REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 271/2013

In the matter between:

ANDREAS ALUGODHI **APPLICANT**

And

MINISTER FOR SAFETY AND SECURITY **1ST RESPONDENT**

COMMISSIONER GENERAL OF NAMIBIAN

CORRECTIONAL SERVICES **2ND RESPONDENT**

OFFICER IN CHARGE, WINDHOEK CENTRAL PRISON **3RD RESPONDENT**

Case No: A 334/2013

GERT SHAPANGE **APPLICANT**

And

MINISTER OF SAFETY AND SECURITY **1ST RESPONDENT**

THE HEAD OF WINDHOEK CENTRAL PRISON **2ND RESPONDENT**

Case No : A 317/2013

FANIE NANUB **APPLICANT**

And

MINISTER FOR SAFETY AND SECURITY **1ST RESPONDENT**

COMMISSIONER GENERAL OF NAMIBIAN

CORRECTIONAL SERVICES **2ND RESPONDENT**

OFFICER IN CHARGE, WINDHOEK CENTRAL PRISON **3RD RESPONDENT**

Case No: A 336/2013

SIMON PETRUS !GANEB **APPLICANT**

And

MINISTER FOR SAFETY AND SECURITY **1ST RESPONDENT**

COMMISSIONER GENERAL OF NAMIBIAN

CORRECTIONAL SERVICES **2ND RESPONDENT**

OFFICER IN CHARGE, WINDHOEK CENTRAL PRISON **3RD RESPONDENT**

Case No: 326/2013

EDWARD KAMBUNDU **APPLICANT**

And

MINISTER FOR SAFETY AND SECURITY **1ST RESPONDENT**

COMMISSIONER GENERAL OF NAMIBIAN

CORRECTIONAL SERVICES **2ND RESPONDENT**

OFFICER IN CHARGE, WINDHOEK CENTRAK PRISON **3RD RESPONDENT**

Case No: A 335/2013

LOUIS G STRAUSS **APPLICANT**

And

MINISTER FOR SAFETY AND SECURITY **1ST RESPONDENT**

COMMISSIONER GENERAL OF NAMIBIAN

CORRECTIONAL SERVICES **2ND RESPONDENT**

THE HEAD OF CORRECTIONAL FACILITY WINDHOEK **3RD RESPONDENT**

THE CHAIRPERSON INSTITUTIONAL COMMITTEE (WFC) **4TH RESPONDENT**

THE CHAIRPERSON OF NATIONAL RELEASE BOARD **5TH RESPONDENT**

Case No: A 310/2013

GERSON KAIBEB **APPLICANT**

And

MINISTER FOR SAFETY AND SECURITY **1ST RESPONDENT**

OFFICER IN CHARGE, WINDHOEK CENTRAL PRISON **2ND RESPONDENT**

Case No: A 126/2013

JOSHUA HECHT **APPLICANT**

And

MINISTER FOR SAFETY AND SECURITY **1ST RESPONDENT**

HEAD OF CENTRAL PRISON **2ND RESPONDENT**

Case No: A 247/2013

IMMANUEL GABRIEL **1ST APPLICANT**

IMMANUEL NDEUAPWA **2ND APPLICANT**

and

MINISTER FOR SAFETY AND SECURITY **1ST RESPONDENT**

COMMISSIONER GENERAL OF NAMIBIAN

CORRECTIONAL SERVICES **2ND RESPONDENT**

OFFICER IN CHARGE, WINDHOEK CENTRAK PRISON **3rd RESPONDENT**

Neutral citation: *Alugodhi v Ministry of Safety and Security* (A271-2013) [2015] NAHCMD 160 (14 July 2015)

Coram: DAMASEB, JP et MILLER, AJ
Heard: **28 May 2014**
Delivered: **14 July 2015**

