

CORRECTIONAL FACILITIES

Transfer of Convicted Offenders Act 9 of 2005

Summary: This Act ([GG 3495](#)) makes provision for the transfer of sentenced offenders between Namibia and foreign States. It was brought into force on 28 July 2006 by GN 116/2006 ([GG 3674](#)).

Amendments: The Act is amended with respect to the use of various terms by the Correctional Service Act 9 of 2012 ([GG 5008](#)), which was brought into force on 1 January 2014 by GN 330/2013 ([GG 5365](#)).

Regulations: Regulations are contained in GN 117/2006 ([GG 3674](#)).

Notices: GN 309/2012 ([GG 5109](#)) announces the ratification of an agreement on the transfer of sentenced offenders between **Zambia** and Namibia, in terms of section 20(3) of the Act. (The text of the agreement is not included in the notice.)

According to the Ministry of Safety and Security, the National Assembly ratified this bilateral agreement on 9 October 2012 and notified Zambia of the ratification on 23 January 2013. On 11 November 2015, Namibia received notification from Zambia that they had fulfilled their domestic procedures in respect of the agreement. The agreement then entered into force on 12 December 2015 (in terms of Article 20(1) of the Agreement).

GN 277/2020 ([GG 7386](#)) announces the ratification of an agreement on the transfer of sentenced offenders between **Russia** and Namibia, in terms of section 20(3) of the Act. (The text of the agreement is *not* included in the notice.)

GN 277/2020 gives notice “that the National Assembly has, on 17 June 2020, ratified the Agreement on the Transfer of Sentenced Offenders between the Republic of Namibia and the Russian Federation” entered into under section 20(1) of the Act.

GN 337/2022 ([GG 7942](#)) announces the ratification of an agreement on the transfer of sentenced offenders between **Angola** and Namibia, in terms of section 20(3) of the Act. (The text of the agreement is included in the Schedule to the notice.)

GN 337/2022 gives notice “that the National Assembly has, on 30 November 2021, ratified the Transfer of Sentenced Offenders or Persons Deprived of Liberty between the Republic of Namibia and the Republic of Angola” entered into under section 20(1) of the Act.

GN 392/2022 ([GG 7971](#)) announces the ratification of an agreement on the transfer of sentenced offenders between **Botswana** and Namibia, in terms of section 20(3) of the Act. (The text of the agreement is included in the Schedule to the notice.)

GN 392/2022 gives notice “the National Assembly has, on 1 November 2022, ratified the Agreement on Transfer of Sentenced Persons entered into by and between the Government of the Republic of Namibia and the Government of the Republic of Botswana” entered into under section 20(1) of the Act.

Related international agreements:

****SADC Protocol on the Inter-State Transfer of Sentenced Offenders, 2019.**

Correctional Service Act 9 of 2012

Summary: This Act ([GG 5008](#)) provides for the establishment of the Namibian Correctional Service and correctional facilities (previously known as prisons). It also covers health care services and hygiene for incarcerated offenders, discipline and rehabilitation programmes for incarcerated offenders, and rules for searches and seizures in correctional facilities. It establishes the National Release Board and provides for parole, remission and pardons. It was brought into force on 1 January 2014 by GN 330/2013 ([GG 5365](#)).

Repeals: The Act repeals the Prisons Act 17 of 1998, which replaced the *Prisons Act 8 of 1959* (which was applicable to SWA) and which in turn repealed the *Prisons and Reformatories Act 13 of 1911* ([SA GG 111](#)).

Amendments: The Combating of Rape Amendment Act 4 of 2022 ([GG 7932](#)), which has not yet been brought into force, amends the Third Schedule.

Savings: Regulations made under the repealed Prisons Act 17 of 1998 appeared to survive in terms of section 134(3) of the current Act:

Anything done under any provision of any law repealed by subsection (1) and which could be done under a provision of this Act is deemed to have been done under this Act.

However, as noted below, the regulations made under the Prisons Act 17 of 1998 have been repealed by regulations made under the current Act.

Regulations under the *Prisons Act 8 of 1959* repealed by the Prisons Act 17 of 1998 appeared to have survived pursuant to the general wording of section 127(2) of the Prisons Act 17 of 1998:

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.

