view that the applicant were notified of the fact that no recommendation was made and that the reasons were provided, albeit brief. This complies with the court's requirement that he should inform the applicant and give reasons. The applicant thus failed to make out a case for civil contempt of court in respect of order 4 and the application in this regard stands to be dismissed.

Grounds: Review Application

[36] The applicant's first ground is that the decision by the second respondent not to make a recommendation to the first respondent, is arbitrary, unreasonable, irrational, and/or caprice and an affront to the jurisdictional facts of s 109. Mr Muluti argues that the considerations which the second respondent relied on not to make the requisite recommendation to the first respondent, are not only alien but extraneous to the scope of s 109. He argues that the only consideration ought to have been those contained in s 109(a) and (b). He submitted that *in casu*, second respondent in refusing and/or failing

to make a recommendation to the first respondent, adopted means/ considerations, that are not only at odds with the power conferred on him, but also arrived at a decision which is not related to the purpose for which the power was conferred on him. He therefore arrived at an arbitrary decision, contrary to the principle of legality which is an incident of the rule of law.

[37] The second ground of review is that the second respondent failed to accord the applicant an opportunity to make representation (to be heard) before he made an adverse decision against the applicant.

[38] The third ground is that the second respondent failed and/or refused to give reasons after taking an adverse decision against the applicant.

[39] Mr Namandje argues that the applicant is not entitled to the review and the structural mandamus order he is seeking. He submits that the second respondent, being a medical officer, is entitled within the context of s 109 to determine whether or not a recommendation must be made with due regard to the provisions of s 109. He submits that to argue that there is no discretion, is untenable. He argues that the default position of the applicant is that his is lawfully detained by order of this court to be incarcerated and to serve his term of imprisonment. Mr Namandje argues that the interpretation of ss 109(a) and (b) as proposed by the applicants cannot be correct and argued that the word 'or' as it appears between ss 109(a) and (b) should be interpreted as a conjunctive and not a disjunctive.

Discussion

[40] The applicant is seeking an order that the second respondent be ordered to fully comply with order 4 of the court order granted of 14 November 2022 by making a recommendation to first respondent to authorise the release of the applicant as contemplated by s 109(a) of the Act within 3 calendar days of this order. The prayer presupposes that the second respondent did not fully comply with the order in question. It is common cause as already stated that the second respondent did not make a recommendation as he held the view that he has a discretion. The question is did he fail to comply with the court order by not recommending the release of the applicant to the first respondent. A further question is whether his decision not to recommend was arbitrary unreasonable irrational and/or caprice and an affront to the jurisdictional facts of s 109.

[41] In *Swartbooi and Another v Speaker of The National Assembly: Katjavivi*⁶ matter cited by Mr Muluti, the court states as follow:

[20] The starting point with reference to the statutory setting relevant to this appeal is the Constitution. Article 1(3) establishes at its very outset the principle of separation of powers and the supremacy of the Constitution. The legislative power is under art 44 vested in the National Assembly (to pass laws with the assent of the President and subject to the powers and functions of the National Council).

[21] Article 1 also makes it plain that the rule of law is a foundational principle of the Constitution. The doctrine of legality, which is an incident of the rule of law, means that the legislature and executive are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. [my emphasis]

[42] The starting point in this matter is s 109 of the Correctional Service Act, 9 of 2012 which reads as follow:

⁶ *Swartbooi and Another v Speaker of The National Assembly: Katjavivi* 2021 (3) NR 652 (SC).

'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 offender 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.'

[43] It is evident that the recommendation by the second respondent is a jurisdictional fact for a valid executive decision to be made by the first respondent. The second respondent is an administrative official who has a statutory duty, when making a recommendation to the first respondent, to consider those jurisdictional facts as they appear from s 109.

[44] Court order 4 directs the second respondent to determine whether the disease(s) affecting the applicant a dangerous disease. The second respondent determined that, according to the classification of WHO, the diseases are considered to be a dangerous diseases. The second respondent however clearly holds the view that reliance on this criteria alone would have far reaching effects in that it may result in emptying the correctional facility. The applicant submits that this consideration is not rationally connected to his decision and is therefore irrational.

[45] This court is of the view that the concerns expressed by the second respondent regarding the applicant's interpretation of s 109(a) is justified as it relate to whether such an interpretation is lawful. Can the second respondent lawfully rely on s 109(a) as interpreted by the applicant to make a recommendation? He consistently argued that he

could not, in good conscience, release the applicant solely on the ground that he suffers from a dangerous disease.

[46] Mr Namandje's proposal that the court ought to interpret the word "or" between ss 109(a) and (b) as conjunctive, is with respect, untenable. The clear intention of the legislature was for the s 109(a) and (b) to be disjunctive as it gives a choice of two alternative jurisdictional facts. Mr Muluti relies on a literal interpretation which, in my mind, leads to absurd results.

[47] The applicant proposes that the words 'dangerous, infectious or contagious' be interpreted as 'dangerous disease, infectious disease or contagious disease'. This sentence construction could never have been the intention of the legislature because this would mean that the Minister may authorise the release of an offender who is suffering from a common cold which is a contagious disease, on medical grounds.

