



REPORTABLE

CASE NO: SA 64/2024

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THOMAS ADOLF FLORIN

Appellant

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Second Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL

Third Respondent

MINISTER OF HOME AFFAIRS, IMMIGRATION,

SAFETY & SECURITY

Fourth Respondent

COMMISSIONER-GENERAL OF THE NAMIBIA

CORRECTIONAL SERVICE

Fifth Respondent

HEAD OF WINDHOEK CORRECTIONAL

FACILITY

Sixth Respondent

NATIONAL RELEASE BOARD OF THE NAMIBIA

CORRECTIONAL SERVICE

Seventh Respondent

INSTITUTIONAL RELEASE COMMITTEE

Eighth Respondent

CASE MANAGEMENT OFFICER ASSIGNED TO

THE APPLICANT

Ninth Respondent

UNIT MANAGER: UNIT 3 AT WINDHOEK

CORRECTIONAL FACILITY

Tenth Respondent

THE PRESIDENT OF THE REPUBLIC OF

NAMIBIA
MINISTER OF JUSTICE

Eleventh Respondent
Twelfth Respondent

Coram: SMUTS AJA, FRANK AJA and SCHIMMING-CHASE AJA
Heard: 5 March 2025
Delivered: 31 March 2025

Summary: Mr Thomas Adolf Florin (appellant), was convicted of murder and other offences on 2 December 1999 for crimes committed on 2 June 1998. The appellant, a German national, was sentenced to life imprisonment, with a recommendation that he not be considered for parole before serving 15 years of his sentence. Although the offences were committed when the Prisons Act 8 of 1959 (the 1959 Act) was in force, he was sentenced under the Prisons Act 17 of 1998 (the 1998 Act), which was subsequently repealed by the Correctional Service Act 9 of 2012 (the 2012 Act). The 1959 Act provided for parole consideration after 10 years, whereas the 2012 Act prescribes a minimum period of 25 years before parole eligibility.

The appellant previously (in 2014) challenged the parole regime in *Kamahere & others v Government of Namibia & others* 2016 (4) NR 919 (SC), arguing that the 1959 Act should govern the serving of his sentence and qualification of parole. In that case the appellants sought a declaration that their parole eligibility should be determined under the Prisons Act 8 of 1959 rather than subsequent legislation. They challenged the applicability of the Correctional Service Act 9 of 2012, arguing that their parole rights were governed by the 1959 Act, which provided for earlier parole eligibility.

The Supreme Court dismissed their appeal, holding that the repeal of the 1959 Act by the 1998 Act also repealed its subordinate legislation. The Court found that the 1998 Act contained no provision for parole eligibility for life sentences, creating a

legislative void. This void was later addressed by the 2012 Act, which introduced s 117, setting a minimum parole eligibility period of 25 years. The Court ruled that s 117 applied to all life-sentenced offenders, including those sentenced under the 1998 Act, as indicated by the use of the past participle 'has been' in the provision. Consequently, the appellants, including the present appellant, would only become eligible for parole after serving 25 years, as prescribed by the 2012 Act.

Despite the judgment in *Kamahere*, the appellant again sought declaratory and review relief in the present proceedings, arguing that his life sentence falls under the Prisons Act 8 of 1959, not the Correctional Service Act 9 of 2012. He contended that the National Release Board's policy of denying full parole to foreign nationals without permanent residence constituted unfair discrimination. He also challenged the constitutionality of s 117(2) of the 2012 Act, which prescribes a 25-year minimum parole eligibility period, asserting that it violates Arts 8, 10, and 12 of the Namibian Constitution.

The relief sought included a declaration confirming that his parole eligibility was under the 1959 Act, an order setting aside the Board's refusal to consider his parole, and a directive for the relevant authorities to immediately assess his application. In the alternative, he sought a declaration that reg 281, implementing the 25-year minimum, is unconstitutional and should not apply to offenders sentenced under the 1959 Act. He further requested costs against opposing respondents.

In the proceedings in the High Court, the respondents opposed the application conceding that the 1959 Act was in force at the time of the offence but maintaining that the appellant was sentenced under the 1998 Act, which contained no parole provisions for life sentences. They argued that the 2012 Act, which came into effect on 1 January 2014, governs his parole eligibility. The respondents further submitted that, under the Correctional Services Policy, parole is available only to Namibian citizens and permanent residents, while non-citizens may be considered for early release on probation, which they contended was substantively equivalent.

They denied that the policy amounts to unfair discrimination or that s 117(2) is unconstitutional.

The High Court dismissed the application.

In the present appeal, which was unopposed, the appellant contended that his parole eligibility should have been determined by the legal framework in force at the time of the offence rather than at sentencing and that the 1959 Act should therefore have applied. He further challenged the National Release Board's policy of restricting full parole to Namibian citizens or permanent residents, asserting that it constituted unfair discrimination. Additionally, he sought a declaration that section 117(2) of the 2012 Act was unconstitutional, as it retrospectively imposed a harsher penalty than was applicable at the time of the offence.

Held that the issue of which parole regime applied to the appellant had already been decided in *Kamahere & others v Government of the Republic of Namibia & others* 2016 (4) NR 919 (SC). The Supreme Court had ruled that the 2012 Act governed his parole eligibility, and this decision was binding.

Held that the doctrine of *res judicata* prevents the appellant from re-litigating the same issue.

Held that the appellant had already served 25 years by December 2024, making his claim for parole eligibility under the 1959 Act moot.

Held that full parole requires supervision and monitoring, which is not feasible for foreign nationals who are subject to deportation, making enforcement of parole conditions impossible. The directive's differentiation is therefore rationally connected to a legitimate objective.

Held that the Board's policy of differentiation between foreign nationals without permanent residence and Namibian citizens was rationally connected to a

legitimate government objective of ensuring effective supervision and reintegration of offenders.