Flynote: **Application** – Declaratory order sought in stated case – Computation of sentences in terms of s 86 of the Prisons Act 17 of 1998 (1998 Prisons Act) and consecutive and concurrent sentences in terms of s 280 of the Criminal Procedure Act, 1977 (Act 51 of 1977)(CPA) – Whether sentences to run consecutively or concurrently in the absence of an express order from the trial court or sentencing court – Statutes interpretation: the two provisions aimed to enforce the same sentencing scheme and not repugnant to one another – Statutory scheme is that firstly, a sentence commences as soon as it is imposed. Secondly, it states that where there are sentences on multiple convictions, such sentences are served one after the other. Thirdly, it creates a statutory exception whereby a subsequent sentence in the wake of a prior sentence of life imprisonment or condemnation as habitual offender, is always concurrent to a term of life imprisonment or sentence following declaration as a habitual offender. Fourthly, the obligation to start serving a sentence is delayed where it is suspended under any law or the offender is released on bail pending appeal; in which case the sentence commences to be served only if the offender surrenders him or herself or is taken into custody . Fifthly, the scheme suspends the running of a sentence where a prisoner has escaped from lawful custody or was erroneously released – Ante-dating of sentences

would lead to absurd results and such power is reserved only for an appeal or review court.

ORDER

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1. When a criminal court (Magistrate or Judge), in passing sentence on an offender who is already serving another sentence or sentences in respect of other and prior convictions does not expressly order that the further sentence(s) should either run concurrently or consecutively with the existing sentence(s) at the time of passing the latter sentence(s), does such omission have the effect that the latter sentence(s) are served/computed by the respondents to be served concurrently or consecutively (with the exiting sentences)?

   The omission has the effect that the latter sentences are to be served consecutively.

2. On what legal authority is whatever the correct answer to the question posed in subparagraph 5.1 above based?

   Section 280 of the Criminal Procedure Act, 1977.

3. When a criminal court is sentencing a convicted offender, is such individual sentenced in terms of the Criminal Procedure Act, No. 51 of 1977 or the

Correctional Service Act, No. 9 of 2012 (whereinafter referred to as "the New Act")?

Such individual is sentenced in terms of the Criminal Procedure Act.

4. When two sentences are ordered by a sentencing court to run concurrently, is the latter sentence automatically antedated to commence running on the same date as the former sentence or not? (This question of law is in regard to the applicant Gert Shapange only).

   The latter sentence is not ante-dated to commence running from the same date as the former sentence.

5. Is the respondents' overall computation of the applicant Simon Petrus !Ganeb sentences authorized by law or not?'

   Yes, it is authorised by law.

6. There shall be no order as to costs.

JUDGMENT

Damaseb, JP: [1] This is a consolidated application by the applicants against the respondents, converted into a stated case.[1] The parties record that the agreed facts are the following:

'

1.1 All the above-named applicants are prisoners serving their different prison sentences at the Windhoek Central Prison, Windhoek, Namibia.

[1] Stated case brought in terms of the old rule 33, now rule 63.

1.2 The respondents in the applications consist of the minister responsible for the Namibian Correctional Services (The Minister of Safety and Security), the Commissioner-General of the Namibian Correctional Services (The Commissioner-General) and the Officer-In-Charge of the Windhoek Central prison (The Windhoek Central Prison Officer-In-Charge).

1.3 The aforesaid applicants and respondents are hereinafter collectively referred to as the applicants and the respondents respectively. Where the need arises to identify a particular applicant or respondent from others, such party will be referred to by their name or particular citation.

1.4 With the exception of the applicant Fanie Nanub, each of the applicants in the consolidated application is serving more than one prison sentence after being convicted and sentenced by various Namibian courts, at different times and for various offences.

1.5 From the records held at the Windhoek Central Prison, the Windhoek Central Prison officer-in-charge prepared, after the institution of the applicants' court applications, sentence computation tables for each of the nine applicants (minus the applicant Fanie Nanub);

1.6 The tables provide the full details of the several offences each of the applicants was convicted and sentenced for; the actual sentences handed down by the relevant courts and the Namibian Correctional Service's computation of the various sentences thereof and for serving by each of the applicants;

1.7 The tables also show that in some instances, in the instances where the nine applicants have been sentenced to further prison sentences, the sentencing courts omitted to expressly prescribe whether the further sentences handed down are to be served consecutively or concurrently.

1.8 The tables further show that in the instances where the sentencing courts have not expressly prescribed that the further sentences be served consecutively or concurrently, the Namibian Correctional Services has proceeded to compute the sentences such that the further sentences have to be served consecutively by the applicants.

1.9 The aforesaid consecutive computation of the applicants' prison sentences is what the applicants are aggrieved about in their consolidated court applications.'