Regulations under the *Prisons and Reformatories Act 13 of 1911* repealed by the *Prisons Act 8 of 1959* appear to have survived pursuant to the general wording of section 95(b) of the *Prisons Act 8 of 1959*:

The laws mentioned in the Schedule to this Act are hereby repealed to the extent set out in the fourth column of that Schedule: Provided that notwithstanding the repeal of the said laws –

- (b) every proclamation, regulation, rule, or order issued, made or given under any such law shall, in the area in which it was in force immediately prior to the commencement of this Act and so far as it is not inconsistent with the provisions thereof, continue in force until rescinded under this Act by the proper authority.

Because there is a chain of savings clauses which stretch back to that Act, it may be relevant to note its applicability to SWA. Section 96 of the *Prisons Act 8 of 1959* stated:

The State President may, by proclamation in the Gazette and subject to such conditions, modifications, exceptions and additions as he may specify in such proclamation, apply the provisions of this Act and of any amendments thereof to the territory of South West Africa including that portion of the said territory known as the ‘Rehoboth Gebiet’ and defined in the First Schedule to Proclamation No. 28 of 1923 of the said territory and also that portion of the said territory known as the ‘Eastern Caprivi Zipfel’ referred to in section 38 of the South West Africa Constitution Act, 1968 (Act No. 39 of 1968), and he may in the like manner amend or repeal any such proclamation.

The *Prisons Act 8 of 1959* was initially applied to South West Africa by *SA Proclamation 271 of 1959* (SA GG 6320), as amended by *RSA Proclamation 63 of 1963* (RSA GG 470) and *RSA Proclamation 314 of 1964* (RSA GG 955). This Proclamation was subsequently replaced by *RSA Proclamation R.130 of 1969* (RSA GG 2406), as amended by *RSA Proclamation R.211 of 1977* (RSA GG 5733). These Proclamations made several amendments to the Act as it applied to SWA. Although these South African proclamations functioned in some respects as transfer proclamations, the administration of this Act was also transferred to SWA by the Executive Powers (Prisons) Transfer Proclamation (AG 6/1977, as amended), dated **13 October 1977**. This transfer proclamation predates the General Proclamation regarding transfers (AG 7/1977, as amended).

However, according to the Namibian Supreme Court in *Kamahere & Others v Government of the Republic of Namibia & Others* 2016 (4) NR 919 (SC) at para [38], there was “no savings provision in respect of the regulations promulgated under the 1959 Act or orders issued under reg 148 [of those regulations] in s 127 of the 1998 Act”. The Court does not discuss the reasoning behind this interpretation, other than to state:

When the minister made regulations under s 124 of the 1998 Act on 8 November 2001 [referring to the regulations contained in GN 266/2001 ([GG 2643](#)), as amended by GN 34/2009 ([GG 4223](#)) and GN

134/2009 ([GG 4272](#)), 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.

This would mean that no regulations made under the predecessors to the 1998 Act would survive – and the regulations made under the 1998 Act have been repealed.

Regulations: Namibian Correctional Service Regulations, made under the current Act, are contained in GN 331/2013 ([GG 5365](#)).⁸⁴

Note that regulation 274 was set aside by *Mwilima v Minister of Home Affairs, Immigration and Safety and Security & Others* 2022 (4) NR 933 (HC) as being *ultra vires* section 109 of the Act read with section 132.

Establishment of prisons: Several new prisons were established under the Prisons Act 17 of 1998 by GN 201/1998 ([GG 1927](#)), and the Katima Mulilo police cells were declared to be a prison under that Act by GN 160/1999 ([GG 2163](#)).

In terms of section 15(1) of this Act, GN 228/2020 ([GG 7333](#)) establishes the Windhoek Female Correctional Facility in Khomas Region and the (Okatyali Correctional Facility in Oshana Region.

Four correctional facilities were renamed by GN 109/2022 ([GG 7776](#)), which repeals GN 201/1998 ([GG 1927](#)).

Presidential pardons: While the Prisons Act 17 of 1998 was in force, Presidential pardons were issued in terms of the Namibian Constitution to certain categories of prisoners in Proc. 15/1993 ([GG 642](#)), Proc. 11/1994 ([GG 836](#)), Proc. 3/1995 ([GG 1051](#)), Proc. 4/1997 ([GG 1533](#)), Proc. 1/2000 ([GG 2306](#)), Proc. 12/2003 ([GG 2956](#)), Proc. 1/2005 ([GG 3397](#)), Proc. 4/2006 ([GG 3626](#)), Proc. 6/2009 ([GG 4230](#)), Proc. 14/2010 ([GG 4552](#)) and Proc. 28/2013 ([GG 5270](#)).