Held further that the policy did not amount to unfair discrimination under Art 10 of the Namibian Constitution, as it was based on a rational and legitimate distinction.

Held further that the appellant had not made out a case that s 117 and regulation were unconstitutional.

The appeal was dismissed without costs.

APPEAL JUDGMENT

SMUTS AJA (FRANK AJA and SCHIMMING-CHASE AJA concurring):

Introduction

[1] The appellant approached the High Court with an application concerning the parole regime applicable to the sentence of life imprisonment imposed upon him on 22 December 1999. The appellant was on 2 December 1999 convicted of murder and eight other crimes including violating a dead human body and attempting to defeat or obstruct the course of justice. The crimes for which he was convicted were committed on 2 June 1998.

[2] The central issue raised in this appeal concerns the legislative regime applicable to the life sentence he is serving and when he can qualify for consideration for parole and related questions.

[3] When sentencing the appellant to life imprisonment, the court stated the following when pronouncing that sentence:

‘I recommend to the prison authorities that you ought not to be released on probation before the lapse of not less than 15 (fifteen) years imprisonment, calculated from today, 22 December 1999.’

[4] The Prisons Act 8 of 1959 (the 1959 Act) was repealed by the Prisons Act 17 of 1998 (the 1998 Act) when it was put into operation on 15 August 1999. The appellant was convicted and sentenced at a time when the 1998 Act had already been put into operation but the crimes for which the appellant was convicted had been committed prior to the 1998 Act coming into operation and at a time when the 1959 Act applied. The 1998 Act was in turn repealed in its entirety by the Correctional Service Act 9 of 2012 (the 2012 Act) with effect from 1 January 2014.

[5] The appellant’s application to the High Court was premised upon the basis that the 1959 Act applied to the sentence of life imprisonment imposed upon him and when he would qualify for consideration of parole because that Act applied at the time he committed the crimes for which he was convicted. That basic premise to his application was disputed by the respondents.

[6] In a nutshell, the regulations and subordinate legislation issued under the 1959 Act meant that offenders serving life sentences may be eligible for parole after serving ten years whereas those sentenced after the 1998 Act came into operation are to serve a minimum period of 25 years in prison before they may be considered for parole. The appellant’s principal assertion is that he committed his

crimes on 2 June 1998, on a date prior to the 1998 Act coming into operation (on 15 August 1999), and at a time when the 1959 Act applied. The appellant accordingly contends that the 1959 Act should govern his sentence of life imprisonment and that he qualified to be considered for parole after ten years and not 25 years imprisonment.

[7] In his application, the appellant rightly referred to his previous litigation in which he raised the issue of qualifying for consideration of parole.

The appellant's prior proceedings

[8] In March 2014, the appellant and 25 others applied to the High Court for an order in the following terms:

- '1. An order declaring 20 years to be the maximum term of imprisonment for any offender sentenced to life imprisonment in terms of the Prisons Act No 8 of 1959;
2. An order declaring 10 years to be the minimum period of imprisonment any offender sentenced to life imprisonment in terms of the Prisons Act No 8 of 1959 should serve before becoming eligible for parole;
3. An order declaring 20 years to be the maximum term of imprisonment for any offender sentenced to life imprisonment in terms of the Prisons Act No 17 of 1998;
4. An order declaring 10 years to be the minimum period of imprisonment any offender sentenced to life imprisonment in terms of the Prisons Act No 17 of 1998 should serve before becoming eligible for parole;

5. An order directing the 7th and 8th Respondents to consider all the applicants for release on parole and to submit its recommendations to the 4th Respondent within 30 days from the date of such order;
6. An order directing the 4th Respondent to consider the recommendations from the 7th Respondent within 30 days from the date of receipt of such recommendations and to inform the applicants accordingly.¹

[9] The appellant was the 22nd applicant in those proceedings and filed an affidavit in support of those proceedings.

[10] That application concerned the position of three categories of offenders:

- (a) those sentenced at a time when the 1959 Act applied,
- (b) those sentenced during the application of the 1998 Act, and
- (c) those in respect of whom the sentencing court made recommendations that they should only be considered for parole after serving a given period of time.

[11] The contention raised by the applicants in those proceedings concerning those sentenced during the application of the 1998 Act, such as the appellant, was in essence that the parole regime set out in the 1959 Act applied to them, as is reflected in the notice of motion and the averments made in support of it. This was because the 1998 Act did not make provision for the release on parole of offenders sentenced to life imprisonment. It was contended in those proceedings that s 95 of the 1998 Act which dealt with the release of prisoners on parole, by

¹ In *Kamahere & others v Government of the Republic of Namibia & others* 2016 (4) NR 919 (SC) para 2.

failing to make provision for those serving life sentences, was in conflict with Art 8 of the Constitution and was to be struck down.

[12] The applicants in those proceedings were not successful with that and their other contentions and appealed against the dismissal of their application to this Court.

[13] This Court in *Kamahere & others v Government of the Republic of Namibia & others*² (*Kamahere*) dismissed their appeal against the dismissal of their application. This Court found that the repeal of the 1959 Act by the 1998 Act included the subordinate legislation made under the 1959 Act. This Court held:

[36] . . . Section 127 of the 1998 Act provided for this repeal of the 1959 Act and certain savings in the following way:

- “(1) The laws specified in the Second Schedule are repealed to the extent specified in the third column thereof.
- (2) Anything done under any provision of any law repealed by subsection (1) and which could be done under a provision of this Act shall be deemed to have been done under the last mentioned provision.”

[37] The first statute repealed in the Second Schedule is the 1959 Act. The extent of the repeal is stated to be the whole Act.

