MINIMUM SENTENCE LEGISLATION
IN SOUTH AFRICA

by

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DECLARATION

I, Eric Sibusiso Nzimande student number 207091931, hereby declare that “Minimum Sentence Legislation in South Africa” for LLM (Criminal Justice) is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

Eric Sibusiso Nzimande
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>SUMMARY</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>iii</td>
</tr>
</tbody>
</table>

## CHAPTER 1: INTRODUCTION AND PROBLEM STATEMENT

1.1 Introduction | 1
1.2 Definition of the problem | 1
1.3 Aims and objectives | 2
1.4 Research methodology | 2
1.5 Feasibility | 2

## CHAPTER 2: MINIMUM SENTENCE LEGISLATION

2.1 Introduction and background | 3
2.2 Government action | 5
2.2.1 Enactment of sentencing guidelines: presumptive sentencing guidelines | 6
2.2.2 Voluntary sentencing guidelines | 7
2.2.3 The adoption of legislative guidelines that assist in determining the choice and length of the punishment | 7
2.2.4 The enactment of principles of sentencing, including guidelines that determine the imposition of imprisonment | 7
2.2.5 The enactment of presumptive sentencing guidelines to guide the imposition of custodial and non-custodial sentences | 8
2.2.6 The enactment of mandatory minimum sentences combined with the discretion to depart from the sentences under certain conditions | 8
2.3 Interpretation of the Act | 12


3.1 Introduction | 15
3.2 Offences to which the sentences apply | 15
3.3 Other matters dealt with by the Act | 17
3.3.1 Notice to the accused of minimum sentence | 17
3.3.2 Time spent in prison before sentence as a mitigating factor | 17
3.3.3 New penalty clauses | 18
3.3.4 No retrospective application | 18
3.4 The subsequent amendments to the Act | 18

## CHAPTER 4: JUDICIAL DISCRETION AND DEPARTURE FROM THE PREScribed SENTENCE

4.1 Introduction | 21
4.2 The interpretation of the phrase “substantial and compelling circumstances” | 23
4.3 Criticism of Malgas decision | 31
<table>
<thead>
<tr>
<th>CHAPTER 5: THE APPLICATION OF MINIMUM SENTENCES</th>
<th>33</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1 Introduction</td>
<td>33</td>
</tr>
<tr>
<td>5.2 Suspension of prescribed minimum sentence</td>
<td>33</td>
</tr>
<tr>
<td>5.3 Sentencing jurisdiction of the courts in terms of the Act</td>
<td>34</td>
</tr>
<tr>
<td>5.3.1 The position of the district courts</td>
<td>34</td>
</tr>
<tr>
<td>5.3.2 Regional and the High Courts</td>
<td>35</td>
</tr>
<tr>
<td>5.4 Child offenders</td>
<td>39</td>
</tr>
<tr>
<td>5.4.1 Children under the age of 16 years</td>
<td>39</td>
</tr>
<tr>
<td>5.4.2 Children between 16 and 18 years of age</td>
<td>39</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER 6: THE IMPACT OF AND RESPONSE TO MINIMUM SENTENCE LEGISLATION</th>
<th>44</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.1 Introduction</td>
<td>44</td>
</tr>
<tr>
<td>6.2 Judicial independence/discretion</td>
<td>45</td>
</tr>
<tr>
<td>6.3 Prison overcrowding</td>
<td>45</td>
</tr>
<tr>
<td>6.4 Prevention of crime</td>
<td>46</td>
</tr>
<tr>
<td>6.5 Consistency in sentencing</td>
<td>47</td>
</tr>
<tr>
<td>6.6 Court efficiency</td>
<td>48</td>
</tr>
<tr>
<td>6.7 Non-extension or renewal of the minimum sentence legislation</td>
<td>48</td>
</tr>
<tr>
<td>6.8 Constitutionality of the Act</td>
<td>48</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER 7: CONCLUSION AND RECOMMENDATIONS</th>
<th>49</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>BIBLIOGRAPHY</th>
<th>52</th>
</tr>
</thead>
<tbody>
<tr>
<td>Books</td>
<td>52</td>
</tr>
<tr>
<td>Journals</td>
<td>52</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>54</td>
</tr>
<tr>
<td>Table of Statutes</td>
<td>57</td>
</tr>
<tr>
<td>Internet Sources</td>
<td>58</td>
</tr>
</tbody>
</table>
SUMMARY

Legislation regulating minimum sentences in South Africa was re-introduced by sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997 which came into operation on 1 May 1998. These provisions were regarded as a temporary measure to be effective for two years, where after they were extended from time to time. After they had been extended for several times, section 51 was rendered permanent on 31 December 2007 by the Criminal Law (Sentencing) Amendment Act 38 of 2007. At the same time sections 52 and 53 were repealed by the same Act.