After this Act came into force, Presidential pardons were issued in terms of the Namibian Constitution to certain categories of prisoners in Proc. 8/2020 ([GG 7154](#)), which was withdrawn and replaced by Proc 19/2020 ([GG 7212](#)).

Notices listing the names of the persons covered by some of these pardons have not been listed here.

Cases: The following cases relate to this Act –

Lomboleni & 10 Other Appeal Cases v The State & Others 2016 (1) NR 22 (NLD) (discussion of official duties in section 3(3) in context of inability of prisons to account for whereabouts of prisoners seeking to prosecute appeals)

Katjivena & Others v Prime Minister of the Republic of Namibia & Others 2016 (3) NR 903 (HC) (section 133(3))

Kamahere & Others v Government of the Republic of Namibia & Others 2016 (4) NR 919 (SC) (effect of successive repeals of previous legislation on regulations and orders issued under previous Acts, in respect of eligibility for parole in respect of life imprisonment; section 117 and Regulation 281 of the Namibian Correctional Service Regulations, 2013 apply to persons sentenced under the Prisons Act 17 of 1998, but not under the *Prisons Act 8 of 1959*; persons sentenced under the *Prisons Act 8 of 1959* continue to be governed by the right to parole acquired under that Act))

See also *Shigwedha & Others v Commissioner General Namibian Correctional Service: Hamunyela & Others* 2020 (4) NR 984 (HC) and *Chika & Others v Commissioner General Raphael Amunyela: Namibia Correctional Facility & Others* 2022 (2) NR 467 (HC), discussed below.

Matengu v Minister of Safety and Security & Others 2017 (2) NR 569 (HC) (section 74)

⁸⁴ These regulations repeal the regulations contained in GN 266/2001 ([GG 2643](#)), as amended by GN 34/2009 ([GG 4223](#)) and GN 134/2009 ([GG 4272](#)). The repealed 2001 regulations issued in terms of the Prisons Act 17 of 1998 do not contain any repeals.

- S v Matlata* 2018 (4) NR 1038 (HC) (section 99 applied to sentences on multiple counts in same case; no need to apply ruling on sentences that effectively exceed life imprisonment in *S v Gaingob & Others* 2018 (1) NR 211 (SC))
- Elia v Minister of Safety and Security & Others* 2019 (1) NR (HC) (section 133; no provision for condonation in section 133(4))
- Akatama v Commissioner-General: Hamunyela & Others* 2019 (2) NR 538 (NLD) (sections 105(1)(a) and 106 govern release on parole, and court may not unnecessarily usurp these powers where no decision on parole has yet been made; offender who has served more than half of his sentence is not automatically entitled to release on parole, but has only become qualified to be a candidate for possible parole)
- Kennedy & Another v Minister of Safety and Security & Others* 2020 (3) NR 731 (HC); *Minister of Safety and Security & Others v Kennedy & Another* (SA 69-2020) 2023 NASC (18 July 2023) (Supreme Court: (1) definition of “offender” in section 1 to include persons awaiting trial is unconstitutional; (2) section 103 of the Act on solitary confinement is unconstitutional, along with regulation 257 in the Namibian Correctional Service Regulations contained in GN 331/2013 ([GG 5365](#)), citing the United Nations Minimum Standards for the Treatment of Prisoners (the “Nelson Mandela Rules”); (4) the blanket policy of policy of not allowing contact visits to awaiting-trial inmates is unconstitutional; (5) the practice of transporting inmates in police vans with their hands handcuffed at the back while the vehicle is moving, where the vehicle lacks safety features to prevent physical harm to the inmates, is unconstitutional (6) the declarations of unconstitutionality of provisions in the Act and regulations is suspended for a period of 18 months from the date of the order to allow the Legislature and the Executive an opportunity to correct the identified defects; (6) the High Court holding that portions of section 103(3) and the entirety of section 132(1)(t) were unconstitutional and must be severed fall away by agreement between the parties since the High Court did not put these issues to the parties prior to determining them)
- Van Wyk v Namibia Correctional Service Commissioner General: Raphael Hamunyela & Others* 2020 (3) NR 864 (HC) (effect of non-compliance with section 133(4) notice requirement)
- Shigwedha & Others v Commissioner General Namibian Correctional Service: Hamunyela & Others* 2020 (4) NR 984 (HC) (relevant law on parole is the Prisons Act 17 of 1998 in force at time of sentencing; sections 95 and 97 of that Act must be read together; since no rights to parole accrued under the previous law, the current Act applies)
- See also *Chika & Others v Commissioner General Raphael Amunyela: Namibia Correctional Facility & Others* 2022 (2) NR 467 (HC), discussed below.
- Kahimise v Commissioner-General of Correctional Service & Others* 2021 (1) NR 78 (HC) (interpretation of sections 51(13), 52(1) and 58(7); application of section 133(3); regulation 68(1) of Namibian Correctional Service Regulations)
- Chika & Others v Commissioner General Raphael Amunyela: Namibia Correctional Facility & Others* 2022 (2) NR 467 (HC) ((1) on the question of which Act applies to an application for parole, the applicable law is the one in force on the date of sentence; (2) interpretation of section 97(8) of Prisons Act 17 of 1998; (3) differentiation between categories of offenders under section 114 of the Correctional Service Act 9 of 2012 on basis of the seriousness of crimes committed is not unconstitutional)
- Minister of Safety and Security & Others v Avelinu* 2022 (2) NR 608 (SC) (discusses High Court holding that section 133(4) places an absolute prohibition on institution of legal proceedings in absence of required notice, but this issue was not part of the appeal before the court)
- Mwilima v Minister of Home Affairs, Immigration and Safety and Security & Others* 2022 (4) NR 933 (HC) (regulation 274 of the Namibian Correctional Service Regulations set aside as being *ultra vires* section 109 of the Act read with section 132)
- Mwaala v Nghikomenwa* 2022 (4) NR 1209 (SC) (discussion, without deciding, whether compliance with notice requirement under section 133(4) brings case within ambit of prescription period in section 133(3) and (in concurring opinion) in respect of

