Reportable: YES
Circulate to Judges: YES
Circulate to Magistrates: YES
Circulate to Regional Magistrates: YES

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST HIGH COURT, MAFIKENG

CASE NO: M370/2020

In the matter between:

MTHOMBELI TSHEMESE **APPLICANT**

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **1ST RESPONDENT**

HEAD OF PRISON: RAMOTSHANA (RUSTENBURG) PRISON **2ND RESPONDENT**

DATE OF HEARING : 17 JUNE 2021
DATE OF JUDGMENT : 01 SEPTEMBER 2021
FOR THE APPLICANT : ADV. R.J. MOKGOSI
FOR THE RESPONDENTS : ADV. H.S. DREYER

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by way of e-mail. The date and time of the handing down of judgment is deemed to be 14h00 on 01 September 2021.

ORDER

(i) The imprisonment portion of the sentence imposed on 06 March 2014 is retrospectively ordered to run concurrently with the sentence imposed on 14 October 2008.

(ii) The remaining portion of the imprisonment imposed on 02 June 2015, being eight (8) years and six (6) months is ordered to run concurrently with the sentence imposed on 10 June 2010.

(iii) It is declared that the applicant would be *eligible* for parole consideration on 15 April 2033.

(iv) The application is otherwise dismissed.

(v) No order as to costs.

JUDGMENT

PETERSEN J

Introduction

[1] This opposed application came before this Court in terms of Uniform Rule 53 of the Uniform Rules of Court, having been launched on 17 July 2020. The applicant seeks an order in the following terms:

> "1. That the decision by the 2nd Respondent in as far as it relates to the calculation and computation of the two 15 years' imprisonment sentences

meted out in 2008 and the other in 2010 respectively, be reviewed and corrected or set aside;

2. That the decision by the 2nd Respondent to add 15 years' imprisonment sentence meted out in 2008 to the 15 years' imprisonment meted out in 2010 thereby making the effective term of imprisonment to be 30 years be declared null and void;

3. That the operation of the 15 years' term sentence meted out in 2008 is independent from the operation of the 15 year' term meted out in 2010 and vice versa;

4. That the 15 years' imprisonment meted out in 2010 starts to operate from date of sentence unless the sentencing Court had made an order that the sentence be postponed;

5. That the applicant ought to have been eligible for parole on or around 2015 in respect of the 2008 sentence and in or about 2017 in respect of the 2010 sentence;

6. That the 2nd Respondent be ordered and/or directed to consider the Applicant for release on parole as at 2017;

7. That the 1st and 2nd Respondent be ordered to pay the costs of the application in the event of opposition, the one paying the other to be absolved; and

8. Further and/or alternative relief."

[2] On 14 October 2020, the applicant amended the notice of motion of 17 July 2020, by the addition of the following prayers:

"1. That the Applicant adds as prayers to its existing notice of motion dated the 17th July 2020 which reads as follows:

1.1 That the independent operation of the two 15 years' terms of imprisonment between 2008 and 2010 respectively without a Court order from the 1st Respondent to Applicant on the date of sentence(s) respectively as to the operation of the said two sentences be declared null and void.

1.1.1 That the decision to group the two 15 years' term of imprisonment by the 2nd Respondent to the Applicant thereby making the Applicant serve a composite amount of 30 years' imprisonment be reviewed, corrected and or set aside.

1.2 That such operation of the two sentences operate independently from date of sentence in the absence of a Court order from the 1st Respondent indicating otherwise."

[3] At the outset, it must be noted that no decision has been taken by the second respondent as alleged by the applicant in respect of the parole date. The second respondent through the alleged acts of a certain *Mr. Mokopi* in the employ of the Department of Correctional Services provided a calculation of a date on which the applicant may become eligible for parole. In the strict sense of Uniform Rule 53, this application is not a review within the ambit of the said Rule but rather an approach to this Court to grant a declaratory order on the parole date. In the ordinary course, a Rule 53 review is heard by two judges. For the reasons stated aforesaid, this Court therefore entertained the application as single Judge, when the application was allocated by the Judge President. A similar application to the present was adjudicated by Satchwell J in matter of *Makwela v Minister of Justice and Others*[1], which is dealt with extensively *infra*.

[1] 2016 (2) SACR 253 (GJ)

[4] The essence of the present application is to consider the manner in which two separate sentences imposed in 2008 and 2010 respectively with two further sentences imposed in 2014 and 2015 respectively, are to be served and thus to determine the date of eligibility for parole. The interpretation of the provisions of section 280(1) and (2) of the Criminal Procedure Act, Act 51 of 1977 [as amended] ("the CPA") and section 39(2)(a), (3) and 76 of the Correctional Services Act, Act 111 of 1998 [as amended] ("the CSA") are brought squarely into focus in considering the application.

Background

[5] The applicant was convicted and sentenced to fifteen (15) years' imprisonment for contravening section 3 of the Firearms Control Act, Act 60 of 2000 ("the FCA") read with section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997 (as amended) ("the CLAA") - possession of a firearm - on 14 October 2008.

