ANNUAL SURVEY OF SOUTH AFRICAN LAW 2016

Annual Survey

of

South African Law

2016

Published for
THE CENTRE FOR BUSINESS LAW
OF THE UNIVERSITY OF SOUTH AFRICA
PRETORIA

by

JUTA
AND COMPANY (PTY) LTD

Published 2018

First Floor, Sunclare Building, 21 Dreyer Street, Claremont 7708

Typeset in 10 on 11½ point Helvetica Light

ISBN 978 1 48512 085 8
ISSN 0376-4605

Typeset by Helanna Typesetting
Print Management by ???

This issue of the *Annual Survey of South African Law* is dedicated with gratitude to Professor JT (Jopie) Pretorius

Professor Joseph Thomas Pretorius retired from the University of South Africa and from *Annual Survey* at the end of 2017 after an illustrious career with the journal spanning some 32 years. Starting as a contributor in 1985, Jopie has throughout been a driving force behind the continuity and success of *Annual Survey*. Apart from authoring the Chapters *Negotiable Instruments* and *Miscellaneous Contracts,* he served on, and since 2007 chaired, the Editorial Board. As Chair of the Board, Jopie brought his encyclopaedic knowledge of who's who in South African law to bear in drawing together the formidable pool of expertise which has over the years promoted and maintained the journal's status as one of the leading and most authoritative legal sources in the country. His wisdom in handling the inevitable problems, and the years of experience that he applied diplomatically in dealing with academic authors have proven invaluable. He also played a pivotal and visionary role in mentoring and developing the talent of several young editors. South African academia and practice alike owe Professor Pretorius a deep debt of gratitude for his contribution to law in our country. We are very pleased to announce that he has agreed to continue serving on *Annual Survey's* Editorial Board.

As the editors of *Annual Survey of South African Law,* we wish Jopie every happiness in his retirement, and every success in his future endeavours, academic and otherwise. May the call of Wakkerstroom never fade, and may you, Bella, and your children spend many happy hours wandering the hills.

And so, with a nod to Leonard Cohen, we must regretfully say: *Now so-long [Jopie-man] it's time that [you] began to laugh, and cry, and cry, and laugh, about it all again . . .*

Leonard Cohen *"So long Marianne"* (Project Seven Music 1966)

Neville Botha, Judith Geldenhuys, Jeannie Van Wyk, and Christian Schulze

PUBLICATION ETHICS AND PUBLICATION MALPRACTICE STATEMENT

Ethical Guidelines for Journal Publication

The publication of the peer-reviewed journal *Annual Survey of South African Law* contributes to the growth of knowledge. Therefore, all participants – authors, editors, peer reviewers, and the publisher – agree on standards of proper ethical behaviour. The University of South Africa and Juta and Co Ltd, who are respectively responsible for producing and publishing the journal, recognise the ethical and other responsibilities and take our guardianship of the functions connected with the publication of the journal very seriously.

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The authors undertake to present an accurate and current account of legislative and judicial developments and to provide objective discussion. The material must contain sufficient detail and permit others to replicate the work. Making fraudulent or knowingly inaccurate statements is unacceptable. Work reflecting editorial opinion must be acknowledged as such.

The work must be original, and where the work/words of others have been used this must be appropriately quoted or cited. Plagiarism in any form is unethical behaviour, and unacceptable. Authors are not permitted, in general, to publish manuscripts. Submitting the same manuscript to more than one journal for publication is unethical and unacceptable, save in exceptional circumstances where the authors have sought approval from the editor for publication of the same material in a secondary publication; in this case, the primary reference must be cited in the secondary publication.

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The editors of the *Annual Survey of South African Law* are responsible for deciding whether chapters submitted for publica-

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The editors must ensure that contributions to the journal appear in correct English which complies with the style guidelines prescribed for the journal. The editors evaluate the intellectual content of manuscripts without regard to gender, race, religious belief, sexual orientation, citizenship, ethnic origin or the political inclinations of the authors.

The editorial board will not disclose any information about chapters submitted for publication to anyone other than the corresponding author, reviewers, and the publisher as appropriate.

Unpublished material submitted by authors may not be used in the editor's own research without consent from the author. Editors must disclose competing interests and publish corrections if the conflicts of interest are discovered after publication. If required, other action must be taken, such as retraction of the manuscript and expression of concern.

The editors take responsibility to respond to ethical complaints concerning a submitted manuscript or chapter published in the *Annual Survey of South African Law*. Any reported complaint, even if submitted years after publication, will be investigated and appropriate measures will be taken.

Duties of Reviewers

The objective peer review process assists the editor-in-chief in making editorial decisions, and in improving the quality of the chapters. Peer review is a key component of scholarly communication and ensures sound standards of research and proper acknowledgment of sources used.

Unpublished materials contained in an unpublished manuscript may not be used in the reviewer's own research without the consent of the author. Reviewers must disclose any possible conflict of interests that may exist, and recuse themselves from reviews in instances where such a conflict exists.

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ANDRA LE ROUX-KEMP*

LEGISLATION

No legislation impacting directly on this branch of the law was adopted during the period under review.

CASE LAW

APPROACH APPLICABLE TO THE ENQUIRY INTO THE EXISTENCE OF SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

Rugunanan AJ for the High Court Eastern Cape Division, Grahamstown, in *S v Koester* (case CC23/2016 [2016] ZAECGHC 60, 12 August 2016) summarised the approach to the enquiry into the existence of substantial and compelling circumstances as follows (para [3]):

> [3.1] A court has a duty to consider all the circumstances of the case cumulatively, including factors traditionally taken into account, such as the personal circumstances of the accused, the crime committed and the legitimate interests of society; this aims at testing the proportionality of the prescribed sentence (*Luthando Mqikela v S* No 119/07 (ECHC), delivered 26 October 2009);
> [3.2] For the circumstances to qualify as substantial and compelling, they need to be exceptional in the sense of seldom encountered or rare, nor are they limited to those which have a diminishing effect on the moral guilt of an offender;
> [3.3] The Act is intended to ensure a severe, standardised and consistent response from the courts unless there were truly convincing reasons for a different response. Put different, the mandatory sentences are to be regarded as generally appropriate for the specified crimes and should not be departed from without weighty justification; and
> [3.4] Where a court is convinced, after considering all the circumstances, that the imposition of the minimum sentence would be unjust, only then is it entitled to characterise the circumstances as substantial and compelling.

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Alcohol Consumption and Intoxication: Mitigating or Aggravating Factors?

With regard to the role of alcohol consumption and intoxication in the commission of a crime, it is interesting to note that, depending on the specific circumstances of the case, it can either be a mitigating or an aggravating factor. (For example, see *S v Ndhlovu (2)* 1965 (4) SA 692 (A) where the intoxication of the accused was an aggravating factor, and the following three cases where it was held to be a mitigating factor: *S v Matjeke* (case 049/2016 [2016] ZAGPJHC 129, 7 June 2016; *S v Johnson* 1969 (1) SA 201 (A); and *S v Alam* 2006 (2) SACR 613 (Ck).)

Appeal Against Sentence by the State, Represented by the Director of Public Prosecutions, to the Supreme Court of Appeal

An appeal against sentence to the Supreme Court of Appeal can be brought by the prosecution in terms of section 316B of the Criminal Procedure Act 51 of 1977 if the sentence was imposed by a superior court sitting as court of first instance and not as a court of appeal (*Director of Public Prosecutions, Gauteng v Mphaphama* 2016 (1) SACR 495 (SCA) para [8]; *Director of Public Prosecutions v Olivier* 2006 (1) SACR 380 (SCA)). It is also possible to bring an appeal under section 311 of the Criminal Procedure Act, but this provision is only available where a provincial or local division of the High Court has, on appeal, given a decision in favour of the person convicted on a question of law (*Director of Public Prosecutions, Gauteng v Mphaphama* 2016 (1) SACR 495 (SCA) para [6]). However, regard must also be had to *S v Mosterd* 1991 (2) SACR 636 (T), where it was held that a sentence imposed can never be a question of law decided in favour of a convicted person (640c-d). The Supreme Court of Appeal in *Mphaphama* (above) was in agreement with this decision: '[C]ertainly, when it comes to the exercise of a judicial discretion in favour of a convicted person in regard to sentence, that cannot be a question of law decided in his or her favour' (para [11]).

Sections 16(1)*(b)* and 17(1)*(a)*(i) and (ii) of the Superior Courts Act 10 of 2013 do not apply to appeals regulated by the Criminal Procedure Act, or in terms of any other criminal procedural law (*Director of Public Prosecutions, Gauteng v Mphaphama* 2016 (1) SACR 495 (SCA) para [9]; *Van Wyk v S, Galela v S* 2015 (1) SACR

584 (SCA)). Thus, the state cannot rely on the provisions of the Superior Courts Act in appealing an order (including a sentence) of the High Court on appeal to it from the regional court, to the Supreme Court of Appeal (*Director of Public Prosecutions, Gauteng v Mphaphama* 2016 (1) SACR 495 (SCA)).

Also see *Gonya v S* (case 891/15 [2016] ZASCA 34, 24 March 2016) and *De Villiers v S & another* case 20732/14 [2016] ZASCA 38, 24 March 2016).

