



REPORTABLE

CASE NO: SA 130/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GEOFFREY KUPUZO MWILIMA

Appellant

and

MINISTER OF HOME AFFAIRS, IMMIGRATION,

SAFETY AND SECURITY

First

DR TONY LUMBIDI N.O.

respondent

Second respondent

**COMMISSIONER-GENERAL OF THE NAMIBIAN
CORRECTIONAL SERVICE**

Third respondent

**OFFICER IN CHARGE: WINDHOEK CORRECTIONAL
FACILITY**

Fourth respondent

CORAM: SHIVUTE CJ, SMUTS JA and FRANK AJA

Heard: 25 April 2024

Delivered: 22 May 2024

Summary: This appeal concerns the interpretation of s 109 of the Correctional Service Act 9 of 2012 (the Act). The appellant, a 68 year old Namibian male offender was sentenced to 18 years imprisonment in 2015 following a conviction of murder and high treason. He is incarcerated at the Windhoek Correctional Facility (the facility). The appellant brought an application in the High Court for review of the medical officer's decision declining to recommend the appellant's release from the facility on medical grounds. Prior to the review application, the appellant had launched an application where he sought a declarator that reg 274 of the Namibian Correctional Service Regulations made in terms of s 132 of the Act was ultra vires s 109 of the Act. This application was decided in his favour on 14 November 2022. The court in that case found reg 274 to be ultra vires s 109 read with s 132 of the Act.

Additional to this order, the court directed the following: (a) that the medical officer determine within 15 days from the date of the order whether or not the appellant was afflicted by a dangerous disease 'or whether or not [his] continued incarceration is detrimental to [his] health on the ground of his physical condition in terms of s 109 of the Correctional Service Act 9 of 2012'; (b) in the event that the medical officer determined that the appellant was suffering from one or more dangerous diseases, then the medical officer was ordered to make a recommendation to the Minister within 20 days of the order, and lastly; (c) if the medical officer declined to make a recommendation to the Minister, he was directed to so inform the appellant and provide reasons therefor within 15 days of the order.

After this order, a medical examination was conducted on the appellant by the medical officer and he confirmed the appellant's existing diagnosis of diabetes mellitus and kidney disease (both classified as 'dangerous diseases' by the World Health Organisation). A letter of this determination was delivered to the Minister on 24 November 2022. The letter further stated that the continued incarceration of the appellant was not detrimental to his health 'as he has access to regular dialysis sessions and also to his private doctors when needed. . .'. Appellant alleged that

the respondents did not comply with the 14 November 2022 order – consequently, he instituted the proceedings that ultimately culminated in this appeal.

To be determined on appeal is whether appellant's interpretation of s 109 of the Act is correct. Appellant advanced three grounds of appeal. The first is that the medical officer's refusal to recommend the appellant's release was arbitrary, unreasonable and irrational. Secondly, his right to *audi alteram partem* was violated in that he was not granted a hearing before the medical officer rendered his decision not to recommend his release; and lastly that the court a quo interpreted s 109(a) of the Act wrongly.

Appellant's argument was essentially that an offender determined to be suffering from a dangerous, infectious or contagious disease upon his committal to a correctional facility must be recommended and authorised for release on medical grounds irrespective of the facilities that may be available in the Correctional Service system to manage their condition. The appellant urged the court to set aside the medical officer's decision and direct the Minister to authorise the appellant's release.

The respondents contended that the interpretation of s 109 advanced by the appellant would lead to unreasonable and absurd results. The respondents supported the court a quo's judgment and contended that the appellant had not made out a case for the reviewing and setting aside of the medical officer's decision.

Held that, the release of an offender from a correctional facility on medical grounds can be justified for several reasons. Those addressing humanitarian concerns; the foundational constitutional value of dignity of a human being (ie in cases of terminally ill offenders requiring specialised or palliative medical care not available in the correctional facilities) and those aimed at preventing the spread of infectious diseases within the overcrowded prison environment – protecting both the members of the correctional service and the incarcerated population.

Held that, in interpreting legislation, a court must pay attention to both the language and context of the legislation or document in question. In the context of this case, it can safely be assumed that the legislator could never have intended to produce a result that an offender suffering from a dangerous, infectious or contagious disease should potentially not serve his or her sentence. To give the provision this meaning as contended for by the appellant, would simply undermine the correctional service regime and to that extent would be absurd.