[6] On 10 June 2010, whilst serving the 2008 sentence, the applicant was convicted and sentenced to twenty (20) years' imprisonment on two (2) counts of contravening section 3 of the FCA read with section 51(2) of the CLAA - possession of a firearm - with an order that five (5) years' of the twenty (20) years imprisonment term runs concurrently with the sentence imposed on 14th October 2008.

[7] The applicant whilst still serving the sentence imposed in 2008, escaped from lawful custody on 15 April 2013. The applicant fails to deal with what happened between 15 April 2013 when he escaped from lawful custody, until his conviction on 06 March 2014, for contravening section 117(a) of the CSA ('escaping from lawful custody'). On the same date of his conviction he was sentenced to three (3) years' imprisonment, half of which was suspended for one and half years', on condition that he not be convicted of a contravention of section 117(a) or (b) of the CSA committed during the period of suspension.

[8] On 02 June 2015, the applicant was convicted and sentenced to fifteen (15) years' imprisonment for robbery with aggravating circumstances read with section 51(2) of the CLAA, which sentence was ordered to run concurrently with the sentence he was serving at the time. The applicant contends that the order of concurrency was in respect of the 2010 sentence, but as will be demonstrated *infra* this contention is incorrect in law.

[9] On 27 April 2012 the President of the Republic of South Africa announced a general amnesty for sentenced offenders. The applicant as a result received a remission of six (6) months on his sentence. As will be demonstrated *infra* the remission should be construed as being applicable to the sentence imposed in 2008.

[10] The applicant sought leave to appeal the conviction and sentence of 14 October 2008, which application was refused in 2015. The applicant did not pursue the matter further by way of a petition to the Judge President of the Division. The applicant makes no allegations in the founding affidavit that any appeals are presently pending.

[11] The basis of the present application is that the applicant was advised by *Mr. Mokopi* referred to *supra* that he would be due for parole consideration in 2023. Aggrieved by the advice, he sought legal advice from his attorneys of record. On 27 February 2020, the attorneys of record approached *Mr. Mokopi* in relation to the computation of the eligibility date for parole consideration. *Mr. Mokopi* it is alleged informed the attorneys of record that the date of eligibility for parole consideration was in fact 2023. This allegation is not confirmed by *Mr. Mokopi* in an affidavit and no answering affidavit has been deposed to by the respondents. The respondents have merely provided the various records or some of the records of the court proceedings which gave rise to the convictions and sentences and a memorandum under hand of *Mr. Mokopi* wherein the date of eligibility for parole consideration is indicated as 13 October 2023.

[12] According to the memorandum compiled by *Mr. Mokopi* dated 20 August 2020 the date on which the applicant may become eligible for parole consideration was calculated as follows:

> "Maximum release date : 2040-10-13
> Sentence expiry date : 2039-10-13
> ½ Sentence period: 2024-04-13
> Non parole period: 2024-04-13
> 1/6 Sentence: 2013-12-13
> ¼ Sentence period: 2016-07-13
> 1/3 Sentence period: 2019-02-13
> Minimum detention period: 2024-04-13
> ²/³ Sentence period: 2029-06-13
> Profile submission date: 2024-01-13
> Profile preparation: 2023-10-13

[13] The date of 13 October 2023 as calculated by *Mr. Mokopi* is disputed by the applicant who contends that he became eligible for parole in 2017 already. The basis of these contentions is dealt with in greater detail *infra*.

The provisions of section 280 (1) and (2) of the CPA and sections 39(2), (3) and 73(1), (2) and (6) of the CSA

[14] A good starting point in considering the application is the relevant statutory provisions. Section 280 (1) and (2) of the CPA provides as follows:

> "**280 Cumulative or concurrent sentences**
>
> (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or,

as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, **shall commence the one after the expiration, setting aside or remission of the other**, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

[15] Section 39(2)(a) and (3) of the CSA, in turn, provides as follows:

"(2) *(a)* Subject to the provisions of paragraph *(b)*, a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, **must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs such sentences shall run concurrently** …

(3) The date of expiry of any sentence of incarceration being served by a sentenced offender who escapes from lawful custody … is postponed by the period by which such sentence was interrupted. (my underlining)

[16] The essence of the provisions of section 280(2) of the CPA and section 39(2)(a) of the CSA is that any periods of imprisonment are to be served cumulatively, that is, the one sentence is served after the expiration, setting aside or remission of the other unless a court directs that such sentences of imprisonment shall run concurrently. It is further clear that if a sentenced person escapes from lawful custody, the date of expiry of the sentence of incarceration he is serving is postponed by the period that the said person was a fugitive. I reiterate that the founding affidavit is silent on the period the applicant was a fugitive.

[17] Section 73 of the CSA provides that:

"73 (1) Subject to the provisions of this Act-

(a) a sentenced offender remains in a correctional centre for the full period of sentence; and

(2) A sentenced offender must be released from a correctional centre …when the term of incarceration imposed has expired." (emphasis added)

[18] The implication of section 73(1)(a) and (2) of the CSA is that a sentenced offender must serve the full period of any sentence imposed and must be released from a correctional centre only when the said sentence expires. Section 73 of the CSA in my view gives further expression to section 280(2) of the CPA and section 39(2) of the CSA which provides that cumulative sentences must be served the one after the expiration of the other.

