

CIVIL CASE NO. 1455/03

In the matter between:

CIEISO NKOSI

APPLICANT

AND

THE ATTORNEY GENERAL CHAIRMAN
COMMITTEE ON THE PREROGATIVE OF
MERCY COMMISSIONER OF
CORRECTIONAL SERVICES

1st RESPONDENT

2ND RESPONDENT

3rd RESPONDENT

CORAM
FOR APPLICANT FOR
RESPONDENTS

K.P. NKAMBULE-J J.
MASEKO D. MAMBA

JUDGEMENT 17/6/04

The applicant has moved an application before court in the following terms:

- a) Reviewing and setting aside the decision of the committee on the prerogative of mercy regarding the release and/or discharge of the applicant from custody upon reaching the age of 75 years.

- b) Directing that the respondent pay the costs of this application.

The applicant states in his founding affidavit that he is a South African citizen presently kept in the maximum security prison of the Correctional Services in Matsapa.

The brief background of applicant's case is as follows:

An indictment disclosing an allegation of murder was filed in the High Court against Sifiso Nkosi (the applicant). On the 6th November 1995, the High Court found the applicant guilty as charged and was sentenced to death. The applicant appealed against the conviction and sentence to the court of appeal and the court of appeal upheld the judgement of the High Court on the 7th October 1996 and therein confirmed the conviction and sentence imposed by the High Court.

His Majesty, who after having taken the advice of the committee on the prerogative of mercy under Section 92 of the constitution (repealed with savings) decided to exercise the prerogative of mercy vested in him and committed the death sentence so confirmed by the court of appeal, to that of life sentence with the condition that the convict shall on attainment of the age of 75 years, be unconditionally released from custody.

The applicant in his founding affidavit stated that the committee on the prerogative of mercy erred in law in recommending and advising his Majesty that his sentence having been committed to life imprisonment his discharge from custody be effected upon the attainment of the age of seventy five.

He stated that in terms of Section 43 (2) of the Prisons Act No. 40/1964 he may only be kept in custody for a period not exceeding 20 years. That therefore, the recommendation by the committee is in direct conflict with the provisions of said legislation.

The respondent filed an affidavit wherein they raised preliminary points of law; which they decided to abandon during the hearing and dealt with the merits of the matter.

Respondent's defence is found in paragraph 9 and 10 of the answering affidavit. Respondent states that Section 43 (2) of the Prison act is not applicable in the instant case because in the courts of law the applicant was sentenced to death.

Secondly, applicant was pardoned when his sentence was reduced to that of life imprisonment subject to the conditions that he will be released unconditionally from custody upon attainment of seventy-five years.

Thirdly, respondent avers that the powers vested in His Majesty in terms of Section 92 (1) of the constitution of 1968 are supreme by virtue of the fact that they flow from the constitution which is the supreme law of the land and not from an ordinary statute, as such, such powers will prevail in instances of confusion.

By interpretation of Section 92 of the constitution it is clear that the exercise of the powers of pardon or remission is vested to His Majesty the King. This section empowers the King to relieve offenders either unconditionally or subject to lawful conditions, and to remit any fine, penalties or forfeitures. No specified criteria are laid down according to

which this prerogative is to be exercised. The king has a wide discretion when he exercises his powers under Section 92 of the constitution.

This matter was finalised by this court when it sentenced applicant to death. The court of appeal put it to rest when it upheld the conviction and sentence of this court. It should be noted that the prerogative of mercy is not susceptible to judicial review. It comes after the court has dealt with the matter to finality. When the king exercises his power of pardon, he does not sit and preside over the matter as a judge of the High Court or a judge of the court of appeal, but he sits as the King of Swaziland. Therefore, by its nature the prerogative of mercy is not susceptible to judicial review.

It is clear therefore, that Section 43 (2) of the Prisons Act 40/1964 is not applicable to the instant case. For the above reasons and conclusions the application fails - with costs.

A handwritten signature in black ink, appearing to be 'K. M. C.', written in a cursive style.

JUDGE