Held that, the word 'or' between the two paragraphs should be read to mean 'and'. This is a sensible approach that would not render the meaning of the provision absurd.

Held that, the High Court erred when it found that s 109(a) should be understood to mean an offender 'who is suffering from a dangerous infectious disease or a dangerous contagious disease'. The phrase 'dangerous, infectious or contagious disease' as contained in s 109 of the Act is clear and requires no interpretation. The reasoning behind the court a quo's interpretation is not understood and this Court finds that that interpretation is not supported by the language or context of the provision.

Held that, there are no valid grounds for this Court to review the medical officer's decision.

Held that, the principles of natural justice do not require an administrative body to hold trial-type hearings when these are not prescribed by statute. What is required is that the administrative agency should act fairly in affording the affected individual a fair hearing. This Court finds that there was no arbitrariness, capriciousness, unreasonableness or irrationality about the medical officer's determination. If the appellant had any representations to make to the medical officer, that opportunity existed during the medical examination.

Held that, a recommendation by the medical officer is a pre-condition for the Minister to exercise the power conferred on him by statute. The facts of the cases

from a foreign jurisdiction relied upon by the appellant are distinguishable from the facts of this matter.

Held that, the Court could not make an order of substitution, because the Minister had not decided whether or not to authorise the appellant's release, rightly so because he was not furnished with a recommendation by the medical officer as required by law.

The appeal is dismissed.

APPEAL JUDGMENT

SHIVUTE CJ (SMUTS JA and FRANK AJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the High Court dismissing the appellant's application for review of the second respondent's decision declining to recommend the appellant's release from a correctional facility on medical grounds. The appeal principally concerns the interpretation of s 109 of the Correctional Service Act 9 of 2012 (the Act). The appellant is a 68 year old Namibian male offender incarcerated at the Windhoek Correctional Facility (the facility). Having been convicted of serious crimes including murder and high treason, he was sentenced to an effective 18 years imprisonment on 8 December 2015 prior to lodging an appeal to this Court, in which appeal an effective 15 years imprisonment was imposed on him on 22 December 2021.

[2] The first respondent is the Minister responsible for Correctional Service (the Minister). The second respondent is a medical practitioner appointed or assigned as a medical officer at the facility (the medical officer). The third respondent is the Commissioner-General of the Namibian Correctional Service (the Commissioner-General). The fourth respondent is the Officer in charge of the facility (the Officer in charge).

Background

[3] Before commencing the proceedings that led to the current appeal, the appellant had initiated a separate application in which all the respondents were cited as parties. In that application, the appellant sought a declarator that reg 274 of the Namibian Correctional Service Regulations made in terms of s 132 of the Act was ultra vires s 109 of the Act.

[4] Paraphrased, the elaborate regulation provided that an offender may be recommended for release on medical grounds – if he or she was suffering from a dangerous disease in respect of which the medical officer had certified that the disease would lead to the offender's death if he or she was not immediately released, or if the offender was suffering from an infectious or contagious disease for which the medical officer had certified that the spread thereof could not be prevented in any way other than the offender's release, or if the offender was certified by the medical officer to have been 'totally blind or crippled to such an extent that his or her continued incarceration is detrimental to his or her health'.

[5] The application was decided in the appellant's favour on 14 November 2022. The differently constituted court held that the regulation was ultra vires s 109 read with s 132 of the Act.¹ Additional to the order declaring the regulation ultra vires, the court made the following three consequential orders.

[6] First, the medical officer was ordered to determine within 15 days from the date of the order whether or not the appellant was afflicted by a dangerous disease, 'or whether or not [his] continued incarceration is detrimental to [his] health on the ground of his physical condition in terms of s 109 of the Correctional Service Act 9 of 2012'.

[7] Secondly, in the event that the medical officer had determined that one or more of the diseases the appellant was suffering from was a dangerous disease, 'or that [his] continued incarceration [was] detrimental to his health on the ground of his physical condition . . .', then the medical officer was ordered to make a recommendation to the Minister within 20 days of the order.

[8] Lastly, if the medical officer declined to make a recommendation to the Minister, he was directed to so inform the appellant and provide reasons therefor within 15 days of the order.