[19] Section 73(1)(a) and (2) of the CSA is ameliorated by the provisions of section 73(6)(a) of the CSA which provide that:

> "Subject to the provisions of paragraph *(b)*, a sentenced offender serving a determinate sentence or **cumulative sentences of more than 24 months** may not be placed on day parole or parole until such sentenced offender has served either the stipulated non-parole period, or if no non-parole period was stipulated, **half of the sentence** …" (emphasis added)

The submissions

[20] On the submissions of the applicant and the respondents on the calculation of the relevant periods to determine the date on which the applicant becomes eligible for parole, it is clear that both move from the premise that eligibility for parole is calculated as half of a sentence of imprisonment being served. The submissions are premised on diametrically opposed interpretations of section 73(6)(a) of the CSA.

[21] The applicant, on the advice of his attorneys of record, having been informed by *Mr. Mokopi* of the computation of the date of his eligibility for parole, contends that the calculation is erroneous and should be calculated as follows:

> "1. That the 2008 matter operates from the date of sentence, that half of the 15 years would have been 7½ ending in 2015.
>
> 2. That the 2010 matter operates from the date of sentence and half thereof would have been 7½ ending 2017.
>
> 3. Ultimately I should have already been considered for parole in 2017, however I am still currently in custody three years later and have also not been considered for parole."

[22] *Adv. Dreyer* for the respondent's in her heads of argument, in turn, deals with the computation of the date of eligibility for parole differently. The submission is that the effective sentence on the various convictions and sentences imposed which the applicant is serving should be calculated by adding the sentences that are to be served consecutively. The calculation is then proposed along the following lines. The first sentence imposed on 14 October 2008, being fifteen (15) years imprisonment commenced on the said date. The second sentence imposed on 10 June 2010, being twenty (20) years imprisonment of which five (5) years imprisonment was ordered to run concurrently with the first sentence, with the result that the fifteen (15) years' on the second sentence does not run concurrently with the fifteen (15) years' on the first sentence, but consecutively. The fifteen (15) years' imprisonment on the second sentence, submits *Adv Dreyer*, will only commence after the last day of the first fifteen (15) years. Nothing is said about the third sentence in respect of the period the applicant would have been a fugitive. The submission further is that the reference in the fourth sentence that the fifteen (15) years imprisonment imposed must be served with the *"sentence already serving"* must be construed as a reference to the first sentence of

2008. Against this background, *Adv Dreyer* submits, turning back to the submission of adding the sentences to served consecutively, that 15 plus 15 plus 1½ totals a combined sentence of thirty-one (31) years and six (6) months imprisonment. If that full sentence were to be served, the submission is that the applicant would only be eligible for release on 13 April 2040.

[23] On the eligibility of the applicant for parole, *Adv. Dreyer* makes the point, correctly so, that none of the sentencing courts fixed a non-parole period. It is at this point where reliance is placed on section 73(6)(a) of the CSA, which presently provides that a sentenced offender *may* become eligible for parole after serving half of his sentence. On the present reading of section 73(6)(a) of the CSA, the submission is that the applicant would be eligible for parole on 13 April 2024.

The omission of section 73(6)(b)(v) of the CSA from the CSA with effect from 01 March 2012

[24] During preparation of the judgment, the omission of section 73(6)(b)(v) of the CSA from the legislation with effect from 01 March 2012, came to mind. The amendment of the CSA in the 2011 legislative process and consequent omission of section 73(6)(b)(v) from the CSA with the enactment of the amendments to CSA, was a particularly uneventful process, which evaded many judicial officers in the criminal courts. In fact, once enacted, not many in the legal fraternity dealing with criminal matters were aware of the change to the parole regime in respect of matters resorting within the ambit of section 51(2) of the CLAA.

[25] In terms of section 73(6)(b)(v) of the CSA, the parole dispensation which applied prior to 01 March 2012, dealt with sentences imposed in terms of the provisions of section 51(2) of the CLAA. Section 73(6)(b)(v) of the CSA provided that:

> "*73(6)(b) A person who has been sentenced to-*

(v) imprisonment contemplated in section 51 or 52 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), ***may not be placed on parole unless he or she has served at least four fifths of the term of imprisonment imposed*** *or 25 years, whichever is the shorter,* ***but the court, when imposing imprisonment, may order that the prisoner be considered for placement on parole after he or she has served two thirds of such term****.* (my underlining and highlighting by way of emphasis)

[26] The provision drew a clear distinction between offenders sentenced in terms of the Regional Court's ordinary jurisdiction of fifteen (15) years' imprisonment or a High Court's inherent jurisdiction when imposing minimum sentences other than life imprisonment. A sentence imposed in terms of the Regional Court's ordinary jurisdiction rendered a sentenced offender eligible for parole after serving half of the sentenced. A sentence imposed in terms of the provisions of the CLAA, however, in the absence of an order by the regional magistrate that that the offender be considered for parole after serving two thirds of the sentence imposed, had the effect that that the said offender would only be eligible for parole after serving four-fifths of the sentence.