[38] In the definitions section of the 1959 Act, the Act is defined to include the regulations promulgated under it. There was no savings provision in respect of the regulations promulgated under the 1959 Act or orders issued under reg 148 in s 127 of the 1998 Act. When the Minister made regulations under s 124 of the 1998

² *Kamahere & others v Government of the Republic of Namibia & others* 2016 (4) NR 919 (SC).

Act on 8 November 2001³, those regulations did not repeal the regulations made under the 1959 Act, further demonstrating that those regulations had been repealed by s 127 of the 1998 Act.

[39] Unlike the 1959 Act, there was surprisingly no reference in the 1998 Act to prisoners serving sentences of life imprisonment. Section 95 dealt with parole or probation of prisoners serving imprisonment of three years and more but only did so with reference to sentences of finite duration

[40] Nor was service of life imprisonment sentences dealt with in the regulations eventually promulgated under that Act in 2001

[41] But there was no provision for those offenders to become eligible for consideration for parole. There was an absence of an empowering statutory provision to that effect.

[42] In view of what was stated in *Tcoeib*, the omission to have provided for the possibility for parole for offenders serving sentences of life imprisonment may have given rise to a constitutional challenge or a mandamus directed at making subordinate legislation during the currency of the 1998 Act. No such challenge was made. This application was brought after the 2012 Act was put into operation.

[43] Mr Rukoro understandably did not pursue the relief directed at attacking the constitutionality of s 95 of the 1998 Act. This was no doubt because that Act was repealed in its entirety by the 2012 Act and the position of parole for those sentenced to life imprisonment is now addressed in the more comprehensive provisions of the new (2012) Act. Section 117 entitled, ‘Release of offenders sentenced to life imprisonment’, is a detailed provision with 19 subsections. Relevant for present purposes are subsecs (1) to (6):

“(1) An offender who has been sentenced to life imprisonment can be released from the correctional facility only on such conditions as to full parole or probation.

³ See Government Notice 226 of 2001 published in *Government Gazette* dated 8 November 2001.

- (2) Notwithstanding subsection (1), no offender who has been sentenced to life imprisonment is eligible to be released on full parole or probation, unless he or she has served the minimum prescribed term of imprisonment and the National Release Board, after conducting a hearing -
 - (a) is satisfied that -
 - (i) there is a reasonable probability that such offender will abstain from crime and is likely to lead a useful, responsible and industrious life;
 - (ii) such offender has displayed a meritorious conduct during such minimum term of imprisonment and no longer has a tendency to engage in crime; and
 - (iii) the release of the offender will contribute to reintegration of the offender into society as law abiding citizen; or
 - (iv) it is desirable for any other reason to release such offender on full parole; and
 - (b) submits a report to the Commissioner-General in which it recommends such offender's release on full parole or probation and the conditions relating to such release, as it considers necessary.
- (3) Upon the receipt of the report referred to in subsection (2), the Commissioner-General must forward it, together with his or her comments, to the Minister.
- (4) On consideration of the report and comments referred to in subsection (3), the Minister must forward the report, together with his or her comments, to the President.

- (5) The President, on consideration of the report and comments referred to in subsection (4), may authorise the release on full parole or probation of the offender on the date and conditions recommended by the Minister or on such date and conditions as the President may determine.
- (6) An offender released on full parole or probation in terms of subsection (5), is on full parole or probation for life, unless the President determines otherwise.”

[44] The minimum period referred to in s 117(2) is prescribed in regulation 281 of the regulations simultaneously promulgated with the coming into operation of the 2012 Act.⁴ Regulation 281 provides:

- “(1) Subject to subregulation (2), an offender who has been sentenced to life imprisonment is eligible to be considered for release on full parole or probation pursuant to s 117 of the Act after serving at least 25 years in a correctional facility without committing and being convicted of any crime or offence during that period.
- (2) The counting of the period referred to in subregulation (1) is restarted whenever the offender is, after being sentenced to life imprisonment, convicted of any crime or offence committed after such sentencing.”

[45] Under the new regime brought about by the 2012 Act, those serving sentences of life imprisonment are entitled to be eligible for consideration for parole after 25 years of incarceration and provided the other conditions specified are met.’

[14] This Court thus found that the hiatus caused by s 95 of the 1998 Act in failing to afford those offenders serving life sentences the opportunity to qualify for consideration for parole was addressed by s 117 of the 2012 Act which applied to

⁴ See Government Notice 330 of 2013 published in *Government Gazette* dated 18 December 2013.

those sentenced during the currency of the 1998 Act. This Court held that the use of the past participle ‘has been’ in s 117 certainly meant that the 2012 Act applied to those serving life sentences upon the date the 2012 Act had come into operation, thus addressing the *lacuna* in the 1998 Act in failing to address that issue. This Court expressly found that they (including the appellant) would only be eligible for parole under s 117 after the lapse of 25 years.⁵

The appellant’s further 2020 application

[15] Despite this Court’s ruling in *Kamahere*, the appellant again applied to the High Court – this time seeking an order declaring that ‘he would be entitled to a one third remission off of his life sentence of 25 years’ The High Court, per Ueitele J, dismissed the application, rightly finding that neither the 1959 Act nor the 2012 Act defined the period offenders are to serve a life sentence which provide for a minimum periods when offenders may be eligible for parole and not the actual duration of sentences.

[16] In the course of his judgment on 4 March 2022, Ueitele J expressed the view that the appellant was serving his sentence under the 1959 Act by reason of the application of that Act when the appellant’s crimes were committed on 2 June 1998, despite being sentenced on 22 December 1999 when the 1998 Act applied and the holding of this Court in *Kamahere*. This view is however *obiter* (in passing) in view of his correct rejection of the contention that a right to remission could arise with regard to a life sentence.

⁵ *Kamahere* para 49.