Minimum sentence legislation was the result of a call by the community for heavier penalties and for the offenders to serve more realistic terms of imprisonment. There was also a general dissatisfaction about the perceived leniency of sentences imposed by the courts for serious crimes. During 1996 and in the wake of these concerns the Minister of Justice requested the South African Law Reform Commission to investigate all aspects of sentencing in South Africa.

A Project Committee chaired by a judge of the High Court was appointed and it operated from the late 1996 to March 1998. Minimum sentences for certain serious crimes were one of the options to be investigated by the Project Committee. Consequent to this the Criminal Law Amendment Act 105 of 1997 was promulgated with effect from 1 May 1998. The legislature intended this Act to defer criminal activity, to avoid disparities in sentencing and to deal harshly with perpetrators of serious offences. The subsequent amendments to the Act included the granting of jurisdiction to the Regional court to pass life imprisonment, an automatic right of appeal against life imprisonment in respect of a juvenile accused and identification of circumstances that do not constitute substantial and compelling circumstances. Judicial discretion and departure from prescribed minimum sentences had initially presented a problem regarding its interpretation in a variety of cases in our courts. Eventually our courts came up with a clear interpretation of the meaning of the phrase substantial and compelling circumstances.
This research project will analyze the provisions of the Criminal Law Amendment Act 105 of 1997 with regard to minimum sentences for certain serious offences. In the process case law and other literature will be discussed regarding the interpretation of minimum sentence provisions in the Act. Recommendations for legislation which will cover the aspect of sentencing on a wider scale are made.
CHAPTER 1
INTRODUCTION AND PROBLEM STATEMENT

1.1 INTRODUCTION

Minimum sentence legislation in South Africa was introduced by sections 51 to 53 of the Criminal Law Amendment Act\(^1\) which came into operation on 1 May 1998. The provisions of this Act were initially to be in effect for two years but, it was extended later. This Act lists certain serious offences such as murder, robbery and rape and identifies actual situations in which mandatory sentences, including life imprisonment for murder and rape, must be imposed.

The Act further provides that the court may deviate from the minimum sentence prescribed if it finds substantial and compelling circumstances, justifying a lesser sentence. This legislation was the result of a call from the community for heavier penalties and for offenders to serve more realistic terms of imprisonment. There was also dissatisfaction from the general public in South Africa about the leniency of sentences for serious offences.

1.2 DEFINITION OF THE PROBLEM

Since the inception of the Act, there has been a wide range of responses to the impact of this legislation with regard to sentencing. The problem to be investigated is whether this legislation has achieved its purpose, \(ie\) whether it has succeeded in addressing the concerns that existed prior to its promulgation. A further question is whether there is a need to improve on the current legislation. The study will also determine whether this legislation should be replaced by a legislative instrument to regulate the whole sentencing framework in South Africa.

\(^1\) Act 105 of 1997 (hereinafter referred to as the Act).
1.3 AIMS AND OBJECTIVES

The aim of the study is to establish whether the Act adequately improved sentencing in South Africa, whether it has had adequate impact on serious and violent crimes and crime in general; whether it has achieved any consistency in sentencing and whether public perceptions that sentences were not sufficiently severe, have been adequately addressed.

The objectives of this study include the question as to whether this legislation deters criminal activity and avoids disparities in sentencing. Furthermore it must be established if there is a need for improvement of this legislation or whether it should be replaced by another instrument to regulate the sentencing framework in South Africa.

1.4 RESEARCH METHODOLOGY

The research involves the identification of the general principles of sentencing in South Africa. Secondly, the analysis of data available on the subject, which include literature on the subject and case law, will be discussed. Once this is done the research will evaluate the legislation in order to establish if it has succeeded in its purpose. Recommendations will then be made regarding the solution to the problem.