[27] On 19 August 2021, in all fairness to the parties, I caused a directive to be forwarded to the legal representatives of the applicant and the respondents, inviting written submissions on the effect of the omission of section 73(6)(b)(v) of the CSA from the CSA with effect from 01 March 2012. In particular, counsel was requested to address the impact of the omission of section 73(6)(b)(v), on the calculation of the date on which the applicant may have or would become eligible for parole, considering the fact that the provision was still applicable in 2008 and 2010 when the applicant was sentenced in terms of the provisions of section 51(2) of the CLAA.

Submissions by the applicant and the respondents on the omission of section 73(6)(b)(v) of the CSA from the CSA with effect from 01 March 2012

[28] The submissions requested from the legal representatives of the parties was received on 26 and 27 August 2021, respectively. I deal with the submissions only insofar as they are relevant and where they deal pertinently with the directive of the Court.

[29] The relevant submissions on behalf of the applicant, submitted by *Mr. Mokaa*, the attorney of the applicant, in respect of the omission of section 73(6)(b)(v) of the CSA, can be succinctly summarised as follows. According to *Mr. Mokaa*, it is a legal requirement that the applicant be considered for release on parole after serving half of the sentence imposed, following the omission of section 73(6)(b)(v) of the CSA from the legislation with effect from 01 March 2012. The contention is specifically that the amendment is a departure from the four-fifths dispensation which applied to offenders sentenced in terms of section 51(2) of the CLAA, prior to 01 March 2012. The only other relevant submission is that a sentenced offender becomes eligible for parole after serving 25 years' imprisonment, regardless of the provisions of section 73(6)(a) or 73(6)(b)(v). The remainder of the submissions respectfully traverse issues previously addressed on behalf of the applicant.

[30] The relevant aspects of the submissions of *Adv. Dreyer* commences with a reference to section 35(3)(n) of the Constitution of the Republic of South Africa and the import of section 35(3)(n) as explained by Dlodlo AJ (as he then was) in *Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening)*[2], that:

> "[38] …Section 35(3)(n) of the Constitution distinguishes between sentence and punishment, indicating that in the eyes of the drafters, the two are distinct concepts. A sentence is a measure of punishment, but it is not the punishment itself; it is the decision, usually but not necessarily of a court, as to which punishment should be imposed. Sentencing is conducted by a court, which

[2] (CCT 44/18) [2019] ZACC 18; 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC) at paragraphs [38] and [41]

must choose from the options provided to it by the Legislature and does not have the prerogative to decide precisely how and where that punishment will be carried out. Courts must apply the appropriate punishment established by statute or the common law. However, as pointed out by the Supreme Court of Appeal in *Mhlakaza*, when sentencing a person to imprisonment, "[t]he function of the sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served.

…

[41] … the rules governing the length of the period to be served in a prison before an inmate becomes eligible for parole are statutory and function automatically. They determine when inmates may apply for parole. These rules determine not whether someone should be released, but when they will have their first opportunity to apply for release on parole. The effect of these rules is to lengthen or shorten a term of imprisonment, which is a type of punishment. Importantly, these rules are distinct from the application of parole policies and criteria by correctional service administrators in determining whether a parole application will be successful.

…

(emphasis added by this Court)

[31] *Adv. Dreyer* refers to an article by Majuzi, J.D. 2011. Unpacking the Law and Practice relating to Parole in South Africa. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad.* 2011(volume 14) No 5, where the difference between section 73(6)(v) and section 73(6)(a) is explained, which accords with this Courts exposition of the two dispensations *supra*.

[32] *Adv. Dreyer* with respect incorrectly submits that the warrants of detention for 2008 and 2010 do not make reference to the type of firearms the applicant was convicted of unlawfully possessing, which is said to be relevant to determine if he was

convicted of such offence read with section 51(2) of the CLAA. The warrants of detention as alluded to by *Adv*. *Dreyer* are not determinative of the offence/s the applicant was convicted of. On a reading of the records filed by the respondents, it is clear that the charges proffered against the applicant in the 2008 and 2010 convictions, pertinently refer to the charge/s being read with the provisions of section 51(2) of the CLAA, and the resultant convictions were in accordance with the said charges. The sentences imposed in 2008 and 2010 were clearly within the ambit of section 51(2) of the CLAA which rendered the said sentences subject to the provisions of section 73(6)(b)(v) of the CSA. In passing, it is apposite to note that the sentence imposed in 2010 for two contraventions of section 3 of the FCA, was not competent. The Regional Magistrate could not take the two statutory contraventions, each providing for a minimum sentence of twenty (20) years' imprisonment in light of the relevant 2008 conviction, together for purposes of sentence. The Regional Magistrate was enjoined to sentence the applicant separately on each of the two counts and could at most have ordered that the sentences run concurrently in terms of section 280(1) of the CPA. That, however, is not an issue, which engages this Court.

[33] To the credit of *Adv. Dreyer*, the applicability of section 73(6)(b)(v) of the CSA was anticipated in her written submissions, in the event of section 51(2) of the CLAA being applicable. In anticipation of section 51(2) of the CLAA being applicable, the submission on the calculation of the date for eligibility for parole consideration, is proposed along the following lines. Four-fifths will be applicable to the sentence imposed in 2008, four-fifths to the sentence imposed in 2010, half of the sentence imposed on 6 March 2014 and the sentence imposed on 2 June 2015 which was ordered to be served concurrently, is irrelevant for the calculation. The aforementioned proposition is calculated in months by *Adv. Dreyer* as follows: (180 months x $\frac{4}{5}$) + (180 months x $\frac{4}{5}$)+(18 x $\frac{1}{2}$)=297 months; 297 months equal 24 years and 9 months imprisonment, with the first date the applicant becomes eligible for parole consideration, being 14 July 2033.