Noteworthy Specific Sentences

Determining a suitable sentence has been described as the most difficult part of a criminal proceeding. For example, in *S v Ngcobo* 2016 (2) SACR 436 (KZP), Judge Poyo Dlwati described it as 'a lonely and onerous task in the criminal justice system' (para [1]). Not only does the sentencing stage of the criminal proceeding involve the interpretation and application of general principles of sentencing as well as specific statutory prescriptions, but the judicial officer is also required to undertake a value judgment, weighing contradictory factors and opposing interests. The punishment must, furthermore, be particularised and tailor-made so as to ensure that justice is served for the accused and the complainant(s) in that particular case, and that it also serves the interests of the public generally. A number of interesting judgments during the period under review, relating to specific sentencing options and related considerations are discussed below.

Committal to a treatment centre

In terms of section 296 of the Criminal Procedure Act, a court may, in addition to or in lieu of any sentence, order that a person be detained at a treatment centre established under the Prevention of and Treatment for Substance Abuse Act 70 of 2008 (the PTSA Act), if the court is satisfied on the evidence before it, which must include a report by a probation officer, that the offender is an involuntary service user. An involuntary service user is defined in section 1 of the PTSA Act as follows:

> Involuntary service user means a person who has been admitted to a treatment centre upon being –
> (a) convicted of an offence and has in addition to or in lieu of any sentence in respect of such offence been committed to a treatment centre or community based treatment service by a court;

(b) committed to an in-patient treatment centre by way of a court order after such court has held an enquiry; or
(c) transferred from a prison, child and youth care centre, alternative care or health establishment, for treatment of and rehabilitation for substances.

In order for a competent order to be made under this provision, the court must comply with sections 33 and 35 of the PTSA Act, which were summarised as follows in *S v Kemp* (case 44/2016 [2016] ZAECGHC 58, 17 February 2016 para [19]):

a. It must be satisfied that the accused is an involuntary service user living within the court's jurisdiction.
b. It must be satisfied that the accused is a danger to himself or to the immediate environment, or that he causes a major public health risk or in any other manner does harm to his own or the welfare of his family and others, or that he has committed a criminal act to sustain his dependence on substances.
c. To this effect an enquiry must be held in the accused's presence, at which enquiry the prosecutor and the accused (or his representative) are entitled to lead evidence and to cross examine witnesses.
d. A report from a social worker as contemplated in terms of section 33(4) of the Act must be placed before the magistrate regarding the social circumstances of the accused and any other matter which the prosecutor may consider relevant, and the accused or his legal representative must be afforded the opportunity to examine or cross-examine the deponent to the report.
e. If it appears to the magistrate on consideration of the evidence and of the social worker's report that the accused is a person referred to hereinbefore and as contemplated in section 33(1) of the Substance Abuse Act, and that he requires and is likely to benefit from treatment and skills development provided in a treatment centre, or that it would be in the accused's interest or in the interests of his dependants or the community that he be admitted to a centre, the magistrate may order that the accused be admitted to a treatment centre (i e a private or public treatment centre registered or established for the treatment and the rehabilitation of service users who abuse or are dependent on substances) designated by the Director-General (i e the head of the Department of Social Development in the national sphere of government), for a period not exceeding 12 months.
f. The magistrate may in addition order that the accused be admitted in custody or that he be released on bail or on warning until such time as effect can be given to the court order.
g. A magistrate who makes an order referring an accused to a treatment centre must, before such referral, order that the accused be admitted for detoxification at a health establishment or a treatment centre authorised to provide detoxification in terms of

the National Health Act 61 of 2003 (ie a medically supervised process by which physical withdrawal from a substance is managed through administration of individually prescribed medicines by a medical practitioner in such a health establishment or treatment centre).

A court may also postpone making an order committing an offender to a treatment centre for a period not exceeding three years, and may then release the offender on condition that he or she submits to the supervision of a social worker or a probation officer specialising in substance abuse, and undergoes any treatment prescribed by such a supervisor (ss 39 and 40 of the PTSA Act). Where a court has referred an offender to a treatment centre and that offender is later found to be unfit for treatment in such a facility, the court may reconsider and impose a different punishment in terms of section 276A(4) of the Criminal Procedure Act.

The accused in *S v Kemp* (above) pleaded guilty and was convicted on a charge of malicious injury to property. It was not disputed that he had a drug addiction problem and was under the influence of tik and mandrax when he committed the offence. The sentence imposed by the regional court magistrate on 24 April 2014, therefore, indicated that the accused be admitted to a rehabilitation centre under section 296(1) of the Criminal Procedure Act read with section 36 of the PTSA Act. It was specifically required that the Director-General of the Department of Social Development identify the rehabilitation centre and arrange for the admission of the accused, and that the accused be detained at St Albans prison pending his referral and removal to this centre (paras [1] [2]). However, during November 2015, the accused's erstwhile legal representative discovered that the accused was still being detained at the St Albans prison, 'despite the fact that his detention warrant had reflected the nature of the sentence, and despite the fact that the prison authorities and his probation officer had been informed thereof' (para [3]). The accused was consequently requisitioned to appear before the sentencing magistrate where it transpired that 'the Director-General of Social Development had never received the documentation to make the referral in terms of the PTSA Act, and that between the Department of Social Development and the Department of Correctional Services "the case basically fell through the cracks"' (para [12]). The regional magistrate thereupon sent the matter on special review, having concluded that 'despite his best

efforts to provide for a sentencing regime which would emphasise the accused's rehabilitation, and despite the intention of the legislature in providing for such a sentencing option, it appeared that executively no structure had been put in place to make provision for such a sentence to be carried out effectively' (para [13]).

In considering the sentence imposed and the unfortunate progression of events, Stretch J for the High Court, Eastern Cape Division, Grahamstown, held that the sentence should have been much more precise and detailed, to fully and clearly meet the requirements of section 33 of the PTSA Act. For example, the sentence should have specified that the admission to the treatment centre not exceed twelve months and that the accused be admitted for detoxification in advance as per the provisions of the PTSA Act (para [27]). He also noted that the Director-General is usually only tasked with designating a treatment centre, and the logistics of the actual transfer of an offender are matters which ought to be arranged by the prosecutor acting in conjunction with the prison authorities and those responsible for the admission of the accused at the designated treatment centre (para [27]). Yet, while Judge Stretch agreed that this case 'reeks of lamentable inefficiency, of indifference and of a dereliction of duty', it was also not altogether clear where the blame lay (para [28]). Given the serious nature of the offence committed by the accused, and the fact that it was not confirmed that he had since been rehabilitated, the matter was referred back to the regional magistrate for sentencing afresh (paras [32]-[35]).

Correctional supervision and community service

The Correctional Services Act 111 of 1998 defines 'community corrections' as 'all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department'. 'Correctional supervision', in turn, is defined as 'a form of community corrections contemplated in Chapter VI' of that Act. Correctional supervision can be imposed as an independent sentence under section 276(1)*(h)* and *(i)* of the Criminal Procedure Act, or as a condition of suspension of a sentence, or when a sentence is postponed (*S v Van Wyk* case 53/2015 [2016] ZAFSHC 59, 7 April 2016 para [12]). A report by a correctional official should be obtained before sentence is imposed, and the sentencing court must determine the period of correctional supervision and its essential elements (para [12]).

Correctional supervision must be distinguished from community service, which is defined in the Correctional Services Act as 'compulsory work for the community organisation or other compulsory work of value to the community, performed without payment'. Community service can be imposed if a sentence is postponed, or where a sentence is passed but the operation of the whole or part thereof is suspended on certain conditions, including the performance of community service (para [15]). An order imposing community service as a sentence on an accused must be practical and formulated in a clear and unambiguous manner, particularly as regards the duration, extent, and nature of the community service (para [16]).

Section 60 of the Correctional Services Act relates to sentences where community service is set as part of community corrections as described above. And it requires, where a condition of community service is set as part of community correction, that the sentencing court stipulate the number of hours which the offender is required to serve, which shall not be less than sixteen hours per month, unless the court directs otherwise. The court, the Correctional Supervision and Parole Board, or any other body with the authority to impose community service, must further specify where such community service is to be performed, and where it has not done so, the Supervision Committee established in terms of section 58 of the Act must specify that place. Only the body which imposed the community service may alter it, unless that body, for example the court or the Correctional Supervision and Parole Board, provided for the order to be altered by the Supervision Committee.

Daffue J for the High Court Free State Division, Bloemfontein, agreed with the trial magistrate that the absence of proper legislation and a credible infrastructure for a sentence of community service not only raise practical obstacles to the imposition of this sentence, but also leave community service standing 'on constitutionally shaky ground' (para [21]). It is, therefore, of particular importance that sentencing courts request a presentence report in this regard, and that the content of this report is confirmed by *viva voce* evidence so that it forms part of the court record (para [21]). Moreover, courts cannot abdicate their responsibilities in respect of sentencing to other institutions, such as the Department of Correctional Services or the National Institute for Crime Prevention and Re-integration of Offenders, the former applying only to a sentence of community correction. The

nature, duration, and place of performance of any community service order remains the prerogative of the sentencing court (or other body imposing the sentence) and must be formulated in a clear and unambiguous manner that is both explicit and possible to execute.

In *Gebert v S* [2016] ZAFSHC 114, it was held that correctional supervision is not an appropriate sentencing option for a foreigner not usually resident in South Africa. The appellant in this matter pretended to be dead so as to enable his wife to submit a death claim in the amount of R5 million to his life insurer, Old Mutual Life Assurance (Pty) Ltd (para [2]). However, after investigating the matter, the insurer discovered that the appellant was still alive. The appellant was sentenced to ten years' imprisonment, of which two years were conditionally suspended for three years – ie, an effective term of eight years' imprisonment (para [8]). The appellant submitted that this sentence induced a sense of shock and was therefore not in accordance with justice (para [18]).