[9] The judgment and order of 14 November 2022 has not been appealed against. The appellant alleged that the respondents did not comply with that order,

¹ The judgment is reported as *Mwilima v Minister of Home Affairs, Immigration and Safety and Security & others* 2022 (4) 933 (HC).

hence the institution of the proceedings that ultimately culminated in the instant appeal.

[10] In the proceedings giving rise to the appeal, the appellant brought a two-pronged application on notice of motion in the High Court. In Part A, he sought an interim mandatory interdict, on an urgent basis, pending the determination of Part B of the application, directing the Minister to authorise the appellant's release from the correctional facility on the ground that the appellant was suffering from a dangerous disease as contemplated in s 109 of the Act and as diagnosed by the medical officer.

[11] In Part B, the appellant sought to review and set aside the Minister's decision refusing – as perceived by the appellant – and/or failing to release the appellant on medical grounds as allegedly recommended by the medical officer. As an alternative relief in Part B, the appellant sought, amongst others, orders holding the medical officer in contempt of court and directing him to recommend to the Minister the appellant's release as well as to give reasons why he did not recommend the appellant's release should he have declined to make such a recommendation.

[12] This prayer was predicated upon the appellant's understanding that the medical officer was bound, without more, to recommend the appellant's release once he had determined that the appellant was suffering from a dangerous disease. The alleged failure to provide a recommendation served as the basis for the prayer for contempt of court.

[13] Part A of the appellant's application was dismissed. The court held that the Minister may authorise the release of an offender in terms of s 109 only on the recommendation by a medical officer. The court noted that it was common cause between the parties that the medical officer had not made a recommendation to the Minister for the appellant's release.

[14] It held further that the granting of a mandatory interim order in circumstances where there had not been a recommendation would have had the effect of compelling the Minister to act without the requisite authority in terms of the Act, which ordinarily would make such a decision a nullity in accordance with the principles set out in *Sikunda*.² The appellant has not appealed against this judgment or order. On the contrary, it was positively asserted in the heads of argument that the decision was accepted without demur.

[15] Subsequent to the dismissal of Part A of the application, the appellant proceeded to amend Part B thereof by ensuring that only the medical officer's decision was sought to be impugned. Accordingly, the appellant sought an order embodying the following prayers: declaring the medical officer to be in contempt of court of the order made on 14 November 2022 for declining to recommend the appellant's release, and for refusing to give the appellant reasons for his decision; for the medical officer to be convicted of contempt of court; for the medical officer to be directed to recommend to the Minister for the appellant's release; for the issuance of a warrant for the medical officer's arrest and committal to

² *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC).

imprisonment for contempt of court until he had made the recommendation to the Minister, and for the Minister to be directed to authorise the appellant's release within four calendar days.

The parties' respective positions

The appellant's case

[16] The appellant's case essentially was that after the order of 14 November 2022 was made, he was not informed whether or not a recommendation for his release had been made. A letter addressed to the Minister by the medical officer, dated 24 November 2022, in which the medical officer determined the appellant's medical conditions but did not recommend his release was later delivered to the appellant. The appellant says he was not informed of the reasons why a recommendation for his release was not made either. He was asked by the Officer in charge to accept delivery of a document dated 1 December 2022, an offer he declined.

[17] A minor digression is called for here to note that the document the appellant refused to accept delivery of contained what the medical officer referred to as his 'detailed reasons' for the decision he made pursuant to the court order of 14 November 2022.

[18] Concluding now the presentation of the summary of the appellant's case during the review proceedings, the appellant stated that he sought to have the medical officer's decision reviewed on the grounds that it was arbitrary, unreasonable, irrational and/or capricious. He also sought the decision impugned on the grounds that the medical officer failed to give him an opportunity to make

representations before he could take a decision adverse to him and for the failure to give reasons for his decision.

The medical officer's position

[19] The medical officer denied disobeying the court order and insisted that he acted swiftly to comply with it. He explained that the delay in informing the appellant of his decision was caused by uncertainty on his part as to who between the Minister and the appellant should be informed of his decision first.

[20] He stated that after the delivery of the court order of 14 November 2022, a meeting was held at the Minister's offices where it was agreed that the court order must be implemented. Following that meeting, he proceeded to medically examine the appellant. He confirmed the existing diagnosis that the appellant was suffering from diabetes mellitus and a kidney disease, both of which were 'dangerous diseases' according to the World Health Organisation classification.