[2] As regards applicant !Ganeb, it is apparent from the parties' 'Supplementary stated case' dated 17 March 2014, that !Ganeb commenced serving a prison term of 5 years and 6 months on 1 August 2004. He appealed against that sentence and was admitted to bail pending appeal. Whilst out on such bail, he was convicted on an unrelated offence and sentenced to a term of 10 years imprisonment. Thereupon, he surrendered himself to prison and by choice forfeited his right to remain on bail in respect of the prior offence. His grievance is that having so surrendered himself to serve his first term of imprisonment, the 5 years and 6 months term of imprisonment should have commenced to run concurrently with the 10 year imprisonment. Applicant !Ganeb also purports to claim compensation for the prolonged imprisonment. The quantum claimed is not quantified and is, in any event, not capable of resolution on stated case basis, let alone on notice of motion. In so far as it is apparent from !Ganeb's other contentions and the respondents reply thereto, there are factual disputes which it is not competent for this court to determine by way of stated case, and for that reason, this judgment confines itself to the consequences of surrendering himself to serve a term of imprisonment after being admitted to bail.

[3] It is for the same reason that I also decline to determine on stated case basis the grievance of applicant Fanie Nanub in case no: A 317/2013. The applicant Fanie Nanub alleges, as part of the consolidated application, that the respondents wrongly computed his sentence in that he is made to serve a sentence including terms of imprisonment which do not arise from his conviction and sentence but belonged to someone else, one Jan Plaatjies. Allegedly, the sentence is being administered as that of a habitual criminal, which he is not. The respondents stated in their papers that the sentence in respect of this applicant had been correctly computated and that Fanie Nanub and Jan Plaatjies is one and the same person, the latter name being an alias. From this, it is obvious that there is a factual dispute which does not fit in with the proposed stated case involving the true meaning of s 86 of the 1998 Prisons Act. If Mr Nanub wants to have that dispute resolved, the parties must approach the registrar to have the matter

assigned to a managing judge who will give directions for the hearing of oral evidence to resolve the dispute.

[4] Barring insignificant differences, the common denominator in respect of all the applicants is that they were sentenced to a further term of imprisonment while serving a prior term of imprisonment for an entirely different and unrelated offence. The gravamen of their complaints, which renders the matter justiciable, is that they want a declarator that they should not be held much longer in prison by the multiple sentences being made to run consecutively. They contend that where a second or subsequent sentencing court fails to specifically direct that the sentence it is imposing run consecutive to the first, the two or more sentences run concurrently.

[5] The applicants rely on s 86 of the Prisons Act, 1998[2] (1998 Prisons Act) for this proposition. That section states that:

> '(1) Subject to subsection (2) and (3), a sentence of imprisonment upon a conviction at common law or under any statute shall take effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law_or unless the offender is released on bail pending the determination of an appeal, in which case the sentence shall take effect from the day on which such offender surrenders himself or herself, or is taken into custody, to serve such sentence.'

[6] Needless to say, the respondents do not agree with the applicants' contention. They take the view that unless the second or subsequent sentencing count directs that the sentence it imposes run concurrently with the prior sentence, the second or subsequent sentence will run consecutively to the first. The respondents rely for their contention on s 280 of the Criminal Procedure Act[3], 1977(CPA), which states as follows:

> 'Cumulative or concurrent sentences.-

[2] Act 7 of 1998.
[3]Act 51 of 1997.

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(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 punishments shall run concurrently.' (My underlining).

[7] Given the similarity in the facts, the parties agreed to consolidate the applications and to have same adjudicated by way of stated case, expressed in the following terms:

'5.1 When a criminal court (Magistrate or Judge), in passing sentence on an offender who is already serving another sentence or sentences in respect of other and prior convictions does not expressly order that the further sentence(s) should either run concurrently or consecutively with the existing sentence(s) at the time of passing the latter sentence(s), does such omission have the effect that the latter sentence(s) are served/computed by the respondents to be served concurrently or consecutively (with the exiting sentences).

5.2 On what legal authority is whatever the correct answer to the question posed in subparagraph 5.1 above based?

5.3 When a criminal court is sentencing a convicted offender, is such individual sentenced in terms of the Criminal Procedure Act, No. 51 of 1977 or the Correctional Service Act, No. 9 of 2012 (whereinafter referred to as "the New Act")

5.4 When two sentences are ordered by a sentencing court to run concurrently, is the latter sentence automatically antedated to commence running on the same date as the former sentence or not.
(This question of law is in regard to the applicant Gert Shapange only).