As mitigating factors, the sentencing court took the following into account: the fact that the appellant was a first offender; was 40 years of age; was a businessman who employed 30 persons; and was financially responsible for his wife, mother-in-law, and two dependant minor children. It was also noted that despite the appellant's fraudulent scheme, the insurer ultimately suffered no actual financial loss (para [21]). The aggravating factors considered by the sentencing court included the seriousness of the offence committed, and the general prevalence of this crime (fraud) within the regional jurisdiction of the court. It was also noted that the monetary amount involved was very high, and although the insurer had not suffered actual financial loss, the potential prejudice remained high. Finally, it was observed that the *modus operandi* of the fraudulent scheme had been meticulously planned, that public interest required that society be protected from fraudsters, and that those who have committed such crimes suffer retribution (para [22]).

As the appellant pleaded guilty to the charge of fraud, Rampai J, writing for the majority of the High Court Free State Division, Bloemfontein, noted the general principle that a court is inextricably bound to sentence an offender in accordance with the factual matrix set out in that offender's plea (para [12]). It was emphasised that fraud is a serious crime, but that it is also often dubbed a 'white collar' crime and tendencies can sometimes be observed

to punish fraudsters more leniently (para [15]; *S v Sadler* [2000] All SA 121 (A)). With regard to the appellant's submission that the trial court had not adequately considered correctional supervision as an appropriate sentencing option, it was held that the primary focus of correctional supervision, as set out in section 276 of the Criminal Procedure Act, is rehabilitation (para [13]). The introduction of the concept of correctional supervision of offenders as a sentencing option was further described as 'a significant milestone in the reformative process of humanising the criminal justice system' (para [13]). And through its introduction, the courts have been called upon to distinguish between two types of offender: those who ought to be removed from society and imprisoned; and those who deserve punishment, but do not deserve to be removed from society and imprisoned (para [13]). Moreover, in *S v Siebert* 1998 (1) SACR 554 (SCA), it was held that it would amount to a misdirection, if a court were to exclude outright, correctional supervision as a sentencing option without a sufficient factual matrix substantiating and justifying such an *ab initio* exclusion (para [28]).

Therefore, in considering the facts of the present case, Judge Rampai also emphasised, in addition to the mitigating and aggravating factors above, the fact that the appellant was a foreigner in South Africa in every sense of the word – he had no permanent physical residential address in South Africa, he was a Mauritian national, and his family resided in Lesotho (para [29]). This is particularly problematic as a fixed address is a basic requirement for a convicted offender placed under correctional supervision, so as to allow for correctional supervision officers to monitor him or her. The court held that it would not be lawfully possible to monitor a foreigner who usually resides in another country (para [30]). It was for this reason that the appellant was not a suitable candidate to be sentenced in terms of section 276(1)*(h)* of the Criminal Procedure Act (para [30]).

With regard to the appellant's submission that the trial court had also not adequately considered the paramount interests of his dependant minor children when it imposed the custodial sentence, Judge Rampai found that the appellant was not the children's primary caregiver, and that they would not be destitute. Moreover, the appellant and his wife were business partners and she was still active in caring for both the children and the businesses (paras [32]-[37]).

However, the court conceded that the regional magistrate had placed too heavy an emphasis on the seriousness and

magnitude of the crime, and the view that the appellant ought to be subject to retribution (para [50]). The sentence was consequently disturbingly shocking and warranted interference on appeal (paras [51] [53]). The effective term of eight years' imprisonment was consequently set aside and substituted with a term of four years' imprisonment (para [54]).

Postponement of sentence

Section 297 of the Criminal Procedure Act provides for the conditional or unconditional postponement of a sentence, the suspension of a sentence, and also for caution and reprimand as sentencing options in criminal proceedings. Section 297(1) specifically deals with the postponement of sentence, and section 297(1)(i) empowers a court, having convicted an offender of an offence for which the law has not prescribed a minimum punishment, to postpone the passing of sentence and release the person concerned on one of more conditions for a period not exceeding five years. The conditions imposed are within the discretion of the court and may include a compensation order, that the accused undergo treatment, compulsory attendance at or residence in some specific centre, or that the accused perform, without remuneration and outside of a prison, some service for the benefit of the community (s 297(1)(i)*(aa)-(hh)*). Where a sentence is postponed subject to conditions, the court must also order that the accused appear before the court on the expiry of the relevant period.

The unconditional postponement of sentence is provided for in section 297(1)(ii) and empowers a court to postpone passing of sentence unconditionally but, as with the postponement of sentence upon conditions, the court must also order the accused to appear before it if called upon to do so before the expiry of the relevant period.

Thus, in *S v Thabethe & another* (case A368/2016 [2016] ZAGPPHC 513, 24 May 2016), Mothle J for the High Court Gauteng Division, Pretoria, held that the postponement of a sentence under section 297(1) of the Criminal Procedure Act must address the following essential elements (para [8]):

a. The period of postponement may not exceed 5 years.
b. The postponement must be either conditionally (section 297(1)*(a)*(i)) or unconditionally (section 297(1)*(a)*(ii).
c. Whether the postponement is conditionally or unconditionally, the sentence must include an order for the accused person to appear

before the court either on a specified date 'at the expiration of the relevant period' (conditional postponement) or when called upon to do so 'before the expiration of the relevant period' (unconditional postponement).

d. When a sentence is postponed conditionally, the conditions of postponement must be specified.

Sentencing upon conviction relating to offences under the Firearms Control Act 60 of 2000

The now repealed Arms and Ammunition Act 75 of 1969, which was in force when the Criminal Law Amendment Act 105 of 1997 was enacted, made no distinction in respect of the type of firearm when it penalised possession of arms or ammunition without a licence. Likewise, the Criminal Law Amendment Act 105 of 1997 also draws no distinction between the unlawful possession of, for example, an automatic or semi-automatic firearm, or between a semi-automatic firearm and other types of firearm such as a heavy calibre revolver or pump action shotgun, which can be regarded as semi-automatic but which is more powerful than a small calibre semi-automatic pistol (*Delport v S* 2016 (2) SACR 281 (WCC) paras [3] [4]). In terms of the Criminal Law Amendment Act 105 of 1997, a minimum sentence of fifteen years' imprisonment is prescribed for a first conviction on any offence relating to the possession of an automatic or semi-automatic firearm, explosives, or armament; and minimum sentences of twenty years and twenty-five years respectively, are prescribed for second- and third-time offenders (*Delport v S* above para [2]).

However, the Firearms Control Act 60 of 2000, which replaced Act 75 of 1969, distinguishes between the possession of a firearm, including a semi-automatic firearm, without a licence in contravention of section 3 of the Act, and possession of a fully automatic firearm in contravention of section 4(1)*(a)* of the Act. These types of firearm are defined as follows in section 1 of the Act:

'firearm' means any –

(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);
(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
(d) device manufactured to discharge a bullet or any other projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);

(e) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or
(f) barrel, frame or receiver of a device referred to in paragraphs (a)–(b), (c) or (d), but does not include a muzzle loading firearm or any device contemplated in section 5;

'fully automatic' means capable of discharging more than one shot with a single depression of the trigger;

. . .

'muzzle loading firearm' means –
(a) a barrelled device that can fire only a single shot, per barrel and requires after each shot fired the individual reloading through the muzzle end of the barrel with separate components consisting of a –
(i) measured charge of black powder or equivalent propellant;
(ii) wad; and
(iii) lead bullet, sabot or shot functioning as projectile,
and ignited with a flint, match, wheel or percussion cap;

. . .

'semi automatic' means self-loading but not capable of discharging more than one shot with a single depression of the trigger; . . .

While the Criminal Law Amendment Act 105 of 1997 prescribes a minimum term of fifteen years' imprisonment for the unlawful possession of a firearm, including a semi-automatic firearm (first offender), the provisions of the Firearms Control Act 60 of 2000 prescribe a maximum term of fifteen years' imprisonment for unlawful possession of a firearm, including a semi-automatic firearm, and a maximum term of twenty-five years' imprisonment for offences relating to 'prohibited firearms' (ss 3 and 4 and Schedule 4 to the Firearms Control Act 60 of 2000). This disparity between the provisions of the two Acts has been the subject of controversy and discordant judicial interpretation by the courts (*Delport v S* above para [2]). For example, in *S v Sukwazi* 2002 (1) SACR 619 (N), it was concluded that the offence of unlawfully possessing a semi-automatic firearm was not subject to the minimum-sentence legislation, and this decision has subsequently been endorsed in a number of High Court judgments – see, eg, *S v Mooleele* 2003 (2) SACR 255 (T); *S v Radebe* 2006 (2) SACR 604 (O); and *S v Manana* 2007 (1) SACR 62 (T). And despite the Supreme Court of Appeal in *S v Thembalethu* 2009 (1) SACR 50 (SCA) rejecting the conclusion reached in *Sukwazi*, the latter judgment was nevertheless favourably cited in *Asmal v S* [2015] ZASCA 122 paragraph [6], and *Delport v S* above paragraph [5].