Subsequent action

[17] Following the judgment of the High Court by Ueitele J, the appellant addressed a letter on 26 March 2022 to the National Release Board (Board), applying for parole. In response, the Board on 17 May 2022 stated that an inmate can only be considered for possible release upon reaching their eligibility date (after 25 years) and meeting the requirements under the 2012 Act. In the second place, the Board stated that foreign offenders (the appellant is a German national) cannot be considered for full parole, except when having permanent residence in Namibia, but stated that the appellant would only be eligible for release on probation and not on full parole, given his status as a foreigner without permanent residence.

These proceedings

[18] The appellant thereafter launched the present proceedings, complaining that the Board's approach was firstly incorrect because he claims that he is serving his life sentence under the 1959 Act and not the 2012 Act, relying upon what was stated by Ueitele J in that regard.

[19] The appellant also avers that the approach of the Board concerning his eligibility for parole (as a foreign national) is furthermore unfair and unreasonable and in conflict with Art 18 of the Constitution protecting his right to fair and reasonable administrative action.

[20] The appellant also challenged the constitutionality of s 117(2) of the 2012 Act. That section, quoted above, authorises the prescription of a minimum period

to be served before being eligible for parole. Regulation 281 promulgated under s 117 sets that minimum at 25 years.

[21] The appellant sought the following relief in his application to the High Court:

- '1. Declaring that the applicant is serving a sentence of life imprisonment under the legislative regime of Prisons Act No. 8 of 1959.
2. Declaring that the 7th respondent's position that foreign offenders cannot be considered for full parole except when he/she has permanent residence in Namibia, constitutes unfair discrimination as between prisoners who have permanent residence in Namibia and prisoners who do not.
3. Setting aside the decision of 7th respondent to refuse to consider applicant's application for parole and declaring that the applicant is immediately eligible for consideration of parole.
4. Directing the 7th and 8th respondents to immediately consider the applicant for release on parole and to submit its recommendation to the 5th respondent within 14 days from date of such order.
5. Directing the 5th respondent to consider the recommendations of the 7th and 8th respondents within 14 days from the date of receipt of such recommendation and to inform the applicant accordingly.
6. That the 7th respondent and any other respondent that may oppose this application, shall pay the costs of this application on a scale as between attorney and client, consequent upon the employment of one instructing and two instructed counsel.
7. Further and/or alternative relief.

Alternatively to prayers 1, 2, 3, 4, 5, 6 and 7 above –

8. Declaring the minimum period referred to in section 117(2) of the Correctional Service Act No. 9 of 2012, as prescribed in regulation 281 of the regulations simultaneously promulgated with the coming into operation of the Act, to be inconsistent with Articles 8, 10 and 12 of the Constitution of the Republic of Namibia, in respect of a prisoner who has committed a crime before the Correctional Service Act of 2012 came into operation, and whose parole regime is governed by the Prison Act 8 of 1959.
9. That it be ordered that regulation 281 referred to in prayer 8 above shall not be applicable to prisoners as referred to above and that such wording be inserted in regulation 281 to that effect.
10. Declaring that the applicant is immediately eligible for consideration of parole.
11. Directing the 7th and 8th respondents to immediately consider the applicant for release on parole and to submit its recommendation to the 5th respondent within 14 days from date of such order.
12. Directing the 5th respondent to consider the recommendations of the 7th and 8th respondents within 14 days from the date of receipt of such recommendation and to inform the applicant accordingly.
13. That the 7th respondent and any other respondent that may oppose this application, shall pay the costs of this application on a scale as between attorney and client, consequent upon the employment of one instructing and two instructed counsel.'

[22] The respondents confined their opposition to the appellant's application to points of law raised in a notice in terms of High Court rule 66(1)(c). In that notice, the respondents admitted that the 1959 Act applied at the time of the commission of the appellant's crimes but point out that the appellant was sentenced during the operation of the 1998 Act. The respondents further point out that the 1998 Act did

not provide for an offender's early release on parole (for those serving life sentences) but that this was rectified by the 2012 Act when it came into force on 1 January 2014 and that the 2012 Act governs his eligibility for parole.

[23] The respondents further stated in their notice that, pursuant to the Correctional Service policy on the release on full parole or probation of offenders, a foreign national is eligible to an early release on probation of sentence and that release on parole is only available to Namibian citizens or those non-citizens with permanent residence permits.

[24] The respondents denied that the differentiation amounted to impermissible or unfair discrimination. The respondents further contended that an early release on parole and early release on probation amounted to the same in practice and effect.

[25] The respondents further deny that s 117(2) violated the appellant's constitutional rights.

Approach of the High Court

[26] The High Court found (per Usiku J) that this Court in *Kamahere* had held that the determinative date for the purpose of eligibility for parole is with reference to the date of sentence. The 1998 Act applied at the time of the appellants' sentence and this Court held that the 2012 Act applied to those sentenced to life imprisonment during the currency of the 1998 Act and would have the right to be

considered for parole after serving 25 years. The High Court accordingly dismissed the relief sought in para 1 of the relief sought in the notice of motion.

[27] As to the policy of the Board regarding offenders who are foreign nationals, the court held:

[40] The Correctional Service Policy provides that an offender who is a Namibian national or an offender who is a foreign national but has a residence permit in Namibia, may be released on full parole. Whereas an offender who is a foreign national and has no residence permit in Namibia may be released on probation.

[41] According to the Policy, during the period of the offender's full parole, he or she will be under the supervision of the Conditional Release Supervisor, and the offender, among other things, must:

- (a) not change the residential address without explicit prior approval of the Conditional Release Supervisor;
- (b) obey lawful orders given by the Full Parole Tenant;
- (c) not travel outside Namibia without the prior approval of a relevant officer;
- (d) not associate himself or herself with criminally minded persons etc.