applicability of section 133 whether there can be a distinction between “acting within the scope and course” of employment and acting “in pursuance” of Act).

The following cases relate to the Prisons Act 17 of 1998, which was repealed by this Act –

S v Babiep 1999 NR 170 (HC) (meaning of “prison”, section 54, section 75(1))

S v Njuluwa 2000 NR 97 (HC) (it would derogate from the statutory powers conferred by sections 92, 95-98 if judicial officers were allowed to order that convicted persons may not be paroled)

Kennedy & Others v Minister of Prisons and Correctional Services 2008 (2) NR 631 (HC) (legal duty of care of members of Namibian Prison Services; discussion of reasonable force under section 30(1) at 654G-I)

Alugodhi v Minister for Safety and Security & Others and Eight Similar Cases 2015 (4) NR 1021 (HC) (relationship between section 86 and section 280 of *Criminal Procedure Act 51 of 1977*, with reference to similar provisions of the previous *Prisons Act 8 of 1959* (section 32) and the current Act (section 99))

Katjivena & Others v Prime Minister of the Republic of Namibia & Others 2016 (3) NR 903 (HC) (interpretation of 2010 directive of Prime Minister on organisational structure)

Kamahere & Others v Government of the Republic of Namibia & Others 2016 (4) NR 919 (SC) (section 126; absence of provision for parole in respect of life imprisonment; section 117 and Regulation 281 of the Namibian Correctional Service Regulations, 2013 apply to persons sentenced under the Prisons Act 17 of 1998).

The following cases relate to the *Prisons Act 8 of 1959*, which was repealed by the Prisons Act 17 of 1998 –

Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State 1991 NR 178 (SC) (sections 36, 37, 48(1), 54(2), 56(3) and Regulation 100 of the Prison Regulations)

S v Haruseb 1991 NR 155 (HC) (section 48(1)(a))

S v Mbahapa 1991 NR 274 (HC) (section 48(1)(a))

S v Vihajo & Others 1993 NR 233 (HC) (section 48(1)(a))

S v Matsuis 1993 NR 234 (HC) (section 48(1)(a))

S v Matthias 1993 NR 420 (HC) (section 48(1)(a))

Namunjepo & Others v Commanding Officer, Windhoek Prison & Another 1999 NR 271 (SC) (section 80 and Regulation 102) (discussed in L Gaum, “The use of mechanical restraints by correctional services in South Africa and Namibia: *Namunjepo v Commanding officer, Windhoek Prison* 6 BCLR 671 (NmS) (2000)”, *African Human Rights Law Journal*, Volume 2, Issue 1, 2002)