[34] *Adv. Dreyer* submits that if it is accepted that parole is a form of punishment and the rules for parole eligibility lengthen or shorten the minimum period of imprisonment, then the right to receive the least severe of the prescribed punishments in terms of section 35(3)(n) is implicated. The commencement of section 12 of Act 5 of 2011, submits *Adv. Dreyer*, shortens the minimum period of imprisonment in accordance with the right to a fair trial conferred by section 35(3) of the Constitution being broader than the list of specific rights set out in paras (a) to (j) of the subsection. *Adv. Dreyer* amplifies this submission with reference to the sentiments expressed in paragraph [56] of *Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening)*, where the following was said:

> "[56] Section 35(3)(n) incorporates the fundamental principle of legality expressed through the maxim nulla poena sine lege (no punishment without law). This requires that punishment be governed by rules which themselves comply with the principle of legality – including prospectivity – as an aspect of the rule of law."

Adv. Dreyer, however, omits to quote the following concluding remarks of paragraph [56] which reads thus:

> "…This aspect of legality has been thus described by this Court:
>
> [T]he rule of law embraces some internal qualities of all public law: that it should be certain, that is ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without justifiable differentiation."

[35] In conclusion, *Adv Dreyer*, submits that the applicant is to serve a combined sentence of thirty-one years and six months imprisonment with parole determined by the Executive and calculated in terms of statute which functions automatically in the absence of a non-parole period stipulated during sentencing by the judiciary. The

submission goes further that in terms of section 35(3)(n) the applicant has the right to a fair trial and the least severe of the prescribed punishments. There should accordingly be no discrimination against groups sentenced before 1 March 2012 and after 1 March 2012 and the least severe calculation of the non-parole period must be used. On this basis, *Adv. Dreyer* surmises that the Department of Correctional services calculated the non-parole period correctly and that the applicant might be eligible for parole on 13 April 2024.

Discussion of the omission of section 73(6)(b)(v) of the CSA from the CSA with effect from 01 March 2012

[36] The effect of section 73(6)(b)(v) of the CSA is that the applicant in the absence of an order by the respective regional magistrates in 2008 and 2010 that he be considered for parole after serving two thirds of the sentence imposed, would only become eligible for consideration for release on parole after serving four fifths of the term of imprisonment imposed in respect of the sentences imposed in 2008 and 2010 respectively. The implication is profound in that an order by a court that a sentenced offender be considered for parole after serving two-thirds of the fifteen (15) years' imprisonment imposed, would render the said sentenced offender eligible for parole after ten (10) years'. In the absence of such an order, however, the sentenced offender would only be eligible for parole only after serving twelve (12) years' of the fifteen (15) years' imprisonment imposed.

[37] The qualification to be added to the sentences imposed in 2008 and 2010 is that section 73(6)(b)(v) of the CSA as with section 73(6)(a) of the CSA would not be applicable as the applicant in terms of section 280(2) of the CPA and section 39(2) of the CSA, must serve the full term of imprisonment.

Should the applicant benefit from the present dispensation on parole eligibility or remain subject to the dispensation which was applicable in 2008 and 2010?

[38] The omission of section 73(6)(b)(v) of the CSA in 2012 begs the question whether the applicant should benefit from the dispensation as it presently stands in terms of section 73(6)(a) of the CSA. There is no authority in this regard post 01 March 2012. Prior to 01 March 2012, the provisions of section 73(6)(b)(v) of the CSA, was dealt with by the SCA in *S v Stander*[3], handed down on 29 November 2011, three (3) months before its omission from the CSA, as follows:

> "[18] It does not appear from the judgment in *Pakane* or the heads of argument delivered in the matter (which are in the archives of this Court) that any of the parties asked for the imposition of an order in terms of s 276B by the Court on appeal. Such an order was not part of the trial court's order. This Court further seems not to have taken s 73(6)(*b*)(v) of the CSA into account, which provides:
>
> > 'A person who has been sentenced to incarceration contemplated in section 51 or 52 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), may not be placed on parole unless he or she has served at least four-fifths of the term of incarceration imposed or 25 years, whichever is the shorter, but the court, when imposing incarceration, may order that the sentenced offender be considered for placement on parole after he or she has served two thirds of such term.'