1.5 FEASIBILITY

The aims and objectives of the research are achievable given the questions, arguments and debate arising from literature and case law. Literature is readily available from University Libraries in South Africa. The data will be in the form of textbooks, articles from law journals and other periodicals. The other source will be articles on the internet. The data will be identified, analyzed and applied to achieve the desired outcome of the research.

In the next chapter minimum legislation will be discussed in detail.
CHAPTER 2
MINIMUM SENTENCE LEGISLATION

2.1 INTRODUCTION AND BACKGROUND

A minimum sentence is a sentence with a lower limit, giving the court discretion to impose a higher sentence. In the history of our penal system a number of attempts were made to limit the sentencing discretion of our courts by providing for mandatory minimum sentences. Minimum sentences thereafter fell out of favour as they were subjected to strong criticism. In S v Toms; S v Bruce for example, Chief Justice Corbett held that the imposition of mandatory sentences by the legislature had always been considered as an undesirable intrusion upon the sentencing function of the courts.

Legislation regulating minimum sentences in South Africa was re-introduced by sections 51 to 53 of the Criminal Law Amendment Act which came into operation on 1 May 1998. These provisions were meant to be a temporary measure, to be effective for two years. Thereafter these provisions were extended from time to time. Their operation was extended for twelve months with effect from 1 May 2000, for two years with effect from 1 May 2001, for two years with effect from 1 May 2003, for two years with effect from 1 May 2005 and for two years with effect from 1 May 2007. However section 51 was rendered permanent by the Criminal Law (Sentencing) Amendment Act. It is important to note that prior to this amendment

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4 1990 (2) SA 802 (A) at 817 C-D.
5 Fn 1.
7 Government Gazette 7059 GN 29, 30 April 2001.
8 Government Gazette 24804 GN 40, 30 April 2003.
11 Act 38 of 2007 which came into operation on 31 December 2007. Sections 2 and 3(a) of this Act repealed ss 52 and 53 of Act 105 of 1997.
the title of section 51 referred to Mandatory Minimum Sentences. However, after this amendment the word “mandatory” was substituted with “discretionary”.

Minimum sentence legislation was the result of a call by the community for heavier penalties and for the offenders to serve more realistic terms of imprisonment. There was also a general dissatisfaction about the perceived leniency of sentences imposed by the courts for serious crimes. The following serve as examples of such dissatisfaction from the general public in South Africa:

(a) “The liberal press calls it ‘Public Enemy No1’. Many social sectors are calling to end the moratorium on death penalty. The well-off and poor communities are scared. Blacks and whites are talking about crime. In the meantime the new government is trying to find a solution to the ‘crime’ problem advocating a lot of ‘tough’ measures to deal with criminals and apparent lawlessness that is taking over the country.”

(b) “People are being murdered, raped, abused and hacked, either through political, recreational or gangster violence. Chaos reigns without control.”

(c) “We will never be in a position to bring the epidemic of serious economic crime and corruption in South Africa to an end if we do not bring in new structures to deal with it.”

(d) “You all talk about the philosophy behind crime and give reasons for it. But I … (cannot use) reason or the constitution with a man holding a gun on my head.”

(e) “Die straf wat opgelê word vir die kindermolestering en kindermishandeling is absoluut onbevredigend. Daarom neem dit so drasties toe.”

13 The Citizen Thursday, 26 October 1995.
14 Pretoria News Thursday, 26 October 1995.
16 Beeld Donderdag, 26 October 1996.
“Tough jail sentences should be imposed on child abusers and this could be the only deterrent against child abuse. We have told Mr Omar that the sentences meted out for offenders were too lenient and that new laws with stiffer sentences had to be introduced.”\(^{17}\)

“Minimum vonnis en strawwer vonnisse kan vir kindermoleesterders ingestel word omdat huidige vonnisse nie 'n voldoende afskrikmiddel vir die gemeenskap blyk te wees nie.”\(^{18}\)

“One reads in the newspapers everyday about aggrieved parties who more and more start taking the law into their own hands said Mr Justice T Grobbelaar. ‘Years ago the Appeal Court already warned that if serious crimes were not punished with severe sentences it would cause people to take the law into their own hands, at the end of the day leading to total chaos’.”\(^{19}\)

“A Correctional Services official told a court that a person with a life sentence would automatically be considered for parole after 20 years.”\(^{20}\)

From the above it is clear that the government had enough evidence for it to take action as matter of urgency.