[21] He informed the Minister of his determination in a letter dated 24 November 2022. In that letter, the medical officer recorded that the appellant was suffering from a dangerous disease as per the wording of s 109(a). The paragraph containing that determination was followed by the paragraph with a heading in the form of a question, namely '*Would the continued incarceration be detrimental to Mwilima's health?*' The answer given was in the negative and the medical officer briefly motivated his opinion 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 the past results, which means that his incarceration does not affect his physical condition.'

[22] The medical officer alleged that 'a considerable number' of offenders at the Windhoek Correctional Facility and other facilities in the country suffered from the type of diseases the appellant was diagnosed with and that they receive decent health treatment and care. In the Windhoek Correctional Facility alone, 65 offenders lived with what would be classified as dangerous diseases, which represented 6.5 per cent of the offenders' population at the facility. The offenders' health conditions were managed by the Correctional Service in terms of obligations arising from the Act.

[23] The medical officer explained his understanding of the court order of 14 November 2022 and what he did to comply with it as follows: He understood the order to require of him to examine the appellant and with due regard to s 109(a) and (b) determine whether the appellant's health condition justified the making of a recommendation for his release on medical grounds. Upon examining the appellant, the medical officer found that the appellant had improved in the last two years; his condition was stable and manageable.

[24] The medical officer did not find reason to believe that the appellant's continued incarceration would more than necessarily impair his dignity or place him at greater risk than he was in already. He found that in the context of a need for medical release, there was no justification to make the recommendation as the

appellant's health condition would neither improve nor deteriorate if he were to be released. In arriving at that conclusion, the medical officer stated that he also considered the available facilities to cater to the appellant's needs and the medical assistance rendered to him.

[25] As to the suggestion by the appellant that the medical officer had no discretion but to recommend the appellant's release once he found that the appellant was suffering from a dangerous disease, the medical officer retorted that s 109(a) could not be applied simply by the ticking of a box requiring no application of the mind. Such an approach, he contended, would empty correctional facilities as a number of offenders were suffering from what were considered to be dangerous diseases.

[26] What the medical officer considered to be the detailed reasons for his decision is a three and half page long document containing detailed results of the appellant's medical examination. In summary, the document gave the appellant's past medical and surgical history. It revealed that apart from suffering from type 2 diabetes mellitus and chronic kidney failure which had worsened into End Stage Kidney Disease, he also had hypertension. He was taken three times a week for haemodialysis at an outside hospital. He suffered a hypercholesterolemia, which was however under control. His medical condition was characterised by general body weakness, mostly after haemodialysis, lower back pain, weakness of legs and occasional shaking as well as swollen legs around the ankles.

[27] The document also records improvements made by the patient and deteriorations. On the improvement side, the epileptic attacks that he previously experienced no longer occurred; the blood pressure readings were within normal range and occasionally on the lower side; the blood sugar levels had remained within the normal limits for the past two years at the time of the examination; cholesterol was within the normal ranges; the liver function had normalised for the past year and the kidney function had improved at the time of the examination.

[28] On the deterioration side, the number of the dialysis sessions had increased from two to three times weekly with the concomitant shaking of lower limbs experienced, especially after the dialysis sessions. The medical officer quoted from an American academic text book for the prognosis that 'people with advanced kidney disease who undergo maintenance kidney dialysis have limited life expectancy' and relied on another author for the proposition that 'according to researchers, 60 per cent of patients undergoing in-centre dialysis in the United States of America died within 5 years, 19 per cent died within 5 to 10 years and 20.9 per cent lived more than 10 years'.

[29] The medical officer did not, however, apply this general prognosis to the appellant's circumstances. The prognosis he made of the appellant was recorded in the report as 'sick but stable'.

Court a quo's reasoning

[30] In dismissing the application, the High Court considered the meaning of s 109. It reasoned that the intention of the Legislature was for s 109(a) and (b) to be

disjunctive as it gave a choice of two alternative jurisdictional facts: the suffering from a dangerous, infectious or contagious disease; or a physical condition which makes an offender's continued incarceration detrimental to his or her health. The court noted that the appellant's understanding of the meaning of the section was a literal interpretation which could lead to absurd results.