[42] Furthermore, the Policy provides that an offender who is released on probation will be handed over to the Immigration Department for deportation and will not be allowed to return to Namibia during the period of probation.

[43] From the foregoing paragraphs, it is apparent that the Policy differentiates between offenders who are Namibian nationals or who are foreign nationals but have residence permit in Namibia, on the one hand, and offenders who are foreign nationals and have no residence permit in Namibia on the other hand.

[44] A discrimination which is unlawful is one which unfairly or unjustly discriminates against a complainant. Having regard to the principle that parole is an integral part of a sentence and that an offender who is on parole is still serving his/her sentence outside the correctional facility and also having regard to the conditions to be complied with by an offender during the period of full parole, it is apparent that the same conditions may not sensibly be applicable to an offender who is a foreign national and who has no residence permit in Namibia. In my opinion there is a rational connection between the differentiation and the legitimate governmental purpose it is designed to achieve.

[45] I am, therefore, of the view that the stance of the Chairperson of the National Release Board that foreign offenders cannot be considered for full parole, does not amount to unfair discrimination. It therefore follows that the applicant's second prayer stands to be dismissed.'

[28] Having dismissed the first two prayers, the court found that it followed that the relief sought in paras 3, 4 and 5 also fell to be dismissed.

[29] The court further dismissed the constitutional challenge to s 117(2). The court found that the reference in Art 12(3) to a 'penalty' does not constitute the policies and guidelines governing a sentence and that Art 12(3) does not refer to the way in which punishment is served at a correctional facility. The court concluded that s 117(2) did not amount to a retrospective imposition of a heavier penalty and thus did not conflict with the Constitution. The application was dismissed, with each party bearing their own costs.

[30] The appellant appeals against that judgment.

This appeal

[31] A few weeks before the hearing and after the appellant's heads of argument were timeously filed, this Court invited the parties to address it on the question as to whether or not the relief sought in para 1 of the appellant's notice of motion is *res judicata*. In addressing that invitation, the notice to do so stated:

'The appellant in this appeal seeks an order declaring that he is serving a sentence of life imprisonment under the legislative regime of the Prisons Act, 8 of 1959. The appellant was however an applicant (and appellant) in the proceedings in *Kamahere & others v Government of the Republic of Namibia & others* 2016 (4) NR 919 (SC) in which the appellant in essence in paragraphs 3 and 4 of the notice of motion in that matter sought an order that such Act governed his sentence of life imprisonment. This Court in that matter at paragraph 54 expressly found that such Act did not apply to the appellant's sentence of life imprisonment.'

[32] This Court invited further written argument on this question.

[33] Further written argument was duly filed on behalf of the appellant. The respondents however failed to provide written argument as contemplated by the rules and also failed to file any written argument on the issue of '*res judicata*', as invited by this Court. The respondents were also inexplicably not represented in court when the matter was argued. It is most unfortunate and regrettable that the Government respondents were not represented for their views to be provided to this Court in this appeal. The Government Attorney also failed to inform this Court that the respondents would abide this Court's judgment on appeal.

The appellant's submissions

[34] The principal basis for the application – that the appellant is serving his life sentence under the regime established under the 1959 Act by virtue of that Act applying at the time of the commission of his crimes on 2 June 1998 – is further developed in the written and oral argument advanced on his behalf.

[35] Counsel for the appellant argued that the correct date to determine the parole regime applicable to him is the date of the commission of his crimes – and not the date of sentencing.

[36] Counsel further referred to the fundamental principle of the common law now incorporated in Art 12(3) of the Constitution that sentence is determined with reference to the date of the offence and that a person may not be sentenced to a harsher sentence than that applicable as at the date of commission of the crime.

[37] It was further contended that the parole regime forms part of sentencing and that, being eligible for parole, should be determined by the date upon when the crime was committed.

[38] Counsel referred to South African Constitutional Court authority⁶ to the effect that punishment and parole eligibility should be determined with reference to the date of the commission of the offence.⁷

[39] Appellant's counsel also relied on the *obiter* statement made by Uitele J in the 2020 matter to the following effect:

⁶ *Phaahla v Minister of Justice and Correctional Services & another (Thlakanye intervening)* (2019) 7 BCLR 795 (CC).

⁷ Para 70.

'I am therefore of the view that the applicant is serving his life sentence under the 1959 Act. Having found that the applicant is serving his sentence of life imprisonment under the 1959 Act, I add that that Act does not confer on him the right to earn one third remission of the period of sentence. Section 64 of the 1959 Act only confers on him the right to be recommended for release either on probation or unconditionally.'

[40] Counsel accordingly submitted that the appellant serves his life sentence under the 1959 Act and is entitled to an order to that effect and that the orders sought in paras 3, 4 and 5 would follow upon that.

[41] It was also argued on behalf of the appellant that the relief sought in para 2 should be granted because not considering foreign nationals without residence status for parole amounts to unfair discrimination in contravention of Art 10 of the Constitution as well as Art 18 as it would also amount to unfair administrative action because it is irrational and by virtue of the failure to apply the *audi alteram partem* principle.

[42] Counsel argued that the effect of the respondents' approach is that 'no foreigner will then ever be eligible to full parole and its benefits'.

[43] As for the constitutional challenge to s 117(2) of the 2012 Act raised in the alternative, counsel argued that the minimum period of incarceration before becoming eligible for parole of 25 years set by s 117(2) read with regulation 281 is inconsistent with the appellant's rights protected under Arts 8, 10 and 12 of the Constitution. The argument ran that s 117(2) offended the guarantee in Art 12(3)

of not receiving a penalty more severe than applicable at the time the offence was committed. It was also submitted that s 117 is contrary to the appellant's right to human dignity protected by Art 8. Counsel also contended that s 117 offended Art 10 by differentiating between offenders who committed crimes and had been sentenced before 15 August 1999 and those who also committed their crimes before 15 August 1999 but were sentenced after that date.

