IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 1711/2017**

In the matter between:

ANDREAS MELUSI MASEKO Applicant

and

THE COMMISSIONER OF CORRECTIONAL SERVICES 1st Respondent

THE DIRECTOR OF PUBLIC PROSECUTION 2nd Respondent

THE ATTORNEY GENERAL 3rd Respondent

Neutral Citation: Andreas Melusi Maseko v *The Commissioner of Correctional Services and two Others (1711/2017) [2018] SZHC 94*

(2nd March2018)

Coram: MAPHANGA J.

Date Heard: 02/03/2018

Date Delivered: 02/03/2018

Summary: *Criminal Procedure-Sentencing-Applicant serving a sentence upon conviction on two separate offences of rape with aggrieving circumstances involving mandatory custodial sentences; Applicant seeking computation of sentence involving interpretation of judgments on sentence aspects- Application and interpretation of Regulation 76 (3) as*

read with sub-regulation (1) of Prisons Regulations of 1965; Whether overlap implies sentences to run concurrently and not consecutively; Applicant seeking favourable interpretation of sentence to be applied consecutively; Prayers sought not in keeping with the prevalent provisions of the Regulations under the Prisons Act ; Application Dismissed.

BACKGROUND

1. This is an otherwise short and simple application which in my view has been incorrectly formulated in the sense of ill-fitting relief or proceeding. It has been brought as an application for judicial review when all indications are that perhaps the most appropriate relief should have been either a declaratory order or interpretation of the judgment the clarification of which is being sought as regards the computation of sentence. When the matter came before me I dismissed the application. These are my reasons.

2. The Applicant is currently serving a sentence upon conviction on two separate offences of rape for which he was tried, convicted and sentenced on the two instances of arraignment.
   In regard to the first of the rape offences the applicant was arrested on the 25th December 2008 and charged and admitted to bail pending trial.

3. Whilst out on bail he was again on the 14th February 2010 arrested on a new change of rape and was remanded in custody for the second rape offence when bail was extreated.

4. On the 5th August 2010 he was convicted by the Principal Magistrate of Manzini having on the first charge of rape and was sentenced to a custodial sentence of 7 years, the Principal Magistrate having accounted and deducted from the sentence the period the Applicant had been held in custody prior to release on bail by the time of passing sentence.

5. The Applicant was subsequently convicted on the 2nd charge of rape by the Principal Magistrate of Shiselweni but his case was remitted in terms of S292 (1) of the Criminal Procedure and Evidence Act of 1938 (as amended) to the High Court for a sentencing on account of his status as repeat offender.

6. On the 15th July 2011 whilst already serving the first sentence on the first rape conviction he was sentenced before the High Court on the second rape conviction and was handed down a 9 year custodial sentence which term was backdated to the 14th February 2010, being the date of his second rape charge – to take into account his period of incarceration to his credit.

7. It is common course that in April 2015, 2016 and 2017 the Applicant accrued and was favoured with certain amnesties of His Majesties the Kings as a prisoner falling within the bracket of eligible prisoners for the amnesty. To this end he received a remission of 18 months to his sentence.

8. As indicated, although the Applicant has captioned his application as one for the relief of judicial review, in effect he has prayed for the following relief as per the notice of motion:

> ***"1. Compelling and directing 1st Respondent to compute the case M168/08 Rex v MASEKO ANDREAS and the High Court the King vs Melusi Maseko case No 31/10 to sum concurrently;***
>
> ***2. directing and compelling 1st Respondent to release Applicant having completed serving the 9 years on 14th February 2016''(sic).***

[1] As I have said I think the appropriate relief should have been mainly a declaratory order for the desired interpretation and computation of sentence with the rest of the prayers being ancillary to the declarator.

[2] Be that as it may, the application has been opposed by the State herein represented by the office of the Attorney General which has invoked sections 76 (3) as read with (1) of the Prisons Regulations of 1965 contending.