[31] The court observed that the clear intent of the legislator in enacting 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 medical grounds 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, so concluded the court a quo's reasoning on this aspect.

[32] On the question of the *audi alteram partem* ('hear the other side') rule, the court below held that the appellant was afforded the opportunity to be heard during consultations with the medical officer.

[33] The court observed that the reasons for refusing to recommend the appellant's release were given in the letter dated 24 November 2022, addressed to the Minister. The court described the reasons stated therein as simple but sufficient explanation for the conclusion that the appellant's continued incarceration did not affect his physical condition. The court thus found that the

medical officer had properly complied with the court order of 14 November 2022 and that there could be no basis for impugning his decision.

Grounds of appeal and submissions of the parties

The appellant

[34] The appellant advanced three grounds of appeal. The first is that the medical officer's refusal – as he perceived it – to recommend the appellant's release was arbitrary, unreasonable and irrational. It was submitted in this regard – persisting in the argument advanced in Part A of the application in the High Court – that once the medical officer had determined that the appellant was suffering from a dangerous disease, the medical officer had no discretion but to make a recommendation to the Minister for the latter to authorise the appellant's release.

[35] It was further argued that the medical officer's refusal to recommend the appellant's release after having determined that he was suffering from dangerous diseases was irrational as it was premised on an irrelevant consideration that the interpretation of s 109 contended for by the appellant would empty correctional facilities of offenders suffering from dangerous diseases. The failure to make a recommendation had breached the appellant's right to be released on medical grounds and violated his right to dignity in terms of Art 8 of the Constitution.

[36] The decision was argued to be unreasonable on the ground that a reasonable decision-maker, having determined that the appellant was suffering from two dangerous diseases, could not have declined to recommend his release.

The appellant argued furthermore in this regard that the letter from the Officer in charge addressed to the Minister 'without an iota of doubt' was a recommendation for the appellant's release, but that due to political interference owing to the offence the appellant had been convicted of, his release was obstructed by the Minister.

[37] On the second ground of the alleged violation of his right to *audi* or a hearing before the medical officer rendered his decision not to recommend the appellant's release, it was argued that the court a quo erred in holding that the consultation between the doctor and the patient sufficed for the purpose of fulfilling the function of *audi alteram partem* rule. The medical officer was under a duty before authoring the letter to the Minister, to invite the appellant to make representations to him on the decision he intended taking.

[38] On the court's interpretation of s 109(a) to the effect that the section should be interpreted to mean 'a dangerous infectious or a dangerous contagious disease', the appellant submitted that such interpretation was not argued by the parties and that argument on the section was confined to the question whether or not the word 'or' between paragraphs (a) and (b) of s 109 was conjunctive or disjunctive. The appellant's legal practitioner thus criticised the court a quo for allegedly not only interpreting the section on a basis not canvassed with the parties, but also for interpreting it wrongly.

[39] The appellant argued that the effect of the court a quo's interpretation was that because the appellant was not found to be suffering from 'a dangerous

infectious disease or a dangerous contagious disease', then he was not eligible for release in terms of s 109(a), for the reason that although the diseases he had been diagnosed with were dangerous, they were not infectious. The appellant contended that in interpreting the section in that manner, the court usurped the Legislature's powers and as such its decision should be set aside on this basis.

[40] Regarding the alleged failure to give reasons for the decision, the appellant argued that the court a quo misdirected itself in finding that the medical officer provided reasons for his refusal to recommend the appellant's release as such alleged reasons were not apparent from the documents admitted in evidence.

[41] The appellant's legal practitioner finally urged this Court to set aside the medical officer's decision and direct the Minister to authorise the appellant's release. He argued that there were compelling and exceptional circumstances warranting such a course of action: the appellant was a geriatric afflicted by multiple comorbidities, some of which were life-threatening. We were referred to decided cases of certain South African courts where courts in that jurisdiction ordered functionaries to release offenders. These cases will be considered later in this judgment. Having summarised the appellant's arguments, it remains to briefly consider those made on behalf of the respondents.