Binns-Ward J and Klopper AJ for the High Court Western Cape Division, Cape Town, addressed this anomaly in *Delport v S* (above) by way of a close reading of the provisions of the Firearms Control Act 60 of 2000. While the judges noted that the seemingly 'bifurcated sentencing regime' may be the result of 'a lack of astuteness' on the part of the legislature, they nonetheless inferred from the provisions of the Act that 'the legislature regards the unlicensed possession of ''prohibited firearms'' as a significantly more serious evil than that of the unlicensed possession of semi-automatic firearms. . .' (paras [13] [15] [18] referring to *Madikane v S* 2011 (2) SACR 11 (ECG)). However, Judges Binns-Ward and Klopper ultimately agreed with the finding in *Swartz v S* ([2014] ZAWCHC 113, 4 August 2014), decided by a full bench of the same court and therefore binding, in which it was held that the phrase 'notwithstanding any other law' in section 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007, which replaced section 51 of Act 105 of 1997, 'served as clear confirmation that the special minimum sentence provisions were intended to trump the general penalty provisions in the Firearms Control Act 60 of 2000' (para [17]).

The court also noted the following general points with regard to the determination of an appropriate sentence for contraventions of the provisions of the Firearms Control Act 60 of 2000:

- Sentences passed in terms of the previous Arms and Ammunition Act 75 of 1969 have little relevance today, as this statute dates back to a time of serious and violent manifestations of crime during which the use of fully automatic weapons was common (para [36]).
- Sentencing an offender for the unlawful possession of an unlicensed firearm must be treated separately from the punishment warranted for having used that weapon in the commission of an offence. The court explained that '[i]n such matters it is the cumulative effect of the sentences imposed, rather than whether a heavier sentence should be imposed for the unlawful possession of the firearm, that should be the more relevant consideration' (para [37]).
- Further, in assessing the gravity to be attached to the offence of unlawful possession of firearms, the court held that regard must be had to 'the objects inherent in the creation of the statutory offences and the attendant sanctions, namely the prevention of crime and the disincentivising of the unlawful possession of firearms in a country in which the proliferation of

the possession of illegally possessed firearms has become, and continues to be, a very menacing evil' (para [38]).

Disparity in sentences of co-accused

The three appellants in *Tladi & others v S* 2016 (1) SACR 424 (GP) were each convicted on one count of kidnapping and one count of rape, and each sentenced to four years' imprisonment on the kidnapping count. In respect of the second count of rape, the first and third appellants were sentenced to fifteen years' imprisonment, while the second appellant was sentenced to five years' imprisonment (para [1]). The disparity in the sentences imposed for the second count was primarily based on the age of the appellants: the first appellant was 28 years of age and the third appellant was twenty years of age. The second appellant, who was only sentenced to five years' imprisonment for his role in the rape of the complainant, was seventeen years and eleven months old at the time of the commission of the offence (paras [8]-[12]). With approximately one year's age difference between the second and third appellants, this disparity in sentences was not justified (para [16]). And, while a disparity in the sentences of co-accused will not necessarily warrant interference on appeal, the degree of disparity in this instance was held to be disturbing enough to justify the interference of the appeal court (para [17]).

With very little information provided by the sentencing court to justify the disparity in sentences, the appeal court considered the facts and circumstances of the case anew, together with the aggravating and mitigating factors for each appellant. It was ultimately ordered that the first appellant's sentence on the rape count be increased to life imprisonment, the second appellant's sentence to fifteen years' imprisonment, and the third appellant's sentence remain at fifteen years' imprisonment. The sentences imposed on the rape counts were furthermore ordered to run concurrently with the four-year term imposed for the count of kidnapping (para [23]).

RAPE AND THE PROVISIONS OF THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 105 OF 1997

The three appellants in *Ngcobo & others v S* (case AR759/14 [2016] ZAKZPHC 26, 3 March 2016), were convicted on two counts of robbery with aggravating circumstances, and the first appellant was also convicted on two counts of rape. It was the same woman who had been raped by the first appellant on two

separate occasions relating to the robbery incidents. Given that the first appellant had raped the same woman more than once, the regional magistrate stopped the proceedings after conviction in terms of section 52(1)*(b)*(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and committed the appellants to the High Court for sentencing (paras [1]-[3]).

Section 52(1)*(b)*(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act requires that an accused who has been convicted of an offence referred to in Part 1 of Schedule 2 to the Act, be committed to the High Court for sentencing. Rape under Part 1 of Schedule 2, includes:

> Rape –
> (a) when committed –
> (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
> (ii) by more than once person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
> (iii) by a person who has been convicted of two or more offences of rape but has not yet been sentenced in respect of such convictions; or
> (iv) by a person knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
> (b) where the victim –
> (i) is a girl under the age of 16 years;
> (ii) is a physically disabled woman who due to her physical disability is rendered particularly vulnerable; or
> (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act 18 of 1973; or
> (c) involving the infliction of grievous bodily harm.

It was the opinion of the magistrate that the rapes in this case fell within item (a)(i) of Part I of Schedule 2 to the Act, 'because they were committed ''in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice''' (para [5]). Legal counsel for the first appellant objected to this, and submitted that this provision could not be read to apply to the present case as the victim had been raped on two separate occasions some six weeks apart (para [5]). Choudree AJ for the High Court agreed with this submission and referred the matter back to the regional court for sentencing (para [5]). However, it was then found in the regional court that the rapes indeed fell within the ambit of Part 1 of Schedule 2, not for the reason previously thought, but because

this was a case of rape committed by a person who had been convicted of two or more offences of rape, but had not yet been sentenced in respect of such convictions (ie, item (a)(iii) of Part I of Schedule 2 (para [6]). The first appellant was subsequently sentenced to life imprisonment on two counts of rape, and to fifteen years' imprisonment on each of the counts of robbery (para [7]). Counsel for both the appellant and the state disagreed with this finding and the sentence imposed for the rape convictions, and submitted that the rapes in this case did not fall within either of the provisions of Part I of Schedule 2, that the referral to the High Court was therefore not competent, and that the High Court, in the circumstances, lacked jurisdiction to sentence the appellants (para [9]).

On appeal, Olsen J, writing for the majority of the KwaZulu-Natal Division, Pietermaritzburg, held, with regard to item (a)(iii) of Part I of Schedule 2 to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, that '[t]he language of that item conveys clearly that a rape which falls within it is one committed by a person who has already been convicted of two or more prior offences of rape but has not yet been sentenced in respect of those convictions. The language permits of no other construction' (para [10]). In this case, the first appellant had not previously been convicted of a rape when he committed these two rapes and his conviction and sentence could, therefore, not fall within item (a)(iii) of Part I of Schedule 2 (para [13]). Likewise, the court concluded that the rape could also not fall within the ambit of (a)(i) of Part 1 of Schedule 2 as this provision referred to a victim having been 'raped more than once in the course of an unbroken chain of events which might be referred to as a single incident. Such a single incident might involve multiple rapes perpetrated one immediately after the other; or, for instance, multiple rapes during the course of a prolonged but uninterrupted abduction' (para [14]). This item was also not applicable in the present matter, as the first appellant in this case had committed two rapes on the same victim, but on the occasion of two separate and distinct robberies committed six weeks apart (para [14]).

Indeed, and in the words of the judges of the KwaZulu-Natal Division, Pietermaritzburg, 'Schedule 2 to Act 105 of 1997 is not a model of clarity' (para [12]). In coming to this conclusion, Judge Olsen relied on *S v Kimberley & another* 2005 (2) SACR 663 (SCA) paragraph [13], in which the following guidelines were laid down for interpreting Part I of Schedule 2 (see too *Ngcobo &*

others v S (case AR759/14 [2016] ZAKZPHC 26, 3 March 2016 para [21]):

(a) The court 'will interpret the paragraphs so as to render an interpretation least harsh to the affected person'.
(b) Where a statutory provision which is not clear changes the common law it must be interpreted restrictively.
(c) 'More particularly statutes which prescribe minimum sentences, such as the statute here under consideration, thus eliminating the usual discretion of a court to impose a sentence which befits the peculiar circumstances of each individual case, will usually be construed in such a way that the penal discretion remains intact as far as possible.'

Judge Olsen explained that the first count of rape in this case took place in circumstances where there was no second rape, and it cannot, therefore, attract the imposition of a minimum sentence of life imprisonment (para [24]). He said: 'The words ''where the victim was raped more than once'' define those circumstances. More than one rape must take place at the time when the rape in question (the one which is to attract the life sentence) takes place. The rape has to have been committed ''in circumstances'' where the victim ''was raped more than once''' (para [25]).

Given that the two rape convictions of the first appellant did not fall under section 52(1)*(b)*(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, the first appellant was referred back to the regional court for sentencing (para [29]). Also see *D v S* (case 89/16 [2016] ZASCA 123, 22 September 2016).

In *E v S* (case CA & R21/2014 [2016] ZANCHC 51, 9 September 2016) it was again confirmed that the provisions of sections 51 and 52 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act do not apply to children under the age of eighteen years when they committed the offence(s) (para [4]; *S v B* 2006 (1) SACR 311 (SCA); *Centre for Child Law v Minister of Justice and Constitutional Development & others (National Institute for Crime Prevention and the Re-integration of Offenders as Curiae)* 2009 (2) SACR 477 (CC)).