5.5 Is the respondents' overall computation of the applicant Simon Petrus !Ganeb 's sentences authorized by law or not?'

[8] The applicants argue that the respondents' reliance on s 280 of the CPA is misplaced because:

a) Section 86 of the 1998 Prisons Act was enacted subsequent to s 280 of the CPA and (so they say), to the extent that both provisions deal with the 'computation'[4] of sentence and are irreconcilable, s 86 had impliedly 'amended' or 'repealed' s 280 of the CPA.

b) In any event, s 86 is couched in peremptory terms [ie a sentence of imprisonment 'shall take effect from the day on which that sentence is passed'] and thus depriving the sentencing court the discretion to order that a sentence commence later than the day on which it is passed. Put another way, according to the applicants a court may never (even if it desires to do so relying on s 280) order a sentence to run consecutive to a prior sentence. This reasoning makes one wonder why the applicants chose to 'state' the case in the way they did, which is, a declarator that unless a court orders a second or subsequent sentence to run consecutively to the prior, the presumption is that it will run concurrent with the prior sentence. The applicants now argue that making a sentence to run consecutively to a pre-existing one is, by virtue of s 86 of the 1998 Prisons Act, impermissible under Namibian law. As Mr. Rukoro for the applicants argued, that was the clear intent of the Legislature. To drive the point home, Mr. Rukoro argues in his written submission that:

> 'In the premises all the sentences of those applicants in respect of whom the sentencing court ordered that such sentences should commence on any other day except the day of sentence should be computed from the date of sentence.'

[4] The heading to s 280 of the CPA is 'cumulative and concurrent sentences' whereas that of s 86 is 'commencement, computation and termination of sentence'. The suggestion that both sections deal with 'computation' of sentence is therefore not a foregone conclusion and depends on what the intent of the Legislature was.

[9] Mr. Muluti for the second applicant in Case No. A 247/13 submitted that the legislative history of the Prisons legislation supports the applicants' contention that the Legislature intended that a sentence of imprisonment subsequent to a pre-existing unrelated sentence will run concurrently with the first. He argued that s 32 of the repealed Prisons Act 8 of 1959 (1959 Act) which has since been repealed, is a pointer to the legislative intent. I will quote s 32 in full. It states:

'(1) Subject to the provisions of subsection (2) of this section, section 39(a), section 48(2) and section 73(6), a sentence of imprisonment upon conviction at common law or under any statute shall take effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the offender is released on bail pending the decision of the division of the Supreme Court having jurisdiction on a question reserved, in which case the sentence shall take effect from the day on which he surrenders himself or is taken into custody to undergo his sentence.

(2) When a person receives more than one sentence of imprisonment or receives additional sentence while serving a term of imprisonment, each such sentence shall be served the one after the expiration, setting aside or remission of the other in such order as the Commissioner may determine, unless the Court specifically directs otherwise, or unless the Court directs that such sentences shall run concurrently: Provided further that any determinate sentence of imprisonment or additional sentence of imprisonment in which solitary confinement with or without spare diet is imposed, shall be served first: provided further that any determinate sentence of imprisonment to be served by any person shall run concurrently with a life sentence or with an indeterminate sentence of imprisonment to be served by such person in consequence of being declared a habitual criminal; and that one or more life sentences and one or more such indeterminate sentences, or more life sentences, or two or more such indeterminate sentences, shall also run concurrently.'(My underlining)

[10] Mr. Muluti argued that the deliberate exclusion of the equivalent of s 32(2) from the 1998 Prisons Act 'is clear evidence of the intention of the Legislature' that a

subsequent sentence will run concurrently with the pre-existing one.[5] An interpretation buttressed, according to Mr. Muluti, by the fact that the Correctional Service Act 9 of 2012 (2012 Correctional Service Act), which was only passed after the applicants' sentences, in s 99 (1) provides as follows:

'(1) Subject to subsection (2), (3) and (4), a sentence of imprisonment upon a conviction takes effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the offender is released on bail pending the determination of an appeal, in which case the sentence takes effect from the day on which such offender surrenders himself or herself, or is taken into custody, to serve such sentence.'

[11] Mr. Muluti argued that s 99 (1) of the 2012 Correctional Service Act is intended to cure what he characterizes as the 'anomaly' created by s 86 of the 1998 Prisons Act.