Respondents

[42] The respondents eschew the interpretation of s 109 contended for by the appellant. They argue that such interpretation would lead to unreasonable and absurd results. They contend that it was not sufficient to simply tick off that an

offender was suffering from a dangerous disease then recommend his or her release on medical grounds. It was submitted that it is unfortunate that there is a disjunctive 'or' – as opposed to a conjunctive 'and' – between paragraphs (a) and (b) of s 109, because in considering whether or not to recommend an offender's release, it is required to also consider whether the offender's continued incarceration would be detrimental to his or her health.

[43] In a nutshell, the respondents supported the judgment of the court a quo and contended that the appellant had not made out a case for the review of the medical officer's decision.

Disposition

Release of an offender on medical grounds

[44] In general, the release of an offender from a correctional facility on medical grounds can be justified for several reasons. Primarily, it addresses humanitarian concerns and the foundational constitutional value of dignity of a human being, particularly in the case of terminally ill patients who require specialised medical care that may not be adequately provided within the correctional service system. By allowing them to receive palliative care in a more appropriate setting, their remaining time can be spent with dignity, and potentially in the company of loved ones. This not only benefits the offender but also reduces the moral and financial burden on the correctional facilities system.

[45] Furthermore, such a release can help prevent the spread of infectious diseases within the overcrowded prison environment, protecting both the members

of the correctional service and the incarcerated population. It is also worth noting that releasing medically frail offenders who no longer pose a significant threat to public safety can lead to more effective allocation of resources towards offenders who may require greater security measures.

Section 109 of the Act

[46] The Act makes provision for the early release of an offender from a correctional facility on medical grounds. Section 109 is the relevant provision. It is to be found in Part XIII of the Act dealing with the release of offenders. It provides as follows:

‘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.’

[47] A closer examination of the section shows that its apparent purpose is to facilitate the release of an offender who meets the jurisdictional facts set in the section. The section says that the Minister may – meaning in the context that the Minister has discretion, which of course is not unfettered – to authorise the release

from the correctional facility an offender serving any sentence. The use of 'any sentence' implies that the release of an offender is not confined to a particular sentence the offender is serving. Furthermore, the Minister may not authorise the release of an offender in terms of this section at his own discretion.

[48] First, there must be a recommendation made by a medical officer, and secondly the Minister may release the offender after consultation with the Commissioner-General. An offender who may be released on medical grounds under this section is one suffering from a dangerous, infectious or contagious disease and whose continued incarceration is detrimental to his or her health on the basis of the offender's physical condition. Moreover, the Minister may release the offender unconditionally or on such conditions as to parole or probation or as to special treatment as the Minister may determine.

[49] The thrust of the appellant's case is that a finding by a medical officer that an offender is suffering from a dangerous disease in paragraph (a) of s 109 is a sufficient trigger for an obligation on the part of the Minister to consult the Commissioner-General and authorise the release of such offender. According to the appellant, the use of the disjunctive 'or' between the two paragraphs shows that each paragraph constitutes distinct legal bases upon which a recommendation could be made. Therefore, so the argument goes, once the medical officer has determined that an offender is suffering from a dangerous disease, he or she is not required to further consider whether or not the continued incarceration of the offender will be detrimental to his health. The crisp question is whether or not this interpretation is tenable.

The context and the subject matter of the legislation

[50] Interpretation is an art of giving meaning to words contained in a document or legislation. A document or legislation may call for interpretation because the provision or phrase in question is obscure or ambiguous. In interpreting legislation, a court must pay attention to both the language and context of the legislation or document in question.³

[51] The provision calling for interpretation is contained in an expansive Act regulating correctional facilities, including the admission of sentenced offenders to those facilities and their release therefrom. In the context of the present appeal, it must surely have been in the contemplation of the law-giver that an offender may be committed to a correctional facility to serve his or her sentence while suffering from a dangerous disease or that he or she may contract such disease while in the correctional facility.

[52] If the interpretation contended for the appellant is to be adopted, it would mean for example, that an offender determined to be suffering from a dangerous, infectious or contagious disease upon his committal to a correctional facility on his day of sentence must be recommended and authorised for release on medical grounds, irrespective of the facilities that may be available in the Correctional Service system to manage his or her condition. It would also mean, that an offender suffering from Influenza (Flu) or the Coronavirus disease (COVID-19) must likewise be recommended for release on medical grounds. Both conditions

³ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC) paras 18 and 23.

are contagious respiratory illnesses that are caused by different viruses⁴ and are also classified as infectious respiratory viral infections.⁵

[53] The appellant's argument that the criteria set in paras (a) and (b) of s 109 contain distinctive legal bases is predicated upon the use of the disjunctive 'or' between the two paragraphs.