The Relationship between an Accused and his/her Child(ren) as a Relevant Factor in Sentencing

The respondent in *Director of Public Prosecutions, Gauteng, Pretoria v Mtshali* 2016 (2) SACR 463 (GP) was convicted of rape

and attempted murder and sentenced to five years' imprisonment wholly suspended for a period of five years on the rape count, and to a fine of R2 000 or twelve months' imprisonment on the attempted murder count. On appeal, De Vos J for the High Court Gauteng Division, Pretoria, noted that the accused was only convicted on one count of rape, although it appeared from the facts that the complainant was raped twice (para [1]). These two rapes happened during the same incident in which the respondent had kidnapped and severely assaulted the complainant but were some hours apart (para [6]). No explanation was given of why the respondent was only charged with and convicted of one count of rape.

With regard to the sentence imposed on the rape count, it transpired that the trial magistrate was primarily influenced by two factors in deciding against a sentence of direct imprisonment: first, that the respondent was divorced and had custody of his two minor children; and second, that the pre-sentence report dealt extensively with the best interest of the respondent's children, and how a sentence of direct imprisonment would impact on them (para [7]). It was argued by the prosecution that the magistrate had misdirected himself by placing too much emphasis on the interests of the respondent's children, and had also not received sufficient information before trial to substantiate the findings that the respondent was indeed the children's primary caregiver (para [7]).

De Vos J agreed with the prosecution's submission and held that the court *a quo* had ignored the fact that the respondent's children were left with their paternal grandmother who looked after them while the father took up employment elsewhere. The respondent was, therefore, the primary breadwinner of the family, but not the primary caregiver (para [7]). Taking into consideration the best interests of the child or children of an accused at sentencing requires a proper investigation into what the position of the children would be were imprisonment to be imposed (para [7]). Judge De Vos explained: 'It is clear from the authorities that sentencing officers cannot always protect children from the consequences of direct imprisonment. The relationship between an accused, convicted of serious crimes, and his children [is] merely one of the factors to be weighed up in each case in determining a proper sentence. Children cannot be used as an excuse to avoid incarceration' (para [8]; *S v Chetty* 2013 (2) SACR 142 (SCA)).

MERCY

In *S v Rabie* 1975 (4) SA 855 (A), Holmes JA said the following of the concept of mercy with regard to sentencing (862D-F):

> . . .
> (i) It is a balanced and humane state of thought.
> (ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.
> (iii) It has nothing in common with maudlin sympathy for the accused.
> (iv) It recognises that fair punishment may sometimes have to be robust.
> (v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.
> (vi The measure of the scope of mercy depends upon the circumstances of each case.

This concept of mercy, and its interplay with other considerations in sentencing, including the aims of punishment and the so-called *Zinn*-triad – which refers to the personal circumstances of the accused, the nature of the offence committed, and the interests of society – were considered in *S v Nteta & others* 2016 (2) SACR 641 (WCC).

The accused in this case brutally assaulted the deceased and were ultimately convicted of murder and rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. It was found that the death of the deceased was not only caused by more than one person in the furtherance of a common purpose, but that the rape also involved grievous bodily harm (para [22]). The provisions of section 51(3) of the Criminal Law Amendment Act 105 of 1997 therefore applied, and the prescribed sentence of life imprisonment ought to have been imposed, unless the court found substantial and compelling circumstances warranting a deviation from this prescribed sentence (para [23]).

No such substantial and compelling circumstances were found. With regard to the concept of mercy, Henney J for the High Court Western Cape Division, Cape Town, emphasised the lack of any mercy, humanity, or respect the accused showed their victim (paras [19]-[21]). The accused also showed no remorse for what they had done (paras [24]-[26]). The prescribed minimum sentences were consequently imposed on the accused, save for accused number four, who was under the age of eighteen years when he committed the offence, and who was sentenced to an effective term of fifteen years' imprisonment (para [28]).

Expressing Remorse after a Plea of Not Guilty

In *Director of Public Prosecutions, Gauteng, Pretoria v Tsotetsi* ([2016] ZAGPHHC 290, 22 April 2016), the DPP applied for leave to appeal against the sentence imposed on the respondent. The respondent was convicted on two counts of murder and sentenced, in terms of the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997, to twenty years' imprisonment on each count. The two sentences were ordered to run concurrently (para [1]).

In deviating from the prescribed sentence of life imprisonment, the sentencing court observed a number of substantial and compelling circumstances, including the fact that the respondent was HIV-positive, was relatively young when the murders were committed, was a first offender, and had already spent a period of almost five years in prison awaiting trial (paras [2]-[4]). The DPP objected, however, claiming that the sentencing court had downplayed the respondent's lack of remorse. It was said, for example, that during her evidence in mitigation of sentence, she offered an apology to the families of the deceased, but stopped short of admitting her role in their murder (para [6]). This, according to the DPP, was indicative of a lack of remorse and also showed that prospects of rehabilitation were remote (para [6]).

Makgoka J for the High Court Gauteng, Pretoria, did not agree. He pointed out that the respondent had pleaded not guilty, and had she expressed remorse in the manner the state would have preferred, she would have had to change her plea to one of guilty during argument in mitigation of sentence (para [6]). In *S v Nkomo* 2007 (2) SACR 198 (SCA) paragraph [30], it was further held that there is hardly any person of whom it can be said that there is no prospect of rehabilitation. Finally, with regard to the order that the two sentences of twenty years' imprisonment on each count run concurrently, it was held that it is a salutary practice for a sentencing court to consider the cumulative effect of sentences imposed, and where the relevant offences are 'inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent' (*S v Mokela* 2012 (1) SACR 431 (SCA) para [11]), an order that the sentences should run concurrently is appropriate (*Tsotetsi* above para [8]).

Taking into Consideration the Prospect of Rehabilitation of an Offender at Sentencing

The appellant in *Brass v S* ([2016] ZAGPPHC 96, 23 February 2016) was convicted of contravening section 4*(b)* of the Drugs

and Drug Trafficking Act 140 of 1992; and of being in possession of four grams of methamphetamine. He was subsequently sentenced to three years' imprisonment in terms of section 276(1)*(i)* of the Criminal Procedure Act, without any option of paying a fine (para [1]). In an appeal against the sentence, the appellant submitted that the magistrate had been vindictive in the way in which he approached sentencing, as he passed a sentence of imprisonment despite recognising that the appellant was a good candidate for rehabilitation (paras [3]-[5]).

In determining sentence, the magistrate asked the appellant questions, the answers to which showed that the appellant had a drug problem that was harmful to his welfare and to the welfare of his family, and that he was a person as described in section 33 of the PTSA Act. In fact, it was clear that the magistrate had no interest in considering the appellant for rehabilitation (paras [11]-[13]), despite the provisions of section 296 of the Criminal Procedure Act which specifically allow a court to consider rehabilitation in lieu of or in addition to any sentence passed (para [15]).

It was consequently concluded that the sentence of three years' direct imprisonment was shockingly inappropriate. It was set aside and the matter was referred back to the magistrate's court to be dealt with in terms of section 296(1) of the Criminal Procedure Act (para [24]).

Interference of an Appeal Court in Terms of Section 304(4) of the Criminal Procedure Act 51 of 1977

The appellant in *Masuku v S* ([2016] ZAWCHC 77, 23 June 2016) was arraigned on two counts of robbery with aggravating circumstances, and one count of kidnapping (para [1]). The appellant had legal representation and pleaded not guilty to all three charges (para [2]). Particularly important in this case, was that the appellant had been arrested for these charges on 25 March 1999, but made his first appearance in the regional court only on 27 March 2001, when it was noted that he was in custody for another matter (para [4]). The appellant ultimately changed his plea to one of guilty on all three charges and made a number of formal admissions in a statement prepared in terms of section 220 of the Criminal Procedure Act (para [7]). It was on the basis of these admissions that the appellant was convicted (para [7]). It was also at the time of this conviction that the appellant's attorney informed the court that he was serving two sentences, a

sentence of 30 years' imprisonment which had been imposed in August 2000, and a sentence of 40 years' imprisonment which had been imposed in February 2001 (para [8]).

For the purpose of sentencing, the appellant was considered a third offender in terms of the counts of robbery. This was because his two previous convictions were on counts of robbery, numerous counts of kidnapping, as well as various counts of attempted murder and the possession of a firearm without a licence, and two counts of theft of a motor vehicle (para [8]). What is more, all these offences were initially held to have been committed in March 1999, which was shortly after the offences for which he was most recently convicted. Yet, it was later accepted that these offences had been committed even earlier, on 6 November 1997 (para [9]). The Regional Magistrate subsequently sentenced the appellant to 25 years' imprisonment on each of the two counts of robbery and ordered that the sentences run concurrently. The appellant was also sentenced to ten years' imprisonment on the kidnapping count. To further ameliorate the effect of the sentences, the Regional Magistrate ordered that '15 years of the sentences in respect of [the robbery counts] and the entire sentence in respect of [the kidnapping count] were to run concurrently with the sentences which were being served by the appellant at the time . . . [It was also ordered] that the balance of 10 years of the sentences on [the robbery counts] should . . . run concurrently' (para [10]). The effect of this was that the appellant only had to serve an additional ten years on top of the sentences he was already serving (para [10]).