[44] Counsel for the appellant also submitted both written and oral argument on the question posed by the Court as to whether the issue raised in para 1 had become *res judicata* by virtue of this Court's findings in *Kamahere*.

[45] Counsel characterised the main issue in *Kamahere* as being whether Prison Service Order 43.7.4.7 under regulation 148 promulgated under the 1959 Act applied to the appellants in that matter and whether it entitled them to be considered for placement on parole after completing 10 years imprisonment.

[46] Counsel argued that the 'cause of action relied upon by the appellant and others (in *Kamahere*) and the legal arguments presented to court, were completely different from the arguments and legal grounds raised in this application'.

[47] Counsel argued that there is a 'clear difference' between the cause of action in *Kamahere* and in this matter, which depends on different *facta probanda* and completely different arguments.

[48] Counsel relied upon the approach of Khampepe J in *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation & others*⁸ in an evenly split court.

[49] Counsel also argued in the alternative that even if the principle of *res judicata* were to find application, it should be relaxed as it would be just and equitable to do so.

Res judicata?

[50] The gist of the doctrine of *res judicata*, which literally translated means that ‘the matter having been decided’, is that the matter or the issue raised has been finally determined in proceedings between the same parties and cannot be raised again.⁹ This doctrine is deeply rooted in the common law.¹⁰ It is founded upon public policy and the interests of justice which require that litigation should not be endless to prevent litigants from facing the same thing being demanded in litigation more than once.¹¹

[51] The doctrine of *res judicata* is strongly underpinned by the principles of judicial case management introduced in the High Court rules in 2011 and further refined and expanded subsequently – to ensure litigation proceeds expeditiously

⁸ *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation & others* 2020 (1) SA 327 (CC).

⁹ *Ascendis* per Cameron J for his lucid summary of the doctrine and its origins in paras 111 to 114; *Prinsloo N.O. & others v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) para 10; *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A). *Smith v Porrit & others* 2008 (6) SA 303 (SCA) para 10.

¹⁰ *African Farms* 564; *Ascendis* (per Cameron J) para 111.

¹¹ *Prinsloo* para 10; *Smith* para 10; *Ascendis* paras 112-113.

to finalisation, to eliminate delays and to increase the cost effectiveness of the civil justice system.¹²

[52] The common law requirements of *res judicata* are a dispute between the same parties for the same relief on the same ground or on the same cause. These requirements have been relaxed over the years to what became known as issue estoppel, primarily by relaxing the 'same cause of action' requirement.¹³ In relaxing these requirements, the courts have stressed that each case would depend upon its own facts and that an extension would be on a case-by-case basis and that relevant considerations in relaxing the requirements would include equity and fairness.¹⁴

[53] The same cause of action requirement of *res judicata* was described by Farlam AJA as 'referring not to the cause of action in the strict sense but to "the same matter in issue"'.¹⁵

[54] A rule related to the doctrine of *res judicata* is that a party with a single cause of action is obliged to claim it in one and the same action whatever remedy is available to that litigant upon that cause.¹⁶

[55] In para 3 of the appellant's application in this matter, the appellant states the following under the heading 'Purpose of this application':

¹² *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) para 89. PT Damaseb *Court Managed Civil Procedure of the High Court of Namibia* (2020) p 80-82.

¹³ *Prinsloo* para 10; *Smith* para 10; *Ascendis* para 112 – 113.

¹⁴ *Smith* para 10; *Ascendis* para 113.

¹⁵ *Tradax Ocean Transportation SA v MV Silvergate* 1999 (4) SA 405 (SCA) para 54.

¹⁶ *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-B.

‘The purpose of this application is to seek an order from this court declaring that I am serving my life sentence under legislative regime established under the Prison Act No. 8 of 1959, and that I am entitled to be considered for parole.’

[56] That purpose is reflected in para 1 of the notice of motion.

[57] The very same purpose was behind the relief sought in paras 3 and 4 in *Kamahere*. The 1959 Act and the subordinate legislation promulgated pursuant to it provided for a period of 10 years of imprisonment being served before being eligible for being considered for parole.¹⁷ That is fully explained in the founding affidavit in that matter and formed the basis of argument advanced in that matter.¹⁸ Counsel’s characterisation of the main issue concerning subordinate legislation and not the application of the 1959 Act is unfortunately incorrect. The subordinate legislation in question was issued under the 1959 Act in respect of parole eligibility for those serving life sentences.

[58] The appellant was a party to *Kamahere* as were the respondents. The cause was also the same – seeking to have the 1959 Act (together with the subordinate legislation issued pursuant to it) being declared applicable to the appellant, having been sentenced during the currency of the 1998 Act, for the purpose of qualifying to be considered for parole. And that was the very issue determined in *Kamahere* in para 54:

¹⁷ Government Notice 57, GG 4709, 13 May 2011.

¹⁸ Government Notice 4, GG 5392, 17 January 2014.

'The relief sought in paras 3 and 4 is premised upon the regime under the 1959 Act continuing to apply to those offenders sentenced during the applicability of the 1998 Act. As is demonstrated above, it is based upon an incorrect premise. The repeal of the 1959 Act without any savings or transitional provisions preserving the prior regime meant that it did not apply to those sentenced after 15 August 1999 – the date of the repeal. The 1998 Act applied to life imprisonment imposed upon offenders after 1998. Despite the lacuna in that Act and the inexplicable failure on the part of the legislature to make specific provisions other than the very limited right to be considered for reprieve under s 93, this would not mean that those offenders acquired rights under the repealed 1959 Act because that regime no longer applied. If the right to reprieve was insufficient to give effect to their rights as articulated in *S v Tcoeib*, their recourse would have been to address that during the currency of that Act. This they did not do. It serves no purpose to express any view on that issue seeing that the 1998 Act has been repealed and the lacuna in respect of life imprisonment has now been addressed by virtue of the way in which s 117 is worded. The declaratory relief sought in paras 3 and 4 must thus fail.'