[54] It is a notorious fact that occasionally the Legislature unfortunately uses the words 'and' and 'or' in legislation inaccurately and law reports are littered with dicta in which one of those words was held to be the equivalent of the other.⁶ Whether or not the words are used inaccurately depends on the context and subject matter of the provision.⁷ It would appear to be the position that the disjunctive 'or' between the two paragraphs in s 109 was used inaccurately.

[55] In the context, it can safely be assumed that the legislator could never have intended to produce a result that an offender suffering from a dangerous, infectious or contagious disease should potentially not serve his or her sentence. To give the provision this meaning, contended for by the appellant, would simply undermine the correctional service regime and to that extent would be absurd.

[56] To avoid such result, the word 'or' between the two paragraphs should be read to mean 'and'. This is a sensible approach that would not render the meaning of the provision absurd. It follows that in considering whether or not to recommend

⁴ [https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm#:~:text=Influenza%20\(flu\)%20and%20COVID%2D19%20are%20both%20contagious%20respiratory,spreads%20more%20easily%20than%20flu.](https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm#:~:text=Influenza%20(flu)%20and%20COVID%2D19%20are%20both%20contagious%20respiratory,spreads%20more%20easily%20than%20flu.) (Accessed 16 May 2024).

⁵ <https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-similarities-and-differences-with-influenza.> (Accessed 16 May 2024).

⁶ *Barlin v Licensing Court for the Cape* 1924 AD 472 at 478.

⁷ *Id.*

an offender's release on medical grounds, additional to determining whether the offender is suffering from a dangerous, infectious or contagious disease, it is required of the medical officer to further enquire and determine whether or not the continued incarceration in the circumstances will be detrimental to the offender's health.

[57] This is how the medical officer appears to have approached the section. His approach in that regard was correct and his decision cannot be impugned on the basis of the interpretation that simply would have an unintended consequence of undermining the sentencing and imprisonment regime in the country. The court below was correct in rejecting the argument.

[58] The High Court, however, erred in holding that s 109(a) should be understood to mean an offender 'who is suffering from a dangerous infectious disease or a dangerous contagious disease'. The reasoning behind this interpretation is not understood and certainly such interpretation is not supported by the text or context of the provision. The phrase 'dangerous, infectious or contagious disease' in s 109(a) is in itself clear and requires no interpretation. It remains to consider and decide the review application next.

Review application

[59] The appellant has not raised any valid ground for the review of the medical officer's decision. There is no arbitrariness, capriciousness, unreasonableness or irrationality about the decision. Viewed objectively, all considerations relevant to the decision appear to have been taken into account by the decision-maker. The

decision was based on the full medical examination of the appellant, the consideration of relevant facts and the requirements of the law. A full and detailed record of the appellant's examination was produced. Reasons for the decision were given albeit in brief. Although the reasons were brief, they should be read in the overall context of the content of the detailed report compiled by the medical officer.

[60] The ground based on the *audi alteram partem* rule cannot succeed either. The principles of natural justice upon which the *audi alteram partem* rule is based are flexible.⁸ The reason for this flexibility was explained by Baxter as follows:

'The range and variety of situations to which they apply is extensive. If the principles are to serve efficiently the purposes for which they exist, it would be counterproductive to attempt to prescribe rigidly the form which the principles should take in all cases.'⁹

[61] The principles of natural justice do not require an administrative body to hold trial-type hearings when these are not prescribed by statute. What is required is that the administrative agency should act fairly in affording the affected individual a fair hearing.¹⁰

[62] The appellant must have been aware of the existence of the court order requiring the medical officer to make a determination as to the appellant's health and to make a recommendation in the event that he made certain findings. He must have been aware of the purpose for the examination he was subjected to by

⁸ L Baxter *Administrative Law* (1989) at 541.

⁹ *Ibid.*

¹⁰ *Administrative Law* at 543.

the medical officer. Depending on the outcome of the examination of the appellant, the medical officer could have decided either to make a recommendation to the Minister for the appellant's release or not to make one.

[63] If the appellant had any representations to make to the medical officer, the opportunity to do so existed during the examination. It is in any event difficult to comprehend what representations he could conceivably make in the circumstances, but this of course is beside the point. The point is that the opportunity for a hearing presented itself to make any representation considered or advised necessary.

[64] The considerations the medical officer relied on not to make the requisite recommendation to the Minister were not extraneous the scope of s 109. The purpose for which the power was conferred on the medical officer was to recommend the appellant's release if he was suffering from, amongst others, a dangerous disease and if his continued incarceration would be detrimental to his health.

[65] The medical officer may be criticised for adopting passages from text books about the prognosis of patients suffering from diseases such as those the appellant is suffering from in the United States, without applying the principles extracted from the literature to the circumstances of the appellant or at any rate without indicating the extent, if any, to which those findings were of application to the appellant's condition.

[66] On the other hand, the appellant on his part did not put up any material facts about the extent to which continued incarceration would be detrimental to his health. The paucity of evidence or material gainsaying the medical officer's findings and reasons is surprising to say the least in a case of this magnitude.

[67] The findings so far made should have disposed of the appeal, but because the appellant forcefully and persistently urged this Court to direct the Minister to authorise the appellant's release, it is necessary to deal with the appellant's grounds of appeal and certain contentions in exhaustive detail. The argument based on substitution will be considered next.

Should the court order the Minister to authorise appellant's release?

[68] As earlier noted, the appellant has urged this Court to order the Minister to authorise his release. For this proposition the appellant relied on decisions of South African courts in *Walus*¹¹ and *Derby-Lewis*.¹² It is noted that both cases concerned the review of the Minister's refusal to release the applicants on parole despite the recommendations made by the Parole Board that the applicants be placed on parole.

[69] The existence of a recommendation for the applicants' release in those cases is a significant feature distinguishing the facts in those cases from the facts in this matter. As previously mentioned, a recommendation by the medical officer is a pre-condition to the exercise of the power conferred on the Minister by statute in this case. The Minister has not decided whether or not to authorise the

¹¹ *Walus v Minister of Justice and Correctional Services & others* 2023 (1) SACR 447 (CC).

¹² *Derby-Lewis v Minister of Justice and Correctional Services & others* 2015 (2) SACR 412 (GP).

appellant's release, rightly so because he was not furnished with a recommendation by the medical officer as required by law.

[70] While it is true that in exceptional circumstances, instead of remitting a matter to the relevant functionary for decision, a court may instead substitute its decision for that of the administrative body, no proper case has been made out for the exercise of this discretion in this appeal. It is therefore not necessary to set out what those exceptional circumstances are and to decide whether such circumstances exist in this case to justify the grant of an order of substitution.

[71] As previously noted, the medical officer's decision cannot be impugned on any of the grounds contended for by the appellant and there is no medical or other evidence gainsaying the evidence or material presented by the medical officer. Moreover, this Court is not in as good a position as the medical officer to recommend the appellant's release.

Conclusion

[72] The appellant's case for review was inept; the interpretation of s 109 proffered by him is untenable for the reasons already given. Some of the submissions and contentions were evidently mistaken or misplaced. A prime example of a mistaken submission is a letter addressed to the Minister by the Officer in charge of the facility conveying the report on the appellant's medical examination. The Officer in charge described the report as 'recommendation'. The appellant argued strenuously that because of the label placed by the Officer in charge on the report, such report in fact constituted a recommendation for his

release, which was ultimately suppressed by the Minister through political interference given the nature of the crimes the appellant had been convicted of. A close reading of the report shows that it contained no recommendation at all. The submission, therefore, appears to have been based on sheer conspiracy theory as opposed to fact. For all the reasons given hereinbefore, the appeal cannot succeed.

Costs

[73] The appeal was argued by a legal practitioner appointed by the Directorate of Legal Aid who also represented the appellant in the High Court. He has not sought costs. The respondents have also not asked for a costs order should the appeal fail. In the circumstances, no order as to costs should be made.

Order

[74] In the premise, the following order is made:

- (a) The appeal is dismissed.
- (b) No order as to costs is made.

SHIVUTE CJ

SMUTS JA

FRANK AJA

APPEARANCES

APPELLANT:

P S Muluti

Instructed by Legal Aid

RESPONDENTS:

S Namandje

Instructed by Government Attorney