Thirty-three months after having been sentenced, the appellant started a barrage of appeals over an extended period (para [11]). He first submitted that he had been adversely influenced by his then legal representative to make the admissions and to admit guilt to the three charges (para [11]). As to the late filing of the application for leave to appeal, the appellant merely submitted that 'it took him some time to find out what to do' (para [12]). Sher J, writing for the majority of the High Court Western Cape Division, Cape Town, found that the application for leave to appeal and the application for condonation did not comply with the requirements laid down for such applications (para [13]). The appeals were subsequently struck from the roll in March 2009 (para [14]). Thereafter, the appellant applied for leave to appeal against the sentence imposed. In this regard, the appellant submitted that the overall, cumulative sentence of 50 years'

incarceration was unduly harsh, and that he had struggled to raise the necessary funds to pursue the appeal (paras [15]-[17]). It was also argued that the appellant had erroneously been sentenced to a minimum term of 25 years on each robbery count as a third offender of this offence (para [18]). Judge Sher also rejected this argument, as the dates on which the offences had been committed and the dates on which the convictions and sentence had been imposed, clearly showed that the appellant was a third offender on the count of robbery (para [19]).

A final appeal was lodged in terms of section 304(4) of the Criminal Procedure Act in which the appellant submitted that he had been in custody since at least 4 August 2000, when he was sentenced to 30 years' imprisonment (he was also sentenced to 40 years' imprisonment on 22 February 2001), and that he could, therefore, not have committed the offences for which he was sentenced on 20 December 2002, as he was already in custody at that time (para [20]).

First, in dealing with the appellant's reliance on section 304(4) of the Criminal Procedure Act, which provides that 'where it is brought to the attention of any provincial or local division that proceedings in which a sentence was imposed were not in accordance with justice, the court shall have the same powers in respect thereof as if the record had been laid before it for the purposes of so-called automatic review, in terms of s 303', Judge Sher held that the provision cannot be used as 'a back door for the shrewd, but an emergency exit for the needy' (para [21]; also see *S v Matsane & 'n ander* 1978 (3) SA 821 (T) 823D-E and *S v Singh* 2013 (2) SACR 372 (KZD) para [14]).

In this regard, it was emphasised that the appellant had legal representation at the time of his trial, and that he had made the admissions freely and voluntarily in terms of the provisions of section 220 of the Criminal Procedure Act (para [23]). And, even though the court conceded that it was inconceivable for the appellant to have committed one of the robberies and kidnappings with which he had been charged, as he was most probably already in custody at that time, this, according to the court, did not mean that the appellant did not commit these offences, or that he was not properly convicted of having committed them (para [26]). Questions were raised, for example, as to why the appellant did not bring this to the attention of his legal representative and the court at the trial *a quo* (para [27]). A court can only interfere in terms of section 304(4) of the Criminal Procedure Act if there has

been an irregularity which has resulted in a failure of justice in the proceedings *a quo.* In the present case it was held that the possible irregularities which may have tainted the trial were not of such a nature that they would have resulted in the appellant having had an unfair trial (paras [34] [36]).

Sentencing in Child Pornography Cases

Determining a just sentence in a case involving child pornography is particularly complex. Judges Baqwa and Kubushi for the High Court Gauteng, Pretoria, remarked in *Director of Public Prosecutions North Gauteng v Alberts* 2016 (2) SACR 419 (GP), that it is difficult, if not impossible, to define exactly what child pornography is, and it is also impossible fully to grasp its reality – ie the full extent of its impact and reach (para [12]). The devastating effects of child pornography are, for example, not only felt at the local level, but extend and operate much further, via the internet in cyberspace (para [13]). In *Du Toit v The Magistrate & others* 2016 (2) SACR 112 (SCA), Ponnan J, writing for the majority of the Supreme Court of Appeal, explained it as follows: 'A child compromised by a pornographer's camera has to go through life knowing that the image is probably circulating within the mass distribution network for child pornography. Because the child's actions are reduced to a recorded image, the pornography may haunt him or her long after the original recording' (para [14]). In *Alberts* (above) the court, quoting from an article on child pornography by Iyavar Chetty, held that

> . . . to ensure appropriate sentencing of those convicted of involvement in child pornography acts, the crime should be seen not simply as the possession or distribution of child abuse images but as the sexual abuse, exploitation, degradation, and impairment of the dignity of all children and the promotion of the use of child pornography for sexual gratification through the portrayal of children as acceptable sexual objects (para [14]; Iyavar Chetty 'The trivialisation of child pornography crimes in South African courts' KINSA Africa 2014).

Judges Baqwa and Kubushi held that this perspective on child pornography has not yet

> sufficiently penetrated the South African jurisprudence in regard to offences against children. [Because] [t]here seems to be a chasm between the public outrage that is expressed when those offences are committed and the manner in which the courts articulate that outrage when sentences are meted out. It is true that sentencing is a balancing act in that it has to take into account the interests not only of the

> criminal but also to consider the seriousness of the crime and the interests of society. [However] . . . the court, as the upper guardian of minor children ought not to be hesitant in protecting the interests of one of the most vulnerable groups of our society. The courts, . . . are enjoined by the Constitution to do so. It is not an option which they may or may not take (para [15]).

The judges, therefore, held that '[i]t is an absolute necessity to understand not only the nature of the crime but also the impact it has not only on the victim, the victim's family, but also the society at large. By society, it must be understood not only the society in and around the victim but society in a global sense due to the advances in technology through which images can go around the world in a matter of seconds' (para [20]).

The respondent in this case had been a collector of pornographic material involving children for a number of years. His collection was made online, and he did not have direct contact with the children, nor did he take the photographs himself. The court *a quo* imposed a sentence of five years' imprisonment on finding the respondent guilty of 482 charges of possession of child pornography in contravention of section 27(1)(9) of the Films and Publications Act 65 of 1996 (para [3]). On appeal, this sentence was set aside and substituted with a term of ten years' imprisonment. It was also ordered that the respondent's name be recorded in the Register of Sex Offenders as per the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (para [40]).

Ameliorating the Extreme Cumulative Effective of Sentences Imposed

The appellant in *M v S* ([2016] ZAECMHC 14, 12 April 2016) pleaded guilty and was convicted of murder, attempted murder, and attempted robbery. He was sentenced to an effective term of 30 years' imprisonment, calculated as follows: twenty years for murder; fifteen years for attempted murder; and ten years for attempted robbery. It was further ordered that fifteen years of this total sentence of 45 years' imprisonment were to run concurrently with the sentence that the accused was currently serving for a conviction on an unrelated offence. Thus, of the total 45 years' imprisonment, the accused was to spend an effective 30 years in prison (para [1]). The appellant was granted leave to appeal against this decision based on the ground that the sentencing court had erred in not taking into account his youth at the time of

the commission of the offences (he was fifteen years and eleven months old at that time), and that whatever terms of imprisonment the court imposed in respect of each of the offences 'should run concurrently with each other taking into consideration that they all flowed from the same incident and that such sentence should be antedated' to the date on which the appellant was sentenced, which was 20 May 2004 (para [4]).

Bloem J for the High Court Eastern Cape Local Division, Mthatha, agreed that the sentencing court had failed sufficiently to consider the appellant's youth at the time of the commission of the offences, and that this constituted a misdirection (para [7]). It was held that the mere remark that 'people [of] the accused's age, 16 years and thereabouts, tend to think that because of their tender age, the courts will not impose heavier [sentences]. If anybody still thinks so [he or she is] in for a big shock' does not constitute a proper consideration of the possible influence that the appellant's 'immature judgment, youthful vulnerability to error, and impulse and influence' may have had in this regard (paras [4] [7]; also see *Centre for Child Law v Minister of Justice and Constitutional Development (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae)* 2009 (2) SACR 477 (CC) 490i-491a).

Moreover, it also appeared from the trial record that the sentencing court was unclear as to the offence of which the appellant had been convicted, and for exactly how many years he had been sentenced to imprisonment for that crime (para [8]). In light of this uncertainty and lack of evidence, it was held to be unconvincing how the sentencing court could have come to a reasoned decision and could have exercised a proper judicial sentencing discretion in ordering that fifteen years of the 45 years' imprisonment should run concurrently with what was assumed to be a term of fifteen years' imprisonment that the appellant was already serving on an unrelated matter (para [9]).

Judge Bloem, however, agreed with the sentencing court that on a practical level, the extreme cumulative effect of the sentences imposed is best ameliorated by ordering that the sentences in the present appeal run concurrently with the sentence imposed on the appellant in terms of his previous conviction (para [14]). It was consequently ordered that eight years of the twenty years' imprisonment imposed on the murder count, and eight years of the fifteen years' imprisonment imposed on the attempted murder count, and the entire ten years' imprisonment

imposed on the count of attempted robbery, run concurrently with the sentence imposed on the appellant in 2002. The sentences were antedated to 20 May 2004 (para [15]).

Sentencing and the Child Justice Act 75 of 2008

The Child Justice Act 75 of 2008 was enacted on 1 April 2010 and effectively established a criminal justice system for children in South Africa who are in conflict with the law and are accused of committing offences. The criminal justice system for minor offenders established under the provisions of this Act, runs parallel to the 'main' criminal justice system, which is regulated primarily by the Criminal Procedure Act. The main impetus behind the Child Justice Act and the criminal justice system for minors established pursuant to its provisions, is to serve and ensure the best interests of child offenders in South Africa.