[12] The respondents' contention is diametrically opposite to the applicants'. Mr. Khupe for the respondents argued that the CPA and the 1998 Prisons Act deal with two different subject-matter: sentencing occurs in terms of the CPA, whereas the 1998 Prisons Act's remit is the 'administration of sentences'. Counsel reiterated the trite proposition that s 280 of the CPA creates the presumption that two different sentences are to be served consecutively, unless the court directs that they be served concurrently. In other words, unless the court orders otherwise, periods of imprisonment are served one after expiration, setting aside or remission of the other. Mr. Khupe added that the administration of offenders' sentences is the exclusive province of the 2012 Correctional Service Act which, in s 134 (3) states that:

'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.'

[5] I will soon demonstrate that there was no omission or exclusion of ss (2) of the 1959 Act in the 1998 Act.

[13] The provision which Mr. Khupe relies on for the proposition that the sentences of the applicants are deemed to have been done under the 2012 Correctional Service Act, is s 99 which states as follows:

> 'Commencement, computation and expiry of sentence
>
> (1) Subject to subsection[s] (2), (3) and (4), a sentence of imprisonment upon a conviction takes effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the offender is released on bail pending the determination of an appeal, in which case the sentence takes effect from the day on which such offender surrenders himself or herself, or is taken into custody, to serve such sentence.
>
> (2) Where a person sentenced to life imprisonment or who has been declared a habitual criminal is sentenced to any further term of imprisonment, such further term of imprisonment is served concurrently with the earlier sentence of life imprisonment or declaration as a habitual criminal, as the case may be.
>
> (3) Where a person receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, each such sentence must be served the one after the expiration, setting aside or remission of the other, unless the court specifically directs otherwise or unless the court directs that such sentences must run concurrently.'

[14] The applicants retort that the 2012 Correctional Service Act cannot be applied retroactively and that the matter falls to be determined on the basis of s 86 of the repealed 1998 Prisons Act.

Did s 86 of the 1998 Prisons Act repeal s 280 of the CPA?

[15] In our constitutional democracy the Legislature, as representative voice of the people, enacts laws for the country's good governance. The duty of the Judge is to ascertain the Legislatures' intent behind the laws it has passed, and to give effect thereto unless it is in conflict with the Constitution. Statutory interpretation is really about

the court trying to ascertain the intention of the Legislature. The Judge does that by, first, looking at the words used. If a word is clear and unambiguous, it must be given its ordinary grammatical meaning. The difficulty is that it is not always that straightforward because words of the English language often have more than one meaning. Therefore, 'context' is an important factor in the difficult task of ascertaining legislative intent. In that respect, we look at the objects of the Act, its general scheme and the mischief sought to be addressed. In that process, legislative history can be an important guide. As Solomon JA famously put it in *Dadoo Ltd & Others v Krugersdorp Municipal Council:*[6]

'[t]he intention of the legislature is to be deduced from the words it has used. It is true that *owing to the elasticity which is inherent in language* it is admissible for the court in construing a statute to have regard not only to the language of the legislature, but also to its object and policy as gathered from a comparison of its several parts, as well as from the history of the law and from the circumstances applicable to its subject matter. And if, on consideration of this nature, a Court is satisfied that to accept the literal sense of the words would obviously defeat the intention of the legislature, it would be justified in not strictly adhering to that sense, but in putting upon the words such other signification as they are capable of bearing.'

[16] Schreiner JA echoed the same sentiment in *Jaga v Dönges NO:*[7]

'Certainly no less important than the often repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of the context.'

<u>The Golden thread running through the three Acts (1959 Act, 1998 Act and 2012 Act)</u>

[17] The 'commencement, computation and termination' formula is consistently the same in all three pieces of legislation – ie the 1959 Act, the 1998 Prisons Act and the 2012 Correctional Service Act. Such differences as there are in wording between the

[6]1920 AD 530 at 554.
[7]1950 (4) SA 653 (A) at 662G-H. See *also Consolidated Diamond Mines of SWA v Administrator, SWA & Another* 1958 (4) SA 572 (A) at 599.

three Acts are, in my view, of no moment and ascribable to peculiarity of style. At the risk of prolixity I will cite the provisions in full:

'Prisons Act 1959

Section 32: Commencement, termination and computation of sentences

'(1) Subject to the provisions of subsection (2) of this section, section 39(a), section 48(2) and section 73(6), a sentence of imprisonment upon conviction at common law or under any statute shall take effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the offender is released on bail pending the decision of the division of the Supreme Court having jurisdiction on a question reserved, in which case the sentence shall take effect from the day on which he surrenders himself or is taken into custody to undergo his sentence.