[59] Appellant's counsel argued that the *facta probanda* and *facta probantia* in these proceedings are different in that an entirely different argument is raised in these proceedings (that the date of the commission of the crime should determine which legislative regime should apply). Counsel is correct that this argument was not raised in *Kamahere*.

[60] The facts raised in support of the relief and the legal question itself are the same. Although no reliance was placed upon the date of the commission of the crimes in *Kamahere*, the same matter was in issue in *Kamahere* as is in these proceedings. It was incumbent upon the appellant to raise that argument in his single cause of action on the issue.¹⁹

¹⁹ *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-B.

[61] Counsel also placed reliance on the approach regarding the requirement of ‘cause of action’ in the context of *res judicata* in the judgment of Khampepe J in *Ascendis* in more narrowly construing the requirement of cause of action than Cameron J in his approach in the same matter where the court was evenly split. That matter is however distinguishable, involving the two-tier proceedings in patent disputes – where a challenger initiates proceedings for the removal of a patent from the statutory register by challenging its validity, (which operates as against the world at large), and the second concerning infringement where a patent holder vindicates rights as against an infringer.²⁰ Quite apart from that distinguishing feature, I in any event prefer the approach and conclusion reached by Cameron, J in that matter which is more in keeping with the position in Namibia.

[62] I further and in any event find that on the facts of this matter that considerations of equity and fairness do not mitigate against the application of the doctrine of *res judicata* in this matter, given that the appellant in any event now qualifies as being eligible for consideration for parole or probation and that the application has become moot as far as he is concerned.

[63] The appellant’s approach in this matter negates the binding nature of this Court’s decisions, aptly stated by Damaseb DCJ in *S v Likanyi*:²¹

‘There are two nuances to the “binding nature” of the Supreme Court’s decisions: the *res judicata* sense and the *stare decisis* sense. In the first, as a general rule, once this court has taken a decision in a case it is final, binds the parties to the

²⁰ *Ascendis* para 105.

²¹ *S v Likanyi* 2017 (3) NR 771 (SC) para 30.

dispute and the court becomes *functus officio*. In other words, a party to the dispute in which the court has rendered a decision cannot come back to reopen the case.'

Mootness

[64] At the outset of his oral argument, counsel for the appellant very properly pointed out that the relief sought under para 1 of the notice of motion – declaring that the appellant is serving a sentence of life imprisonment under the legislative regime of the 1959 Act has become moot in the sense that the appellant, having completed 25 years imprisonment in December 2024, was entitled to be considered for parole or probation under s 117 of the 2012 Act.

[65] Counsel however contended that even though a ruling on that issue may have become moot for the purpose for which it is sought, this Court should address the issue given its importance. This Court in *ES v AC*²² followed *MEC for Education, KwaZulu Natal & others v Pillay*²³ in listing the factors which would sway a court to hear a matter in spite of the consideration that it may be moot. Those factors include:

- '(a) The nature and extent of the practical effect that any possible order might have;
- (b) the importance of the issue;
- (c) the complexity of the issue; and
- (d) the fullness or otherwise of the argument advanced.'²⁴

²² *ES v AC* 2015 (4) NR 921 (SC).

²³ *MEC for Education, KwaZulu Natal & others v Pillay* 2008 (1) SA 474 (CC) para 32.

²⁴ *ES v AC* para 37.

[66] Given the passage of time since the 1998 Act was put into operation (15 August 1999), being more than 25 years ago, by and large offenders serving life sentences for crimes committed around that date would by now have served 25 years imprisonment. There would thus be a lack of practical effect which the determination of the issue may have. It can no longer be of importance. Finally this Court did not have the benefit of argument and assistance on the issue from the respondents, even though very thorough and detailed argument was prepared and presented by appellant's counsel.

[67] As this Court has furthermore already determined the question raised in para 1 in *Kamahere*, there thus can be no good reason in the public interest to determine the issue.²⁵

[68] Given the conclusion reached that the doctrine of *res judicata* applies in respect of the relief sought in para 1, it is not necessary to pass upon the question as to the operative date for the applicable parole regime which was found in *Kamahere* as being the date of sentence. The approach set out in *Phaahla* is premised upon parole forming part of sentencing. That conclusion is reached upon the basis of the provisions concerning the description of punishment in s 276 of the Criminal Procedure Act as it reads in South Africa. That section reads differently in Namibia and does not include the amendments passed in South Africa after 1990 which significantly introduced 'correctional supervision' as a form of punishment in South Africa. That form of punishment listed in s 276 of the South African Act was found to be significant by the Court in *Phaahla* in reaching the

²⁵ *Prosecutor-General of the Republic of Namibia v Gomes and others* 2015 (4) NR 1035 (SC) paras 24-25.

conclusion that parole forms part of a sentence imposed. The South African Correctional Services Act 11 of 1998 also includes a definition of parole as a form of ‘community corrections’ contemplated in Chapter VI of that Act. Neither of these features are in the equivalent Namibian legislation. There are thus significant differences in the respective statutory regimes in South Africa and Namibia. That court also based its conclusions upon parole amounting to deprivation of liberty for a set period albeit outside prison and an offender remaining subject to supervision. But those considerations would not apply in the case of the appellant, given his eligibility to apply for probation rather than parole as is set out below.

[69] Based upon these statutory differences and on the facts of this matter, the approach in *Phaala* would not in any event find application in Namibia.²⁶ It is also clear that the finding in *Kamahere*²⁷ that the operative date is that of sentence, which is binding unless clearly wrong and should not be followed.