When an accused will be regarded as a child in terms of the Child Justice Act 75 of 2008

In *S v Nteta & others* 2016 (2) SACR 641 (WCC), Henney J for the Western Cape Northern Circuit Local Division, Ceres, affirmed that a person will be regarded as a child for the purpose of sentencing in terms of the Child Justice Act, if that person was under the age of eighteen years when the offence was committed and also at the time of arrest (para [10]). The purpose of section 4(1)*(b)*(iii) of the Child Justice Act is clear – to provide for a separate criminal justice system for minors, and also for such minors to be kept separately from adults whilst in detention (para [11]). The Act does not, therefore, protect a person who was under the age of eighteen years when he or she committed the offence, but had already reached the age of eighteen years or older at the time of arrest (para [13]). An interpretation to the contrary could lead to the situation where a child offender would end up being detained with an adult offender (para [14]). Where an offender committed the offence whilst still under the age of eighteen years, but was arrested after having come of age, the correct approach is rather to consider the age of such an accused when the offence was committed as a strong mitigating factor, i e that the accused was at that time still a child in terms of the law (para [15]).

A just sentence for a youthful offender guilty of a heinous crime

The appellant in *S v S* ([2016] ZAWCHC 24, 9 March 2016) was convicted of murder, possession of a firearm in contravention of

section 3 of the Firearms Control Act 60 of 2000, and possession of ammunition in contravention of section 90 of the Firearms Control Act 60 of 2000. The appellant was sentenced to ten years' imprisonment on the murder charge, three years' for possession of a firearm, and one year on the possession of ammunition charge. The court ordered that the sentences imposed on counts two and three run concurrently with the sentence on the murder count (paras [1] [2]). The appellant made use of his automatic right to appeal in terms of section 84(1)*(a)* of the Child Justice Act 75 of 2008, and appealed against this sentence on the ground that it was too harsh given that he was only fifteen years old when he committed the offences, and only seventeen years of age when he was sentenced (para [9]).

In considering the appeal, Justice Henney for the High Court Western Cape Division, Cape Town, restated the rudiments applicable when a court sentences a child: first, the provisions of Chapter 10 of the Child Justice Act must be considered. Section 69 of the Act specifically provides for the objectives of sentencing and the factors that the court must take into consideration (also see *S v LM* 2013 (1) SACR 188 (WCC) paras [18] [19]). These objectives include the following: that the child be encouraged to understand the implications of, and be held accountable for, the harm caused; the sentence must promote an individualised response to the crime committed that strikes a balance between the circumstances of the child, the nature of the offence, and the interests of society; it should promote the reintegration of the child with its family and community; it should ensure that any necessary supervision, guidance, treatment or services which form part of the sentence, support and assist the child in this reintegration; and the court must also only impose a sentence of imprisonment as a measure of last resort, and then only for the shortest appropriate period (para [17]). These sentencing objectives as set out in section 69 of the Act must further be considered together with the ordinary considerations relating to sentencing, such as the triad and the aims of punishment (para [17] and see *S v Zinn* 1969 (2) SA 537 (A) 540G where the triad is described as considerations relating to the crime, the offender, and the interests of society). Other factors and requirements include that the court first obtain a pre-sentence report from a probation officer, unless the child has been convicted of a Schedule 1 offence, or requiring such a report would cause undue delay, in which case this requirement may be dispensed with (s 71(1) of the Child Justice Act 75 of 2008).

With regard to the sentencing options available to a Child Justice Court, regard must be had to Part 2 of Chapter 10 where the options are set out in sections 72-79. Section 77 specifically provides for a sentence of imprisonment (para [14]). When considering a sentence of imprisonment, section 69(4) of the Child Justice Act also requires that the court consider: the seriousness of the offence with due regard to the harm suffered, risk posed, and the culpability of the offender in causing or risking the harm; the protection of the community; the severity of the impact of the offence on the victim; the previous failure of the child to respond to a non-custodial sentence (if applicable); and the desirability of keeping the child out of prison (para [19]). It is, therefore, evident that where a court decides that a sentence of imprisonment is appropriate under the circumstances, that such a sentence must reflect all the factors and requirements as set out in the Act, and the court must also clearly state and justify how it reached its decision (para [20]).

While the sentencing court in this case attempted to strike a balance between the circumstances of the appellant, the nature of the offence, and the interests of society, it did not state whether it had considered other sentencing options, and also failed to consider all the factors set out in section 69(4) of the Act (para [22]). In addition, the sentencing court failed to take into account the period of time (nine months and 24 days) the appellant had spent in custody prior to the sentence being imposed (para [23]). It was accordingly held that the sentence imposed was not in accordance with the provisions of the Child Justice Act (para [24]).

In considering an appropriate sentence, Judge Henney noted that the murder of which the appellant had been convicted was very serious: he shot the deceased – who was unarmed and vulnerable – at close range, showed no remorse, and refused to take responsibility for his actions (para [21]). The appellant also did not attend school regularly at the place where he was held in custody prior to sentencing, and his general 'attitude' was found to militate against his reintegration into society (para [25]). A community-based sentence, or a sentence of correctional supervision or placement in a child-and-youth care centre was, therefore, not appropriate (paras [26] [27]). The sentence of ten years' imprisonment on the charge of murder was consequently set aside and replaced with a term of eight years, which was held to be the shortest appropriate sentence of direct imprisonment in this case (paras [31] [32]).

Victim Impact Statements

Mocumie JA, writing for the majority of the Supreme Court of Appeal in *Mhlongo v S* 2016 (2) SACR 611 (SCA) para [22], said the following about the importance of victim impact statements:

> In *S v Matyityi* 2011 (1) SACR 40 (SCA) this Court with reference to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, and the Service Charter for Victims of Crime in South Africa, sent a powerful message on the importance of a VIS which seems to be disregarded wantonly and without fear of any repercussions, by the State. A VIS forms an integral part of the last phase of the trial. It is essential for the court in arriving at a decision that is fair to the offender, victim and the public at large. It serves a greater purpose than contributing only to the quantum of punishment. It generally gives the sentence court a balanced view of all aspects in order to impose an appropriate sentence. It accommodates the victim more effectively, thus giving her or him a voice and the only opportunity to participate in the last phase of the trial. Moreover, the VIS gives the victim the opportunity to say in her or his own voice how the crime has affected him or her. This is particularly so where no expert evidence is led by the State to indicate the impact of the crime on the victim.

The judge further held that a 'permanent infusion' of victim impact statements in the South African criminal justice system is necessary and can be achieved by way of comprehensive guidelines, protocols, and model VIS instruments drafted by the NDPP. He explained that this 'will address the lackadaisical manner in which the State treats victims of violent crimes and in particular, rape. If this is not dealt with decisively, there will soon come a time when the State will be held accountable for this failure of its duty by victims of violent, particularly sexual crimes such as rape' (para [23]).

Principles of Resentencing

The principles of resentencing were restated by Judge Molahlehi for the High Court Gauteng Division, Pretoria, in *Moagi v S* (case A448/2015 [2016] ZAGPPHC 1166, 26 October 2016). The sentence imposed by the court *a quo* in this matter was set aside, as it was vitiated by the fact that the trial court had failed to forewarn the appellant of the possibility that he may, at the end of the trial, be faced with a minimum sentence as prescribed in the Criminal Law (Sexual Offences and Related Matters) Amendment Act. Judge Molahlehi J, quoting from *Machongo v S* (case

20344/14 [2014] ZASCA 179, 21 November 2014), explained the process of resentencing as follows (para [20]):

> Once the sentence is set aside as a result of the irregularity arising from failure to forewarn the accused about the minimum sentence regime, the court then has to conduct the inquiry regarding the sentence as though the sentence was never imposed by the trial court. The enquiry as the SCA warned in Machongo, is not that of comparing or considering whether the sentence of the trial court was fair and just in the circumstances. The SCA, in that case, explained the meaning of considering the sentence afresh as follows:
>
> > 'Considering a sentence afresh must ineluctably mean, setting aside of the sentence of the trial court, inter alia, and conducting an inquiry on the sentence as if it had not been considered before. In other words, the appeal court must disabuse itself of what the trial court said in respect of sentence – it must interrogate and adjudicate afresh the triad in respect of sentence as stated in *S v Zinn* 1969 (2) SA 537 (A) at 540G-H. Its task would be to impose a sentence which it thinks is suitable in the circumstances, without comparing it with the one imposed by the trial court. The full court erred in my view by stating that an appeal court ''will only interfere when the sentence imposed is vitiated by an irregularity . . . or when the sentence is shockingly severe, disturbingly inappropriate and totally out of proportion . . .'' What the full court did was not considering the sentence afresh but compared what it had in mind with what was imposed.'

Parole

The decision to grant parole falls within the exclusive domain of the Department of Correctional Services and courts are generally hesitant to interfere for fear of violating the principle of separation of powers, and because courts' sentencing jurisdiction is strictly prescribed by statute. For example, a court is not allowed to give any direction to the parole board in sentencing an accused (see, for example, *S v Motloung* 2016 (2) SACR 243 (SCA)). However, this does not mean that courts are not at times tasked with considering matters related to parole. The cases discussed below are examples of the interchange between the judiciary and the executive with regard to the release of convicted offenders on parole.