(2) When a person receives more than one sentence of imprisonment or receives additional sentence while serving a term of imprisonment, each such sentence shall be served the one after the expiration, setting aside or remission of the other in such order as the Commissioner may determine, unless the Court specifically directs otherwise, or unless the Court directs that such sentences shall run concurrently: Provided further that any determinate sentence of imprisonment or additional sentence of imprisonment in which solitary confinement with or without spare diet is imposed, shall be served first: provided further that any determinate sentence of imprisonment to be served by any person shall run concurrently with a life sentence or with an indeterminate sentence of imprisonment to be served by such person in consequence of being declared a habitual criminal; and that one or more life sentences and one or more such indeterminate sentences, or more life sentences, or two or more such indeterminate sentences, shall also run concurrently.

Prisons Act, 1998

Section 86: Commencement, computation and termination of sentence

(1) Subject to subsection (2) and (3), a sentence of imprisonment upon a conviction at common law or under any statute shall take effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the offender is released on bail pending the determination of an appeal, in which case the sentence shall take

effect from the day on which such offender surrenders himself or herself, or is taken into custody, to serve such sentence.

(2) Where a person sentenced to life imprisonment or who has been declared a habitual criminal is sentenced to any further term of imprisonment, such further term of imprisonment shall be served concurrently with the earlier sentence of life imprisonment or having been declared an habitual criminal, as the case may be.

(3) The date of expiry of any sentence of imprisonment being served by a prisoner who escapes from lawful custody or who is erroneously released shall, subject to the provisions of section 87(3), upon his or her recapture or re-arrest be postponed for a period equal to the period by which such sentence was interrupted by reason of such escape or release.

Correctional Service Act, 2012

Section 99: Commencement, computation and expiry of sentence

(1) Subject to subsection[s] (2), (3) and (4), a sentence of imprisonment upon a conviction takes effect from the day on which that sentence is passed, unless it is suspended under the provisions of any law or unless the offender is released on bail pending the determination of an appeal, in which case the sentence takes effect from the day on which such offender surrenders himself or herself, or is taken into custody, to serve such sentence.

(2) Where a person sentenced to life imprisonment or who has been declared a habitual criminal is sentenced to any further term of imprisonment, such further term of imprisonment is served concurrently with the earlier sentence of life imprisonment or declaration as a habitual criminal, as the case may be.

(3) Where a person receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, each such sentence must be served the one after the expiration, setting aside or remission of the other, unless the court specifically directs otherwise or unless the court directs that such sentences must run concurrently.

(4) The date of expiry of any sentence of imprisonment being served by an offender who-

(a) escapes from lawful custody must, upon his or her recapture; or

(b) is erroneously released must, subject to the provisions of section 100(3), upon his or her re-arrest

be postponed for a period equal to the period by which such sentence was interrupted by reason of such escape or erroneous release.'

[18] Most importantly, the CPA was enacted in 1977 only. It is no surprise therefore that s 32(1) of the 1959 Act is to the same effect as s 280 of the CPA. Logically, the 1998 Prisons Act did not replicate the equivalent of s 32(1) of the 1959 Act.

[19] It is apparent from the provisions quoted that the legislative history of the prisons legislation does not support the applicants' contentions. It also shows that there is no conflict between s 86 of the 1998 Prisons Act and s 280 of the CPA. The implicated CPA provision and the 'commencement, computation and termination of sentence' formula are complementary to each other and not in conflict with each other.

[20] The following five principles are consistently present in all the three referenced prisons legislation. In the first place, the 'commencement, computation and termination' formula or scheme makes the statement that a sentence commences as soon as it is imposed. Secondly, it states that where there are sentences on multiple convictions, such sentences are served one after the other. Thirdly, it creates a statutory exception whereby a subsequent sentence in the wake of a prior sentence of life imprisonment or condemnation as habitual offender, is always concurrent to such term of life imprisonment or sentence following declaration as a habitual offender. Fourthly, the obligation to start serving a sentence is delayed where it is suspended under any law or the offender is released on bail pending appeal; in which case the sentence commences to be served only if the offender surrenders himself or herself or is taken into custody. Fifthly, the scheme suspends the running of a sentence where a prisoner has escaped from lawful custody or was erroneously released.