### 2.2 GOVERNMENT ACTION

During 1996 and in the wake of these concerns the then Minister of Justice and Constitutional Development, Mr Dullah Omar, requested the South African Law Reform Commission\(^{21}\) to investigate all aspects of sentencing in South Africa. A project Committee under the leadership of Judge Leonora van der Heever operated

\(^{17}\) *Sowetan* Friday, 10 November 1995.

\(^{18}\) *Beeld* Woensdag, 22 November 1995.

\(^{19}\) *Pretoria News* Thursday, 23 November 1995.


\(^{21}\) Then known as the South African Law Commission (hereinafter referred to as “the Commission”). The name was changed by s 5 of the Judicial Matters Amendment Act 55 of 2002, as from 17 January 2003 to South African Law Reform Commission.
from the late 1996 to March 1998. The Minister of Justice also asked this committee to investigate the desirability of the Legislative determination of minimum and maximum sentences.

In 1997 the committee produced an issue paper no. 11 entitled “[Project 82] Sentencing: Mandatory Minimum Sentences”. During their research the committee examined the sentencing regimes in England and Wales, Sweden, United States of America, Germany, Canada and Greece.

A number of justifications for these nations’ guidelines and minimum sentencing regimes included the following:

(a) Retribution or just deserts - it is argued that punishment should fit the severity of the crime and that past leniency should be corrected;

(b) incapacitation - it is vital to ensure the incapacitation of serious offenders to protect the community;

(c) disparity - mandatory minimum sentences are held to reduce unwarranted disparity in sentencing; and

(d) inducement of co-operation - mandatory minimums may help induce defendants to co-operate with authorities.\(^{22}\)

The committee then considered the following sentencing guidelines for sentencing reform:\(^{23}\)

### 2.2.1 ENACTMENT OF SENTENCING GUIDELINES: PRESUMPTIVE SENTENCING GUIDELINES

One option is to set up a sentencing commission to develop sentencing guidelines in respect of certain offences. In this regard the best example is the Minnesota


\(^{23}\) Fn 22 ch 4.
sentencing guidelines in the United States of America where the enabling statute directed the sentencing commission to develop guidelines, which were to specify presumptively correct prison commitment and prison duration rules. Specific principles are used as determinants of the presumptive correct sentence, for example the severity of the offence and the accused’s criminal record. The court is allowed to depart from the presumptive correct sentence only if special circumstances exist.

2.2.2 VOLUNTARY SENTENCING GUIDELINES

This option requires the development of sentencing guidelines, which are not required by law to be followed, but which simply guide the courts in the exercise of their discretion. Such policies are based on past sentencing practices but may be elaborated either by appellate courts or more formally by a sentencing commission or council.24

2.2.3 THE ADOPTION OF LEGISLATIVE GUIDELINES THAT ASSIST IN DETERMINING THE CHOICE AND LENGTH OF THE PUNISHMENT

This option is based on the Swedish model, which provides that the legislature determines the nature of punishment and the penal value attributed to the particular offence. The penal value is determined with special regard to the harm, offence or risk which the conduct involved and what the accused realized or should have realized about the conduct including his intentions or motives.

2.2.4 THE ENACTMENT OF PRINCIPLES OF SENTENCING, INCLUDING GUIDELINES THAT DETERMINE THE IMPOSITION OF IMPRISONMENT

This option is based on the proposals of the Canadian Sentencing Commission, which recommended the enactment of the principles of sentencing. Provision is made; inter alia, for principles governing the determination of the sentence, that is, that the sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence. In addition, a number of factors are listed which the court has to consider in determining the sentence, including, aggravating and mitigating circumstances, the need for consistency in

24 Fn 22 para 4.2.
sentencing offenders for similar offences committed, the need not to impose excessive sentences, the fact that imprisonment should not be imposed solely for the purposes of rehabilitation and the circumstances under which imprisonment should be imposed.25

2.2.5 THE ENACTMENT OF PRESUMPTIVE SENTENCING GUIDELINES TO GUIDE THE IMPOSITION OF CUSTODIAL AND NON-CUSTODIAL SENTENCES

Presumptive guidance takes the form of statutory orders that impose a predetermined sentence range to the judge. Although presumptive guidelines are statutory in nature they can allow the continued existence of sentencing discretion if the judge is allowed to deviate from the adopted range under certain circumstances.