[39] According to footnote 17 at the end of paragraph [18] of the *Stander* judgment, the SCA noted that:

> "s73(6) came into operation on promulgation of the CSA on 31 July 2004. It has subsequently been substituted by s 48(*c*) of the Correctional Services Amendment Act 25 of 2008, but the date of commencement of the new section has not yet been proclaimed. The substituted s 73(6)(*b*)(v) reads as follows: 'A person who has been sentenced to incarceration contemplated in section 51 or 52 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), may not be

[3] 2012 (1) SACR 537 (SCA) at para [18]

placed on parole unless he or she has served the period determined by the National Council in terms of section 73A.' S 73A has also been inserted into the CSA by Act 25 of 2008 and its date of commencement has similarly not yet been proclaimed. The new section adopts a more flexible and individualised approach towards the determination of the compulsory minimum period of sentence to be served by each prisoner.) (my underlining)

[40] On 01 March 2012, however, what the SCA noted at footnote 17 of the *Stander* judgment was omitted from the CSA, with the reason for such omission being unclear. What, however, remains is section 73(6)(a) of the CSA, in terms of which, it is accepted that from 01 March 2012, any person sentenced in terms of section 51(2) of the CLAA, becomes eligible for parole, not meaning that he will be released on parole, after serving half of the minimum sentence imposed.

[41] I considered the judgment of *Phaahla v Minister of Justice and Correctional Services and Another supra*, which dealt with retroactivity of the CSA legislation in respect of parole applicable to a sentence of life imprisonment (section 73(6)(b)(iv) of the CSA) in circumstances where *Phaahla* was sentenced four (4) days after a more stringent parole provision was introduced in respect of life imprisonment. At paragraph [70] the following was held:

"Date of commission of offence or date of conviction?

[70] The question that remains is: if the date of sentencing is to be abandoned, what date should take its place - the date of conviction or the date of commission of the offence? During oral argument it was put to counsel whether the date of conviction would provide a compromise. Counsel for the applicant argued that, although in this instance using the date of conviction would provide the applicant with a satisfactory result, generally the use of the date of conviction would face similar obstacles to those encountered when using the date of sentencing. Firstly, an accused has no control over the length of a

criminal trial or frequent delays in the criminal-justice process. As with sentencing, two accused could commit the same offence on the same day, be arrested on the same day and still be convicted on different dates. The result would be that the two accused would not be treated equally by the law. Secondly, if parole is part of the punishment, as we have held that it is, then the relevant date must be the date of the offence. This accords with s 35(3)*(n)*, which provides that if the punishment has changed between date of offence and date of sentence, the accused has the right to the benefit of the least severe of the two punishments. The relevant dates are those of the commission of the offence and those of sentencing; the date of conviction does not enter the equation. **For these reasons, the applicant's proposition should win the day: punishment, and parole eligibility, should be determined by the date of commission of the offence**."

(emphasis added)

[42] The present matter in my view is distinguishable from the *Phaala* case, save for the date of commission of an offence being determinative of the date from which eligibility for release on parole should be calculated. The submission by *Adv. Dreyer* that the applicant should benefit from the current parole dispensation does not accord with the ultimate finding in *Phaahla* that punishment and parole eligibility should be determined by the date of the commission of the offence. The parole dispensation applicable in 2008 and 2010 should accordingly be accepted as being applicable to the applicant.

The issue of the escape from lawful custody and the order of concurrency of 2015

[43] There are two further issues which, in my view, merits closer scrutiny. The first being the absence of evidence on the period the applicant was a fugitive when he escaped from lawful custody in 2013; and the second being the correctness in law of the order of concurrency by the regional magistrate in the sentence imposed in 2015.

[44] On the first issue, in the absence of evidence that the applicant was a fugitive, which impacts on the suspension of the serving of the sentence imposed in 2008, this Court has no evidence from the applicant. In the absence of such evidence, this Court will deal only with the issue as to how the eighteen (18) months imprisonment which was to be served by the applicant within the context of the various sentences imposed, should be considered having regard to the evidence as a whole. I deal with this aspect later to avoid prolix.

[45] On the second issue, the judgment of *Makwela v Minister of Justice and Others supra* merits consideration. Satchwell J dealt with the question of concurrency, which I consider, should be quoted extensively to appreciate the well-reasoned approach, which I am in agreement with:

> "[8] Section 280(2) of the Criminal Procedure Act 51 of 1977 (the Act) provides that punishments consisting of imprisonment shall commence one after the other 'unless the court directs that such sentences of imprisonment shall run concurrently'. The usual rationale for such orders is that a sentencing court should be mindful of the cumulative (and sometimes harsh) impact of the imposition of more than one sentence.
>
> [9] In the present case the learned sentencing magistrate was mindful that the accused before him had already been sentenced to serve a term of imprisonment and that same was actually in the process of being served. He must therefore have been mindful that some portion of the first sentence of imprisonment (15 years) had already been served and that only some portion remained still to be served - in this case some 8,5 years of the first sentence.
>
> [10] The learned magistrate ordered that the sentence which he imposed was to 'run concurrently with the sentence presently serving'. **At issue is whether or not the 10 years are encapsulated within the remaining 8,5 years of the**

first sentence, or whether they run from 2014 parallel with the remaining portion of the first sentence but continue beyond that first sentence which terminates earlier than the later sentence.

[11] The Act contains no definition of the word 'concurrent' and the commentary on s280(2) mainly deals with the impact of sentencing, therefore the rationale for ordering sentences of imprisonment to run concurrently. I have been unable (and so have Adv *Mbuli* and Adv *Phanyane*) to find any decisions of our courts which deal with the manner in which shorter and longer concurrent sentences of imprisonment are to be implemented.