[21] In my view, the mischief sought to be addressed by s 86 of the 1998 Prisons Act is different from that which s 280 of the CPA speaks to. Section 86 gives clarity to prison administrators as to the date from which to admit a convicted person into prison. It helps

them provide an answer to the convicted person who comes and says: ‘Yes, I have been sentenced, but I have unfinished business I must attend to and can only start serving my sentence at the end of the year; after all the Court did not say when I must start serving my term!.’ Section 86 is the prison administrator’s complete answer to such a person!.

[22] The only escape from having to start a sentence the day it was imposed is ‘unless it is suspended under the provisions of any law or unless the offender is released on bail pending the determination of an appeal.’ In the latter two exceptions, the sentence ‘shall take effect from the day on which such offender voluntarily surrenders himself, or is taken into custody, to serve such sentence.’

[23] Section 86 of the 1998 Prisons Act is thus both sword and shield: a sword in the hands of the prison administrator who is confronted by a convicted person who does not want to start serving his/her sentence immediately; and a shield in the hands of the convict whose immediate detention is suspended ‘under the law’ or who has been released on bail pending an appeal.

[24] Section 86(1) of the 1998 Prisons Act is concerned with when a sentence commences and supports the rationale I have set out. Subsection (2) of s 86 is the only circumstance in which the Legislature intends a ‘concurrence’ in sentence between an earlier prison term and the later one. Therefore, subsection (1) of s 86 was not intended by the Legislature to create any concurrence between multiple sentences. Subsection (3) of s 86 for its part assists the prison administrator in dealing with the prisoner who, whilst serving a prison term, escapes or is erroneously released. The latter subsection ensures that it shall lie ill in the mouth of such person to say that his or her term of imprisonment continued to run while he or she was out either as an escapee or through a mistaken release.

[25] I come to the conclusion therefore that s 86 of the 1998 Prisons Act does not have the effect contended for by the applicants – in the sense that it renders s 280 superfluous and that the law presumes that a subsequent sentence must run concurrently with the prior sentence – whether or not the trial court directs that it does. Only a sentencing court has competence to make a sentence run concurrently. The statutory exceptions are contained in s 86(2) relative to life imprisonment and a habitual offender, which sentences, by operation of law, are made to run concurrently with a subsequent term of imprisonment. The Legislature consistently and punctiliously isolated the cases where it wished multiple unrelated prison terms to run concurrently. It does so in the 2012 Correctional Service Act, did so in the 1998 Prisons Act and also in the 1959 Act. It is not hard to surmise why the Legislature chose not to re-enact the equivalent of subsection (2) of s 32 of the 1959 Act. That provision, albeit it in modified form, already existed in the form of s 280 of the CPA. In any event, the Legislature did not create a vacuum by omitting the provision in the 1998 Prisons Act.

Does concurrence in sentence mean the latter sentence is ante-dated to the date of commencement of the prior sentence?

[26] Ante-dating a sentence, as correctly submitted by Mr. Khupe for the respondents, derives authority from s 282 of the CPA. The section reads thus:

> 'Whenever any sentence of imprisonment imposed on any person on conviction for an offence is set aside on appeal or review and any other sentence of imprisonment is thereafter imposed on such person in respect of such offence, the latter sentence may, if the court imposing it is satisfied that the person concerned has served any part of the first-mentioned sentence, be ante-dated by the court to a specified date which shall not be earlier than the date on which such first-mentioned sentence was imposed, and thereupon such latter sentence shall be deemed to have been imposed on the date so specified.'

[27] Concurrence in sentence and ante-dating are two different concepts in our criminal justice system. The notion that concurrence means making a sentence run from

the date the prior sentence was imposed will lead to an absurd result. For example, if the second sentence of say 5 years is imposed on the date the prior sentence of 5 years runs out, the convicted person would have to go free without having to serve any time at all. Words must be given their ordinary grammatical meaning, unless doing so leads to an absurd result. I see no reason to assign a strained meaning to the word 'concurrently' to achieve the result proposed by the applicants. In any event, the power to ante-date a sentence is reserved only for an appeal or review court and finds no application in the circumstances of the applicants.