2.2.6 THE ENACTMENT OF MANDATORY MINIMUM SENTENCES COMBINED WITH THE DISCRETION TO DEPART FROM THE SENTENCES UNDER CERTAIN CONDITIONS

This option implies the enactment of a mandatory minimum sentence26 coupled with discretion to the sentencing officer to depart from the prescribed sentence if special circumstances exist. In such circumstances the sentencing court is required to record the circumstances and to give written reasons for departure from the prescribed sentence.27

Furthermore the Issue Paper recommended that the issues raised be discussed and debated thoroughly before any particular direction was taken. The committee considered the sentencing practices in South Africa and summarized points of criticism as follows:28

(a) The existence of a sentencing discretion is the source of inconsistency and disparity in sentencing practices in South Africa.

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25 Fn 22 para 4.5.
26 For example 15, 20 and 25 years imprisonment for the first, second and third conviction respectively.
27 For example The Minnesota Guidelines.
28 Fn 22 para 2.46.
(b) The legislative framework for control of the sentencing discretion is too broad and it enhances inconsistency and disparity in sentencing practices.

(c) The principles developed by the courts to limit or control the sentencing discretion are ineffective.

(d) The principles upon which a superior court will interfere with a sentence imposed by the court of first instance are vague and the lower courts are in desperate need of a comprehensive set of principles which can be used as basic guidelines in sentencing.

(e) There is great uncertainty as to which sentencing aim or theory should be pursued. In some cases it is suggested that deterrence is the most important consideration while others emphasize retribution or rehabilitation.

(f) There is a clear absence of a systematic approach to sentencing.

(g) Attempts by the legislature to control the sentencing discretion by the introduction of mandatory minimum sentences elicited strong criticism. In the Viljoen Commission’s report the Commission expressed its opposition to interference with the judicial discretion in the form of prescribing minimum sentences and sentences for corrective training (2-4 years), prevention of crime (5-8 years) and the indeterminate sentence (9-15 years). It recommended that minimum sentences be abolished (and sentences for corrective training and prevention of crime were subsequently removed from the statute book).

(h) There is a clear absence of a structured sentencing policy and sentencing guidelines.

(i) Most sentencing officers appear to approach the question of sentencing in an intuitive and unscientific manner.

(j) Sentencing practices fail to protect the community from criminals committing serious offence.
Release of convicted prisoners by the Parole Board before expiration of their sentences is severely criticized. It is regarded as interference by the Executive in the functions of the courts.

Academics have highlighted a number of factors which were in the past regarded as justification for discrimination in sentencing, for example race, gender, class, economic position and political background.

Many sentencing officers imposed sentences with a specific political background as point of departure.

The committee also realized that, failure by the legislature to provide a clear and unambiguous legislative framework for the exercise of the sentencing discretion; failure by the courts to develop firm rules for the exercise of the sentencing discretion and failure by the courts and the legislature to give firm guidance as to which sentencing theories or aims carry the most weight, brought much uncertainty and inconsistency into the sentencing process in South Africa.

Unfortunately the van der Heever Committee completed its term of office without consolidation of its work in a discussion paper or in draft legislation proposals. This was occasioned by the rush to enact legislation giving effect to stricter sentencing laws. The government was under pressure to do so following the public perception that the government was not taking the crime problem seriously. The closing date for comment on the Issue Paper was the end of September 1997, however, by then the legislation was already being considered in the National Assembly, the work of the Portfolio Committee having been finalized, in November 1997.

During the Second Reading Debate on this Bill on 6 November 1997, the Minister of Justice described the introduction of minimum sentences for certain serious offences as “an important matter for our country and in the fight against crime in particular”. The Minister also acknowledged the existence of the arguments for and against the

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29 Fn 22 para 2.45.
30 Hansard 6 November 1997, columns 6080 – 6120.
introduction of minimum sentencing framework. He summarized the arguments against the introduction of minimum sentences as follows:31

(a) A statutory obligation on the courts to impose minimum sentences impinges on the independence of the judiciary.

(b) The introduction of minimum sentences will undermine, instead of strengthen, the administration of justice.

(c) Mandatory minimum sentences set the wrong tone for sentencing reform in South Africa.

(d) Mandatory minimum sentences have, in the past, elicited very severe criticisms.