Anon-parole period in terms of section 276B of the Criminal Procedure Act 51 of 1977

Section 276B of the Criminal Procedure Act, which came into force on 1 October 2004, makes provision for courts, when

imposing a term of imprisonment for a period of two years or longer, to fix a period during which the offender shall not be released on parole. Such a period is referred to as the non-parole period, and may not exceed two-thirds of the term of imprisonment imposed, or twenty-five years, whichever is the shorter. Such an order for a non-parole period has been described as 'a determination in the present for the future behaviour of the person to be effected thereby. . . . [I]t is an order that a person does not deserve being released on parole in future' (*Strydom v S* (case 20215/2014 [2015] ZASCA 29, 23 March 2015 para [16]). A non-parole order should, furthermore, be made only in exceptional circumstances and upon a proper evidential basis, as a court will effectively make a prediction with regard to the probable future behaviour of the offender (*Jimmale & another v S* 2016 (2) SACR 691 (CC) para [13]). A final principle with regard to the fixing of a non-parole period is that it does not work retrospectively and can, therefore, not be applied to crimes committed before 1 October 2004 (*Mvubu v S* (case 518/2016 [2016] ZASCA 184, 29 November 2016 para [9]; *S v Mchunu & another* 2013 JDR 2103 (SCA) para [5]).

The Constitutional Court in *Jimmale & another v S* (above) considered whether the non-parole period imposed on the applicants in this case was appropriate. The applicants were convicted of murder and each sentenced to a term of 25 years' imprisonment. The trial court also ordered that the accused only be eligible for parole after having served twenty years of their respective sentences (para [6]). It was argued on behalf of the applicants that the trial court had 'erred grossly in law' in imposing the non-parole order for four-fifths of their respective sentences, and that the non-parole orders infringed on their rights not to be deprived of freedom arbitrarily or without just cause under section 12(1)*(a)* of the Constitution (paras [7] [10]).

Judge Nkabinde, writing for the majority of the Constitutional Court, agreed. In addition to the non-parole period imposed transgressing the prescribed two-thirds limit of the term of imprisonment, the applicants in this case had also not been afforded an opportunity to make submissions in this regard, and the trial court had also made no findings as to the existence of exceptional circumstances warranting the imposition of the non-parole order (para [19]). It was held that courts should generally allow the parole board and the officials of the Department of Correctional Services, guided by the Correctional Services Act

111 of 1998 and the attendant regulations, to make parole assessments and decisions. A non-parole order should then only be made when circumstances specifically relevant to parole exist in addition to aggravating factors pertaining to the commission of the crime. A proper evidential basis is, furthermore, required for such an order to be made, and this must be supplemented by oral argument and submissions by the parties (para [20]).

Also see *Makgoba v S* case A12/2016 [2016] ZAGPPHC 796, 7 September 2016; *Britz v S* case 889/2015 [2016] ZASCA 86, 31 May 2016; and *Mhlongo v S* 2016 (2) SACR 611 (SCA).

Judicial review of a decision by the Minister of Correctional Services refusing a parole application

On 10 April 1993, the applicant in *Walus v Minister of Correctional Services & others* (case 41828/2015 [2016] ZAGPPHC 103, 10 March 2016) murdered Chris Hani, then General Secretary of the South African Communist Party. The applicant was convicted of murder and sentenced to death on 15 October 1993. His sentence was subsequently commuted to life imprisonment on 7 November 2000 (para [3]). The applicant had served approximately 23 years of his sentence, and was 60 years old when his application to be released on parole was refused by the Minister of Correctional Services (paras [1]-[4]). In making this decision, the Minister emphasised the nature of the crime committed by the applicant and concluded that the time he had spent in prison was inadequate punishment for his crime (para [15]). The applicant subsequently applied for this decision to be reviewed on the basis that the emphasis placed by the Minister on the nature of the crime and the sentencing in reaching his decision was unreasonable and irrational (para [14]).

In view of the date on which the applicant had been sentenced, his parole application had to be considered in terms of the previous Correctional Services Act 8 of 1959, read together with the Parole Board Manual (paras [7]-[9]). Judge Janse van Niewenhuizen for the High Court Gauteng Division, Pretoria, noted that in Part VI(1A)(15)(b) of the Manual, it is stated that in considering an application for release on parole, the focus of punishment shifts with the passing of years, so that more weight is ultimately attached to rehabilitation rather than punishment (para [19]). Parole is furthermore itself a form of punishment, in that it imposes strict conditions on a prisoner released on parole, and it can be withdrawn should the prisoner not adhere to the conditions (para [20]).

In this case, the parole board had recommended the applicant's case to the Minister for a decision and this was held by Judge Janse van Niewenhuizen to be a positive factor as it was 'evident that the parole board applies its mind responsibly after having considered detailed information from diverse sources' (para [26]). The court also regarded as an exceptional circumstance in this case, the fact that the applicant's previous application for parole had been refused in 2011 by the current Minister's predecessor, and it was then recommended that the applicant attempt to arrange for a 'Victim Offender Dialogue' in the spirit of restorative justice (paras [32]-[34]). Yet, the numerous requests made since by the applicant to officials from the Department of Correctional Services to assist him in arranging for a 'Victim Offender Dialogue' had been ignored (paras [36]-[39]). The current Minister of Correctional Services was fully aware of this when he made his decision (para [42]). In this regard, Janse van Niewenhuizen J remarked as follows:

> On what basis the Hani family's refusal to engage with the application could strengthen the Minister's decision to refuse the applicant's application for parole is difficult to grasp. The applicant has no control over their decision. It is furthermore disconcerting that the Minister attaches so much weight to the issue whilst it is not, in terms of the applicable policies, a factor to be considered when evaluating the application for parole' (para [42]).

The judge further regarded this intimation by the Minister as indicative of what his decision would be if the matter were referred back to him, and also remarked that it was indicative of the fact that the Minister would, in all probability, not be able to apply his mind in an unbiased manner (para [43]). Moreover, given that the Minister took almost eighteen months to reach a decision in the present matter, it was clear that the applicant would suffer further prejudice if the matter was not finalised by the court (para [45]).

The decision of the Minister of Correctional Services not to grant the applicant parole was consequently set aside and the court ordered the applicant to be released on parole within fourteen days from the date of the court order, subject to the necessary parole conditions as decided upon by the Minister (para [47]).

The appeal against this decision by the Minister of Correctional Services was dismissed in *Walus v Minister of Correctional Services & others* (case 41828/2015 [2016] ZAGPPHC 260, 14 April 2016).

In another case, *Ricardo v Minister of Correctional Services & others* (case 32623/2014 [2016] ZAGPJHC 66, 3 February 2016), the applicant, a prisoner serving a term of life imprisonment for murder, sought to have the recommendation made by the National Council for Correctional Services and approved by the Minister of Correctional Services not to grant him parole, set aside (para [1]). As with the case discussed immediately above, the previous Correctional Services Act 8 of 1959 also applied in this case. And, in terms of a policy directive under this previous legislative framework, a prisoner serving a sentence of life imprisonment was eligible to be released on parole once he or she had served a period of thirteen years and four months of his or her sentence, notwithstanding the provisions in the legislation requiring that a period of twenty years be served before the Minister could consider releasing such a prisoner on parole (para [2]).

The applicant appeared before the Correctional Supervision and Parole Board in October 2013 and his case was thereafter considered by the National Council for Correctional Services. The Council recommended to the Minister that the applicant not be released on parole, and that the following three requirements be satisfied before 2016 – an intervening period of 24 months before the applicant's parole could again be considered – the applicant had to continue participating in the Gang Management Strategy; he was to be encouraged and assisted to develop academic and/or practical skills to enable him to compete in the labour market upon his release; and thirdly, when the matter of the applicant's parole was again brought before the National Council for Correctional Services, it had to be accompanied by the profiles of the applicant's accomplices (para [7]).

However, the prison where the applicant was held did not offer a Gang Management Strategy programme, and the applicant was never transferred to another facility that would have made it possible for him to participate in such a programme (paras [12]-28]). With regard to the second requirement, it was noted that the applicant had completed all conceivable courses available to him in prison, and that he submitted an 'endless' number of certificates to demonstrate that he would be able to compete in the job market. It was not clear, therefore, what further academic or training programmes the National Council for Correctional Services and the Minister of Correctional Services wished the applicant to complete (paras [29]-[41]).

In accepting the recommendation by the National Council for Correctional Services, the Minister of Correctional Services also stated an additional condition: that the applicant participate in 'Restorative Justice Processes involving the family of the victims as well as the community' (para [42]). Regarding this condition, Judge Satchwell for the High Court, Gauteng Local Division, Johannesburg, said the following,

> . . . the respondents have taken no steps at all to implement any of the possibilities which may be available in any restorative justice programme. They claim ignorance of any such steps and then seek to penalise the applicant for their ignorance. If any restorative justice is desired by victims or their families or the community it is hardly possible for the applicant to go and visit the victims or hold a town hall meeting or devise a programme. Respondents are absolutely silent on what could or should be done and who should do it and when or how. No direction is given to [the] applicant. . . . It may be, of course, that none of the victims or their families wish to participate in any restorative justice programme. That is their right. They are not obliged to interact with, meet with, communicate or engage with – and certainly not to forgive – the offender. And no burden should ever be placed on such a victim that he or she is responsible for the continuing incarceration of the offender (paras [45]-[47]).

While Judge Satchwell was loathe simply to bypass the carefully charted chain of command or consideration and decision-making with regard to parole (ie, the Case Management Committee, the Correctional Supervision and Parole Board, the National Council for Correctional Services, and the Minister of Correctional Services), she also held that this matter required the intervention of the court, as a man was seeking his release on parole and continued to be incarcerated because the requirements to be fulfilled were 'impossibilities set up by the authorities as hurdles which he cannot overcome' (paras [54] [55]). The relevant role-players in the applicant's application for release on parole were consequently directed to give their earliest possible consideration to the applicant's parole application (para [60]).