[12] *The Oxford English Dictionary* vol II 2 ed provides definitions of 'concurrent' as:

> 'Adj: running together in space, as parallel lines; going on side by side, as proceedings; occurring together, as events or circumstances; existing or arising together; conjoint, associated.
> Law: covering the same ground.
> Concurrent Lease: a lease made before another is expired, and so existing for part of the time side by side with the other.'

[13] I had always understood that where one entity runs 'concurrently' with another there is considered to be a parallel relationship running in tandem. In the case of a sentence of imprisonment this has usually meant that a shorter sentence runs at the same time as the longer sentence, is encapsulated within and is usually bounded by the beginning and the ending of the longer sentence. **However, in the present case, the later and longer sentence cannot be encapsulated within and bounded by the termination date of the earlier and shorter sentence**.

[14] **I do take note of the submissions of Adv *Mbuli* that there has been neither appeal nor review of the sentences imposed by the learned**

magistrate and that this court should be careful not to interfere with that which was ordered by the sentencing magistrate. I am in agreement with his approach but do not find that my reasoning either interferes or changes that which was ordered by the learned magistrate.

[15] I cannot find that the later sentence of 10 years is to terminate when the remaining portion of the earlier sentence of 8,5 years ends.

[16] Firstly, the learned magistrate was alive to the fact that the accused had already served 6,5 years of the first 15-year sentence and therefore had only 8,5 years to serve. One cannot assume that a judicial officer was ordering an absurd result - i.e. that 10 years should fit within 8,5 years.

[17] Secondly, the Act does not provide that the later sentence must be entirely subsumed within the earlier sentence.

[18] Thirdly, the clear meaning of the word 'concurrent' indicates that the two sentences run in parallel while they operate at the same time. However, when one sentence is complete there is nothing to suggest that the remaining sentence must or should also then terminate. It simply has nothing further with which to run in tandem - it now stands on its own. The offender has certainly benefited by the court order of concurrency - since the first portion of the later and longer sentence ran with the remaining portion of the earlier and shorter sentence; the sentences did not run consecutively.

[19] In the present case the applicant would serve 15 years of the first sentence and thereafter the remaining 1,5 years of the 10-year sentence, instead of 15 years of the first sentence and thereafter 10 years of the later sentence. The impact of the subsequent sentence has certainly been ameliorated by the learned magistrate.

[20] My registrar has helpfully explored the Anglo-American jurisdictions for assistance. One must always be careful of placing any reliance upon the law of foreign jurisdictions, especially when it relies upon its own statutes and is also not the common law of the Republic of South Africa.

[21] In *R v Governor of Brockhill Prison, Ex parte Evans* [1997] 2 WLR 236 the court had to decide whether or not several sentences of imprisonment, whether consecutive or concurrent, were to be treated as a single term. The Lord Chief Justice held at 282 that:

> '(I)n the case of concurrent sentences, the single term would in effect be the longest of the terms except where those sentences had been imposed on different occasions when the term would expire on the terminal date of the last sentence to expire.'
>
> And at 298:
>
> 'If concurrent sentences are imposed on the same occasion, the single term will in effect be the longest of the concurrent terms because that will be the last sentence to expire. Where concurrent sentences are imposed on different occasions they must still be treated as a single term, but the terminal date of the sentence pronounced by the court will not necessarily be that of the longest of the concurrent terms; it will, however, be the terminal date of the last sentence to expire, which may or may not be the longest of all the sentences. In the case of concurrent sentences it is not, obviously, a question of adding the relevant sentences together but of seeing which expires last.'

[22] The Legal Aid Society of the United States of America's commentary on the New York Penal Code comments that 'the time to be served on concurrent sentences is determined by the longest of the concurrent sentences' which is often referred to as 'the controlling sentence'. Since 'concurrent does not mean retroactive…two identical sentences imposed at different times may result in

different release dates', whilst 'concurrent sentences, even if they are for the same length of time, will not necessarily begin and end at the same time if they are imposed on different dates'.

[23] **Although these comments come from different jurisdictions and in relation to different statutes and issues, the point made is the same. Concurrency allows different sentences their own life span and, although they may, partially, occupy the same time span, they are not necessarily destined to expire together**.

[24] **In the result I am in agreement with the calculations of respondent as set out in the answering affidavit, which indicate that the 10-year sentence runs until 3 April 2024 and thereafter the 3-year sentence (for escape) runs until 3 April 2027**.

[46] Having regard to the reasoning in *Makwela*, by way of application to the present matter, the implications are as follows. At the time the applicant was sentenced to fifteen (15) years' imprisonment on 02 June 2015, he had served a period of six (6) years' and eight (8) months of the 2008 sentence which was imposed on 14 October 2008. The full fifteen (15) years' imprisonment imposed in 2015 could therefore not be subsumed by the remaining eight (8) years' and four (4) months of the 2008 sentence. The applicant upon completion of the sentence of fifteen (15) years' for the 2008 sentence will therefore have six (6) years' and eight (8) months left of the 2015 sentence to complete. The logical question which then comes to mind, is when does the remaining six (6) years' and eight months of the 2015 sentence take effect, considering the fact that the 2010 sentence is to commence upon completion of the 2008 sentence. And, not losing sight of the eighteen (18) months imprisonment for the 2014 escaping sentence.