He then summarized the main arguments in favour of the introduction of minimum sentences as follows:32

(a) There is a public demand for more stringent punishment for convicted offenders.

(b) The introduction of minimum sentences will help to restore confidence in the ability of the criminal justice system to protect the public against crime.

(c) The introduction of minimum sentences confirms the Government’s policy, which aims to curb the increasing crime rate and to protect the community against criminals.

(d) In terms of the proposed legislation, the courts are granted discretion to deviate from the prescribed minimum sentences. The introduction of minimum sentences could therefore not be regarded, in the Bill, as being interference with the independence of the judiciary.

31 Fn 30 at 6084 – 66120.
32 Fn 30 at 6086.
(e) And most importantly, those provisions relating to minimum sentences are
designed to ensure that our courts are able to deal effectively, in terms of
sentencing, with the kinds of serious crimes which we have witnessed in our
country and which our people unfortunately still experience.

2.3 INTERPRETATION OF THE ACT

As is the case with all the other legislation, interpretation of the Act is important in
order to determine the intention of the legislature.

Our courts have interpreted the intention of the legislature as follows:

In *S v Willemse*\(^3\) the court held that another and cogent reason for the amendment
was the deterrent effect of the new minimum sentences.

In *S v Mofokeng and Another*,\(^4\) the court held that deterrence appears to be the
principal concern of the Legislature in the imposition of the severe minimum
sentences upon which it has decided even before the offences are committed. However the court endorsed deterrence and retribution as the intended purposes of
this legislation in *S v Homareda*.\(^5\) The court also disapproved the notion that these
purposes can only be achieved through obligatory sentencing or prescribed minimum
sentences which have failed in the past in respect of drugs and drug trafficking.\(^6\)

The court further referred to the case of *S v Makwanyane and Another*\(^7\) where
Chalskalson P held that the greatest deterrent to crime is the likelihood that the
offenders will be apprehended, convicted and punished. In *S v Kgafela*,\(^8\) the court
emphasized the aspects of deterrence and retribution to be heavily relied on where
the courts imposed minimum sentence for the purpose of combating crime.

\(^3\) 1999 (1) SACR 450 (C) at 454 c.
\(^4\) 1999 (1) SACR 502 (W) at 526 a.
\(^5\) 1999 (2) SACR 319 (W) at 324 h.
\(^6\) Fn 20 at 325 e.
\(^7\) 1995 (2) SACR 1 (CC) at 122.
\(^8\) 2001 (2) SACR 207 (B) at para [23].
Booysens AJ in *S v Snyders*,\(^39\) affirmed the retributive aspect of punishment concluding that it was clear that the Legislature intended that the perpetrators of the serious offences referred to in the Act should be harshly dealt with.

In *Centre for the Child Law v Minister for Justice and Constitutional Development and Others*\(^40\) Cameron J held that there can be no doubt that the intention and effect of the minimum sentencing regime introduced in May 1998 was to impose a harsher system of sentencing for the scheduled crimes. In *S v Blaauw*\(^41\) the court referred to the case of *S v Majalefa and Another*\(^42\) where Leveson J expressed the view “that the purpose of the legislation was to avoid disparities in sentencing”.

In *S v Montgomery*\(^43\) the court acknowledged that the dual purpose of this legislation referred firstly, to deterrence and retribution and secondly, to intention to avoid situations where surprisingly disparate sentences are imposed by different courts for a particular offence. In *S v Zitha and Others*\(^44\) the court disapproved the notion of disparity in sentencing and it found difficulty in accepting that the purpose of the Legislature in enacting the provisions concerned was to address disparity in sentencing.

Sloth-Nielsen and Ehlers\(^45\) hold the view that the stated intention of the legislature with the introduction of the minimum sentencing provisions in 1997 was to reduce serious and violent crime, to achieve consistency in sentencing, and to address public perceptions that sentences were not sufficiently severe.

\(^{39}\) 2000 (2) SACR 125 (NC) at 129 e.
\(^{40}\) 2009 (2) SACR 477 (CC) at para [16].
\(^{41}\) 1999 (2) SACR 295 (W) at 303 A.
\(^{42}\) Unreported judgment of the Witwatersrand Local Division delivered on 22 October 1998.
\(^{43}\) 2000 (2) SACR 318 (N) at 322 H.
\(^{44}\) 1999 (2) SACR 404 (W) at 409 E.
According to Tait\textsuperscript{46} the stated intention of the legislation was to promote consistency in sentencing, to address public concerns regarding the need to be “tough on crime” and to reduce the levels of serious and violent crime.