[3] The Applicant contends on the other hand that by backdating the second term imprisonment to the 14th February 2010 what the court ordered was that the sentences sum concurrently.

[4] The simple issue to the determined here is whether upon consideration of the High Court judgment on sentence the part of the judgment dispensing sentence could be construed as the Applicant contends, that the latter sentence of 9 years would been concurrently with the earlier 7 years sentence.

[5] The Supreme Court has in the care of Director of Public Prosecution and others v. ***Celani Maponi Ngubane (04/2016) [SZSC] 34, 2016*** expressed the opinion that the High Court may review and interpret any aspect to bring light on that ambiguity.

[6] In that spirit I now proceed to consider the applicable law.

THE APPLICANT LAW

The Sub Regulations relied on by the State bear note.

Regulation 76 (3) of the Regulations, 1965 provides as follows:

> ***"Except where otherwise provided by a law or the court, if a person is convicted of an offence and, either befine or alter sentence for much offence but before the expiry of such sentence, he is convicted of another offence, and the sentence for the second offence shall be served after the completion of the sentence for the first offence."***

[7] The Crown contends that the clear precept of the section is that, in the event of a second conviction which a person is set to complete an earlier sentence for a previous offence, the terms of sentences in the language of the section shall sum consecutively (it in succession) unless the count specifically diverts otherwise or subject to another law such law provides otherwise.

[8] As regards the method of computation Regulation 78 (1) sets out the manner of reckoning the consecutive sentences to mean effectively that much terms are aggregated.

Regulation 78 (1) reads this:

> ***" If a prisoner is serving consecutive terms of imprisonment the aggregate of all the terms shall be treated as one term for the purpose of remission of sentence."***

[9] If read and applied in tandem the net effect of these regulations is that the consecutive sentences would have to:

a) first be added as if one sentence, before,
b) taking into account any remission of such sentence of any purport. The leaned Counsel for the State. Mr. Vilakati submitted that on the facts of taking into account the peculiar features of this case:

    1) the effective date for commencement of the sentence notionally would run from the date to which the sentence was backdated being 14th February 2010 when he was arrested for the 2nd offence and taken into the custody.
    2) the aggregate term of imprisonment would be 16 years (upon application of Regulation 78(1).
    3) that taking into account the remission, the 16 year term would only come to an end on the 19th November 2018.

[10] I consider the exactness of the end date to be purely a matter of computation that we med lot trouble ourselves with if the court were to adopt this line of reasoning or not. What needs to be set right is the principle.

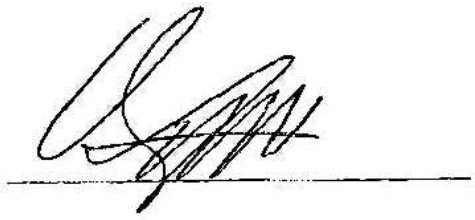
[11] The Prisons Act of 1964 makes provision for certain statutory of remission sentence. Again I do not consider this aspect to be in dispute as in any case once the correct principle as to the application of the sentence is set if becomes again a matter of computing the exact timeline to apply; a function within the ambit of the 1st Respondent discretion or powers.

[12] I have considered the submission by the Applicant and I must say I am unable to agree with the logic of reasoning and interpretation of the Regulations are as against his contention that the back dating of the sentence effectively conflates the two sentences to sum concurrently.

[13] There is nothing to suggest that was the intention of the court in passing the said sentence, nor is there any ambiguity in the courts judgment on sentence as to warrant any interpretation or clarification. All indications are that the court was mindful of the rigour and severity of the sentence and intended to apply it in the manner pronounced.

[14] In the circumstances I am not persuaded of any merit in the applicants case. In the circumstances and for the reasons above the application must fail.

As conceded by Mr. Vilakati for the State, I order that each party shall pay own costs in the outcome.



MAPHANGA J

Appearances:

For the Applicant: **Mr L. Dlamini**

For 1st Respondent: **Mr M. Vilakati**