S v Linyando 1999 NR 300 (HC) (section 48(2) read together with section 32(2))

Amakali v Minister of Prisons and Correctional Services 2000 NR 221 (HC) (section 48)

Kamahere & Others v Government of the Republic of Namibia & Others 2016 (4) NR 919 (SC) (section 90; Prison Order 43.7.4.7 issued under Regulation 148 of the Prison Regulations, 1965 contained in GN R.2080 of 31 December 1965; persons sentenced under the *Prisons Act 8 of 1959* continue to be governed by the right to parole acquired under that Act).

Commentary:

SH Bukurura & JW Nyoka, “The Namibian Prison Service and the Constitution: Lessons and experiences, 1990-2000”, 34 (1) *De Jure* 96 (2001)

SH Bukurura, “Prison Overcrowding in Namibia: The Problem and Suggested Solutions”, 16 (1) *Acta Criminologica* 82 (2003)

“*Prisons In Namibia: Report of The Special Rapporteur on Prisons And Conditions of Detention in Africa, adopted by the African Commission on Human and Peoples’ Rights at the 33rd Ordinary Session, 15-29 May 2003*”, available [here](#)

SK Amoo & Davy Y Kambinda, “Community service orders as part of judicial discretion in the criminal justice system”, *Namibia Law Journal*, Volume 3, Issue 2, 2011

Clever Mapaure & Raphael T Hamunyela, “Once jailed, wait for fuzzy mercy: A critical legal analysis of the blurred prison and parole laws of Namibia”, *Namibia Law Journal*, Volume 4, Issue 2, 2012

Chuks Okpaluba, “State liability for acts and omissions of police and prison officers: recent developments in Namibia” 46 (2) *The Comparative and International Law Journal of Southern Africa* 184 (2013)

Law Reform and Development Commission, *Discussion Paper on the Possible Statutory Interventions to Curb the Alarming Spate of Domestic Violence, Murder and Gender Based Violence*, LRDC 33, 2014 (parole)

Obonye Jonas & Tshepiso Ndzingi-Makhamisa, “Anti-retroviral drugs for foreign inmates in Botswana: *Tapela & Anor v Attorney-General & Others*”, *Namibia Law Journal*, Volume 6, Issue 2, 2014

Legal Assistance Centre, “Use of force by law enforcement officials in Namibia”, 2019, available [here](#).

Conditions in police cells: The Correctional Service Act defines “correctional facility” to include, for certain purposes, every place used as a police cell or lock-up. *McNab & Others v Minister of Home Affairs & Others* 2007 (2) NR 531 (HC) at 548C-ff found that conditions in the holding cells in which the plaintiffs were detained were inhuman and degrading and therefore a violation of the constitutional right to human dignity. See also:

Adv JR Walters, “Follow-up Report on Conditions Prevailing at Police Cells in Namibia”, Office of the Ombudsman, 2008, available [here](#)

“Report of the Standing Committee on Foreign Affairs, Defence And Security on Visits to Police Stations, Police Cells, Prisons, Border Posts and Military Installations”, National Assembly, 2006

Adv JR Walters, “Special Report on Conditions Prevailing at Police Cells throughout Namibia”, Windhoek: Office of the Ombudsman, 2006

Oliver C Ruppel and Angelique L Groenewald, “Conditions of Police Cells in Namibia, Human Rights and Documentation Centre”, University of Namibia, undated, available [here](#) and [here](#).

APPOINTMENTS

Appointment of First Commissioner of Prisons, Proc. 19/1990

Appointment of Commissioner of Prisons, Proc. 34/1997 ([GG 1765](#))

Commissioner-General of Correctional Service, Proc. 4/2014 ([GG 5407](#)).

COMMENTARY

Legal Assistance Centre / University of Wyoming College of Law, *Struggle to Survive: A Report on HIV/AIDS and Prisoners' Rights in Namibia*, 2008, available [here](#)

Legal Assistance Centre, *Understanding Prisoners' Rights*, undated pamphlet, available [here](#).

See also Security Commission Act 18 of 2001 (**CONSTITUTION**).

See also **DISASTERS** (involvement of uniformed forces in disaster situations).