Minimum sentences regime a relevant factor

[28] Section 86 of the 1998 Prisons Act saw the light of day against the backdrop of a burgeoning landscape of mandatory minimum sentences regime in response to an exponential increase in certain types of crime.[8] The applicants' contentions would, if they prevail, have serious implications for the enforcement of mandatory minimum sentences consciously chosen by the Legislature to arrest the ever rising tide of these offences. For example, it raises the prospect that a person convicted of rape with coercive circumstances and sentenced to a mandatory minimum sentence of 15 years while already serving a 10 year sentence for, say, murder will have the rape sentence run concurrently with the murder sentence. Such anomalous result could not have been in Parliament's contemplation.[9]

Does surrendering after being admitted to bail pending appeal have the effect of activating a sentence in circumstances where a convict is already serving a term of imprisonment?

[29] When Mr. !Ganeb surrendered himself to serve his prison term whilst already serving a prior sentence, and in so far as his second sentence was not made to run concurrently with the first, s 86(1) was engaged and the subsequent sentence could

[8]Stock Theft Act 12 of 1990 and after the 1998 Prisons Act, for example, the Combatting of Rape Act 8 of 2000.
[9] Compare Venter v R 1907 TS 910 at 915, S v Burger 1963 (4) SA 304 (C) at 308.

only begin to run after he had served the first sentence. The only circumstance in which the sentence of 5 years and 6 months would have run concurrently with the first sentence, is if he were serving life imprisonment or was a habitual offender.

[30] Given my finding that s 99 of the 2012 Correctional Service Act, in substance, achieves the same result as s 86 of the 1998 Prisons Act, whether or not the respondents' reliance on s 99 of the 2012 Correctional Service Act is retroactive, becomes moot. I am also satisfied that there is no conflict between s 86 of the 1998 Prisons Act and s 280 of the CPA. In my view, the CPA speaks to those who are tasked with sentencing persons who are found guilty of crimes, whereas s 86 engages the people who receive those who have been sentenced and administer their sentences. The latter's responsibility is to admit to prison and to enforce the sentence of the court. They need to know when that sentence starts and when it ends. Section 86 helps them in that process. When the court has pronounced itself in terms of s 280, they are bound thereby.

[31] The net result is that the questions of law posed are resolved in favour of the respondents' contentions. For the avoidance of doubt, the applicants contentions relative to the effect of s 86 of the 1998 Prisons Act are rejected.

The order

[32] The legal questions as contained in the stated case are answered as follows:

1. When a criminal court (Magistrate or Judge), in passing sentence on an offender who is already serving another sentence or sentences in respect of other and prior convictions does not expressly order that the further sentence(s) should either run concurrently or consecutively with the existing sentence(s) at the time of passing the latter sentence(s), does such omission have the effect that the latter sentence(s) are served/computed by the respondents to be served concurrently or consecutively (with the exiting sentences)?

The omission has the effect that the latter sentences are to be served consecutively.

2. On what legal authority is whatever the correct answer to the question posed in subparagraph 5.1 above based?

   Section 280 of the Criminal Procedure Act, 1977.

3. When a criminal court is sentencing a convicted offender, is such individual sentenced in terms of the Criminal Procedure Act, No. 51 of 1977 or the Correctional Service Act, No. 9 of 2012 (whereinafter referred to as "the New Act")?

   Such individual is sentenced in terms of the Criminal Procedure Act, 51 of 1977.

4. When two sentences are ordered by a sentencing court to run concurrently, is the latter sentence automatically antedated to commence running on the same date as the former sentence or not? (This question of law is in regard to the applicant Gert Shapange only).

   The latter sentence is NOT ante-dated to commence running from the same date as the former sentence.

5. Is the respondents' overall computation of the applicant Simon Petrus !Ganeb sentences authorized by law or not?'

   Yes, it is authorised by law.

[33] There shall be no order as to costs.

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P.T. Damaseb

Judge-President

I agree

_____

PJ Miller

Acting Judge

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APPEARANCES:

1st APPLICANT	S Rukoro
On Instructions of	Directorate of Legal Aid
2nd APPLICANT (Case no: A 247/2013)	PS Muluti
Of	Muluti & Partners
RESPONDENTS	MC Khupe
Of	Government Attorney