[47] If one were to follow *Makwela's* reasoning, the 2010 sentence would commence on 15 October 2023 when the 2008 sentence has expired. The 2010 sentence would

then expire upon being fully served on 15 October 2038. On 16 October 2038, the eighteen (18) months imprisonment imposed in 2014 will commence and run until completion on 16 April 2039. On 17 April 2039, the remaining six (6) years and eight (8) months of the 2015 sentence will commence. In terms of section 73(6)(a) of the CSA, the applicant would then only be eligible to be considered for parole after serving half of the six (6) years and eight (8) months and if granted, it would mean that he would only be released from the correctional centre where he may be serving his sentence at the time on 17 August 2042. At that time the applicant would have served a period of thirty-four (34) years' imprisonment.

[48] The result of the 2015 sentence is clearly that the regional magistrate who imposed the said sentence failed to carefully consider the impact of the sentence in circumstances where it was ordered that the sentence of fifteen (15) years imprisonment be subsumed by the remaining portion of the 2008 sentence, which *Makwela* makes plain, is untenable.

[49] In the present matter, the applicant has not pursued any leave to appeal the 2015 sentence and the question is whether this Court sitting in review as single judge, on an application which is flawed in law, has the power to interfere in the sentences and orders of the courts *a quo*, to ameliorate the impact of what appears to have been the unintended consequences by the trial court in 2015. As for the sentence imposed in 2010 and the partial order of concurrency, the regional magistrate in my view cannot be faulted. The absence of an order of concurrency of the sentence imposed in 2014 exacerbates the matter.

[50] If the conundrum brought about by the 2015 sentence is removed from the equation on the basis that this Court is empowered to order concurrency of the 2014 and 2015 sentence in a manner which will ameliorate the impact of the sentences imposed, what would be left are the 2008 and 2010 sentences. That will bring this Court back to question, when the applicant in terms of section 73(6)(b)(v) of the CSA and *Makwela*, would be eligible for parole.

The date of the applicant's eligibility for consideration for release on parole

[51] In the exercise of this Court's powers, it would be fair and just to order that the sentence imposed in 2014 be deemed to have been served concurrently with the sentence imposed in 2008. In respect of the remaining six (6) years and eight (8) months imprisonment of the 2015 sentence, it would be fair and just to order that same shall run concurrently with the fifteen (15) years imprisonment imposed on the 2010 sentence. What remains therefore is the interpretation to be accorded to the 2008 and 2010 sentences to determine the date on which the applicant may become eligible for parole.

[52] On a correct interpretation of the dispensation which applied at the time the applicant committed the offences relevant to the convictions and sentences of 2008 and 2010, he is required to serve 12 years' of the 15 years' imprisonment imposed on each of the sentences in 2008 and 2010 and not half of the sentence as applies in terms of the dispensation effective since 01 March 2012. The applicant in respect of the 2008 sentence would accordingly only have been eligible for parole on the 2008 sentence on 14 October 2020 if it were not for the sentence imposed in 2010. In accordance with the provisions of section 280(2) of the CPA and 39(2) of the CSA, the 2008 and 2010 sentences are to be served consecutively, the one after the expiration of the other. The eligibility for parole on the 2008 sentence accordingly finds no applicability as the applicant is required in law to complete the full fifteen (15) years imprisonment imposed on 14 October 2008. The result being, that the 2008 sentence, with due regard to the six (6) month remission of 2012, would expire only on 14 April 2023. On 15 April 2023, the fifteen (15) years' imprisonment imposed in 2010 will commence. The applicant would then be eligible to be considered for parole twelve (12) years later, on 15 April 2035. At the time he becomes eligible for parole in 2035, he would have served a period of twenty-seven (27) years' imprisonment. In terms of section 39(2) of the CSA, the applicant must be considered for parole after twenty-five (25) years of the twenty- seven (27) years, which date would be 15 April 2033.

[53] In my view, the convictions and resultant sentences imposed on the applicant were for very serious and prevalent offences. The applicant being eligible for parole consideration after twenty (25) years' is accordingly both fair and reasonable when regard is had to the seriousness of the offences and the interests of society. It is clear that on the applicant's interpretation of the legislation as set above, it would make a mockery of the administration of justice and bring the administration of justice into disrepute in the eyes of a society who are faced with the audacity and horror of the nature of similar crimes as committed by the applicant, on a daily basis.

Costs

[54] The applicant sought costs against the respondents in the event of opposition. Counsel for the applicant submitted that in the event of a dismissal of the application, no costs should be granted against the applicant who is serving a sentence and is as a result not a man of means. In the ordinary course, costs follow suit. In light of the legal question which this application raised and in the interest of justice, I do not propose to make an order as to costs.

Order

[55] Consequently, the following order is made:

(i) The imprisonment portion of the sentence imposed on 06 March 2014 is retrospectively ordered to run concurrently with the sentence imposed on 14 October 2008.

(ii) The remaining portion of the imprisonment imposed on 02 June 2015, being eight (8) years and six (6) months is ordered to run concurrently with the sentence imposed on 10 June 2010.

(iii) It is declared that the applicant would be *eligible* for parole consideration on 15 April 2033.

(iv) The application is otherwise dismissed.

(v) No order as to costs.

AH PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG