

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: LUBOYA MULENDA ELIYA vs NAMIBIAN CORRECTIONAL SERVICE COMMISSIONER GENERAL : RAPHAEL TUHAFENI HAMUNYELA	Case No: HC-MD-CIV-MOT-GEN-2018/00045 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE CLAASEN, ACTING JUDGE	Date of hearing: 16 JANUARY 2019
	Delivered on: 24 JANUARY 2019
Neutral citation: <i>Eliya v Namibian Correctional Service Commissioner General : Raphael Tuhafeni Hamunyela</i> (HC-MD-CIV-MOT-GEN-2018/00045) [2019] NAHCMD 8 (24 January 2019)	
Results on merits: Heard on merits.	
The order: Having heard Mr Eliya , in person and Mr Khupe , for the respondents, and having read the documents filed of record: IT IS ORDERED THAT: 1. The application by the applicant for the relief sought in the notice of motion is hereby dismissed. 2. There is no order as to costs. 3. The matter is removed from the roll and is considered as finalised.	
Reasons for orders:	
[1] Mr. Eliya approached the court in pursuit of his liberty, as he was serving a fifteen year imprisonment term at the Windhoek Correctional Facility, which sentence was imposed on 24 June 2008. [2] The applicant claimed orders for his release on full probation within 30 days upon finalization of this matter and that the Namibia Correctional Facilities comply with Section 95 of the Prisons Act 1998 and release other inmates without hesitation.	

[3] It was common cause that the Prisons Act 17 of 1998 was the legislation that governed parole at the time of his incarceration. The issue in question was whether the applicant was entitled to be considered for parole in terms of the 1998 Act.

[4] The applicant asserted that according to section 95(1) of the 1998 Act he should have been released on parole on 24 December 2015 as by that date he had served half of his imprisonment term. He placed emphasis on the *Kamahene*¹ judgment and argued that by opposing this application and by the refusal of parole, the authorities were in breach of the *Kamahene* order.

[5] The respondents argued that the 1998 Act afforded no parole to the applicant at all. This was attributable to a provision under the aforesaid Act which has the effect of depriving certain serving inmates from being considered for parole.

[6] In turning to the parole regime under the Prisons Act 17 of 1998, Section 95(1) essentially states that offenders whose sentences are in excess of 3 years may be released on parole once they have served half of the term and has satisfied certain stipulated institutional requirements as to responsible conduct and discipline.

[7] The stipulation in paragraph 6 is not the only provision governing probation in the 1998 Act. Evidently section 97 in the same Act also applies, as its entitled 'further matters pertaining to parole or probation'. Section 97(8) of Act 17 of 1998 amongst others provides that a prisoner, who has, after the said commencement committed an offense and has been sentenced to a term of imprisonment for certain offenses shall not be eligible for parole or probation.

[8] The date of commencement of Act 17 of 1998 was 15 August 1999. According to the applicant he committed the offense of rape on 6 October 2005 and was sentenced on 24 June 2008 for that. Rape is one of the offenses listed in section 92(2)(c) of the Act, effectively taking him out of the zone of being considered for parole in terms of the 1998 Act.

[9] The *Kamahene* judgment does not support the applicant's argument as it was concerned with offenders serving sentences of life imprisonment and when they may be eligible for parole. The applicant did not face a term of life imprisonment and the 1998 Act afforded him no parole by virtue of section 97(8) and section 92(2)(c).


[10] The respondents did not argue any of their points *in limine*, and the court regards them as abandoned.

¹ *Kamahere v Government of the Republic of Namibia* (SA 64-2014)[2016] NASC (19 August 2016)

[11] Incidentally the order the applicant sought in terms of his own release on probation, has become academic. It had been so on the hearing date of 16 January 2019 as Mr. Eliya had been released on full remission during the month of December 2018. He opted to continue with his case, nonetheless, arguing that there is difference between parole and remission and it appears his preference was parole in terms of the 1998 Act.

[12] As far as the relief prayed for by the applicant in respect of the other inmates, the applicant had no proof that he had authority to seek relief for other prisoners too.

[13] For these reasons the application is dismissed. No cost order is made.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Mr Eliya In-person	Mr Khupe of <i>The Government Attorneys, Windhoek</i>