[48] It would be useful to consider the development of this particular section from its inception. Section 71(a) of the Prisons Act 8 of 1959, before any of the amendments reads as follows:

'Any prisoner who is detained in any prison under sentence of court and:

- a) Who is suffering from a dangerous infectious or contagious disease; or
- b) ...
- c) ...
- d) May, on the recommendation of the medical officer, be released by the Minister either unconditionally or on probation or on parole as the Minister may direct.'

[49] Section 69 of the Correctional Services Act 8 of 1959, as amended reads as follows:

A prisoner serving any sentence in a prison –

- (a) who suffers from a dangerous, infectious or contagious disease or
- (b) ...'

[50] The identical wording can be found in s 94 of the repealed Prisons Act 17 of 1998 and the current Correctional Service Act 9 of 2012. The absurd results as proposed by the applicant have been introduced by the insertion of a simple comma between the words dangerous and infectious. The clear intent of the legislator in s 109 (a) was to make provision for the release of the offender who suffers from a dangerous infectious or a dangerous contagious disease. It could never have been the intention of the legislator to authorise the release of an offender on the medical ground for a disease which is dangerous but which could still be managed or controlled with medical treatment or for that matter, an offender who is simply suffering from an infectious or contagious disease. To hold differently would lead to absurd results. The rationale for the release on medical grounds is per the words of Jalila Jefferson-Bullock cited by Mr Muluti:

'The medical virtue of compassionate release is grounded in basic humanity, and commends that we treat dying prisoners as people, worthy of a dignified death.'

[51] The other factors such as the improvement of the applicant's health condition, and that his would not deteriorate nor improve if release are not extraneous when considering that the second respondent made a determination in terms of s109(b). This court however makes no finding in respect of the second respondent's decision not to recommend the release of the applicant in terms of s 109(b) as this was not the case before me.

The right to be heard

[52] The applicant is aggrieved by the decision of the second respondent for not making a recommendation which would have caused the first respondent to effectuate the process of authorising his release. He submits that if he had been afforded the opportunity to be heard such an outcome would have been materially different. The second respondent stated that he examined the applicant and this included a face to face consultation with the applicant and daily liaison with the applicant on his condition. He further stated that the applicant is his patient and he has been dealing with and managing his medical condition both before and after the court order of 14 November 2022. He furthermore has been privy to affidavits filed by the applicant for the purpose of making out a case as to why he should be released on medical grounds. The applicant's response hereto is that the right to be heard involves more than just face to face consultations but includes representations by his legal practitioner.

[53] The second respondent is an administrative official who was tasked by this court to make a determination within 15 days of the court order. This court is satisfied, on the papers before it, that the second respondent, whose duty it was to make a decision based on his medical expertise, properly consulted with the applicant and that the applicant was afforded the opportunity to be heard during these consultations.

Reasons not provided

[54] Mr Muluti correctly pointed out that a rational decision is one where reasons are given and it is for this very reason that the court order directed the second respondent to give reasons. He referred the court to *Member of Environmental Affairs and Tourism*

*v Rhambili Fisheries (Pty) Ltd; Minister of Environment |& Tourism v Bato Star Fishing (Pty) Ltd*⁷ were the court held as follows:

'It is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information.'

[55] I have already indicated that the second respondent is of the view that he indeed provided the applicant with reasons as per his letter to the first respondent dated 24 November 2022 and the recommendation document. Not one of these documents were addressed to the applicant but it is not denied by the applicant that he received same. The recommendation document contains the medical details and a finding that the applicant is sick but stable. It however, as correctly pointed out by Mr Muluti, does not provide the reasons for the second respondent's decision not to recommend the release of the applicant. It does however provide more information as to the following statement which appears in the letter in his letter dated 24 November 2022:

'No, for the simple reason that he has access to regular dialysis sessions and also to his private doctors when needed. His current blood results show improvement compared to the past results, which means that his incarceration does not affect his physical condition.'

[56] These are simple but explanatory reasons for the second respondent's conclusion that his continued incarceration does not affect his physical condition.

[57] I have considered the grounds upon which the applicant is seeking an order for this court to order the second respondent to properly comply with the court order by recommending the applicant's release. I am the considered view that these grounds are premised on an erroneous and absurd interpretation of s 109(a) and that the second respondent properly complied with the court order dated 24 November 2022.

⁷ *Member of Environmental Affairs and Tourism v Rhambili Fisheries (Pty) Ltd; Minister of Environment & Tourism v Bato Star Fishing (Pty) Ltd* [2003] 2 All SA 616 (SCA) 2003 6 SA (SCA) para 40.

[58] In light of this conclusion, the court cannot entertain the remaining prayers of the applicant and the entire application stands to be dismissed.

Costs.

[59] Given the fact that the applicant is legally aided, no order as to costs will be made.

[60] The following order is made:

1. The application, (Part B) is dismissed.
2. No order as to costs.

TOMMASI J

APPEARANCE

APPLICANT:

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Windhoek

RESPONDENT:

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Of Sisa Namandje Inc
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