Appellant’s unfair discrimination claim

[70] The appellant in para 2 of his notice of motion seeks an order declaring the ‘position’ of the National Release Board of the Namibia Correctional Service (the Board) that a foreign offender cannot be considered for full parole except if he or she has permanent residence as unfair discrimination as compared to those offenders who have residence in Namibia.

²⁶ The *obiter* statement by Ueitele J to the contrary is accordingly at variance with the approach of this Court and should not be followed.

²⁷ *Gariseb v S and thirteen similar cases* 2024 (3) NR 617 (SC) (incorrectly reported as *S v Gariseb and thirteen similar cases* 2024 (3) NR 617 (SC)).

[71] This claim is based upon the Board's response to him on 17 May 2022. The relevant portion of that response is:

'Secondly, foreign offenders cannot be considered for full parole, except when he or she has permanent residence in Namibia, thus you are only eligible for release on probation and not on full parole.'

[72] The letter concludes:

'There are no changes with regard to your sentence information and your eligibility date for release on probation, thus the information communicated to you previously still has reference.'

[73] In answer to his claim, the respondents stated in their rule 66 notice:

'10. The respondents will submit that the applicant, under the 2012 Act, is eligible to an early release on probation of sentence under section 117(1) and the Regulation aforesaid. The respondents submit that the applicant, being a non-Namibian citizen and foreign national is eligible to an early release on probation of sentence, the release on parole being available to Namibian citizens, permanent resident permit and other valid residence permit holders in terms of the Namibian Correctional Service's Policy on Release on Full Parole or Probation of offenders issued through the Commissioner-General's Directive No. 10 of 2014.

11. The respondents will further submit that the applicant or any non-Namibian citizen is not discriminated on or treated un-equally compared to Namibian citizens in their eligibility to an early release on parole or probation policy under the 2012 Act, the relevant Regulation and the parole and probation policy aforesaid. The alleged violation of the applicant's constitutional rights protected by Articles 8, 10 and 12 of the Namibian Constitution on account of his immigration status is disputed by the respondents. The respondents'

submission is that eligibility to an early release on parole and on probation is the same in practice and effect.'

[74] The directive referred to does not constitute part of the appeal record but would have been available to the court below in view of the detailed reference to it in paras 40 to 42 of Usiku J's judgment.

[75] It is surprising that the Directive was not itself directly challenged in the proceedings as it constitutes subordinate legislation issued by the Commissioner-General and thus is legislative administrative action. The Board was merely applying that Directive. The relief sought in para 2 is thus inept as the Board merely applied what was in the Directive, which should have been challenged. Even though the Directive was not properly challenged, the Board applied (and embraced) it and it will be considered as if challenged as that would seem to have been intended and has been addressed in the respondents' rule 66(1) notice. The Commissioner-General is furthermore a party to these proceedings. The reference in counsel's argument to a breach of the right to be heard is however not raised in the founding papers and is to be disregarded. It is plainly insufficient to raise Art 18 without specifying the review grounds upon which the decision – in this case 'a position' set out in subordinate legislation – is challenged.

[76] The appellant in para 3 of the notice of motion does however challenge the decision of the Board 'to refuse to consider' the appellant's application for parole. The Board however pointed out that the appellant 'cannot apply for release on parole/probation' until meeting the requirement of the 2012 Act which includes

service of imprisonment for 25 years under that Act. That decision cannot be faulted for that reason alone.

[77] The directive's differentiation (incorrectly characterised as the Board's) between foreign nationals who do not have the right to reside in Namibia on the one hand, and those who do and Namibian citizens on the other hand, is in essence challenged as unfair discrimination.

[78] Has the appellant succeeded in challenging that differentiation on that basis? In my view, not for the reasons articulated by Usiku J in his judgment.

[79] As the Directive makes clear, release on full parole entails conditions which include being monitored and supervised.²⁸ That would only be possible where offenders are permitted to reside in Namibia. A foreign national without the right to reside would be subject to deportation under the Directive and the monitoring and supervision of conditions would not be possible given the clear lack of jurisdiction to do so. The differentiation contemplated by the Directive and as applied by the Board is thus rationally connected to a legitimate objective, upon an application of *Müller v President of the Republic of Namibia & another*,²⁹ as correctly found by Usiku J.

²⁸ S 117 read with s 116.

²⁹ *Müller v President of the Republic of Namibia & another* 1999 NR 190 (SC) at 199 – 200. See also *Chika & others v Commissioner General Raphael Amunyela: Namibia Correctional Facility & others* 2022 (2) NR 467 (HC) paras 46-48.

[80] It follows that the appellant is not entitled to an order under paras 2 and 3 of the notice of motion.

Challenge to s 117(2) and Reg 281

[81] This constitutional challenge raised in the alternative is, in the wording of para 8 of the notice of motion, premised upon the appellant's parole regime being governed by the 1959 Act. That premise was already authoritatively dismissed in *Kamahere*. It follows that the court below was entitled to dismiss this relief (albeit upon a different basis) and paras 9 to 13 which would flow from the granting of that relief.

Conclusion

[82] It follows that the approach of the High Court in its dismissal of the appellant's application cannot be faulted.

[83] As for the costs of appeal, the respondents did not oppose the appeal and would not be entitled to any costs. It follows that no order as to costs of appeal should be made.

Order

[84] In the result the following order is made:

1. The appeal is dismissed.
2. No order as to costs of appeal is made.

SMUTS AJA

FRANK AJA

SCHIMMING-CHASE AJA

APPEARANCES

APPELLANT:

R Du Plessis (SC)

Instructed by Theunissen, Louw &
Partners, Windhoek

RESPONDENT:

No appearance