According to Roth\textsuperscript{47} one of the reasons for Parliament’s decision to adopt mandatory minimum sentencing regime was its belief that it would deter violent crime. She further states that Parliament expected mandatory minimums to reduce sentencing disparities as well.

In the next chapter the structure of minimum sentence legislation will be discussed.

\textsuperscript{46} Conference Report on sentencing in South Africa held at Commodore Hotel, V & A Waterfront Cape Town on 15 – 26 October 2006.

CHAPTER 3
THE STRUCTURE OF THE MINIMUM SENTENCE LEGISLATION AS CONTAINED IN ACT 105 OF 1997

3.1 INTRODUCTION

In this chapter the structure of the relevant legislation will be discussed. The discussion will reflect on the details of the Act including the relevant categories of offences.

Section 51 of the Act prescribes various minimum terms of imprisonment for the variety of serious offences described in section 3.1 herein. These are predominantly the offences committed in the circumstances thought to render the perpetrator especially blameworthy and attracting particular public concern at the time.

3.2 OFFENCES TO WHICH THE SENTENCES APPLY

The categories of offences concerned are grouped under different Parts of Schedule 2 to the Act. The offences provided for in Part 1 of Schedule 2 to the Act include murder; rape; compelled rape; any offence referred to in certain sections of the Protection of constitutional Democracy against Terrorist and Related Activity Act 2004, when certain circumstances as stipulated in Schedule 2 exist and the offence of trafficking in persons for sexual purposes in terms of section 71(1) or (2) of the Criminal Law (Sexual offences and Related Matters) Amendment Act, 2007.

The offences in Part II include murder (in the circumstances other than those mentioned in Part I); robbery in specified circumstances and any offence relating to Drugs and drug Trafficking Act, 1992\(^{48}\) in specified circumstances.

The offences referred to in Part III include rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in

\(^{48}\) Act No 140 of 1992.
Part I; sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 12 or 23 of the said Act or using a child pornography or using a person who is mentally disabled for pornographic purposes as contemplated in section 20(1) or 26(1) of the said Act respectively; assault with intent to do grievous bodily harm on a child under the age of 16 years; any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 on account of being in possession of 1000 rounds of ammunition intended for firing in an arm contemplated in section 39(2)(a)(i) of that Act and any trafficking related offence by a commercial carrier as contemplated in section 71(6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

Part IV provides for the following offences: if the accused person had with him or her at the time a firearm which was intended for use as such in the commission of such offence; treason; sedition; public violence; robbery other than robbery referred to in Part I or II; kidnapping; an offence involving an assault, when a dangerous wound is inflicted with a firearm, other than an offence referred to in Part I, II or III; breaking or entering any premises, whether under common law or statutory provision, with intent to commit an offence and lastly escaping from lawful custody.

Section 51(1) applies to offences referred to in Part I of Schedule 2 to the Act. It places a duty on the High or Regional court to impose life imprisonment on an offender that is convicted of these offences. The phrase “notwithstanding any other law” in section 51(1) means that if any other law provides otherwise, section 51(1) will apply. The phrase “… but subject to subsections (3) and (6) …” means that when the conditions provided for in these subsections exist, the minimum sentence regime finds no application.

Section 51(2) of the Act applies to offences referred to in Part II to IV of Schedule 2. It imposes a duty similar to subsection (1) in the sense that a minimum term of imprisonment has to be imposed by the court for such offences.

49 Act No 75 of 1969.
50 Fn 1 pg 47 paragraph 3.5.2.
Subsection 3(a) contains the main exception i.e. substantial and compelling circumstances, which re-instates the sentencing discretion of the court.\textsuperscript{51} Subsection 3(aA) provides for the circumstances which do not qualify as constituting substantial and compelling circumstances.

3.3 OTHER MATTERS DEALT WITH BY THE ACT

3.3.1 NOTICE TO THE ACCUSED OF MINIMUM SENTENCE

It is now established practice that the court has a duty to inform an unrepresented accused about the provisions of the Act if applicable at the inception of the trial. The application of the provisions of the Act must be reflected in the charge sheet. This duty arises from the decisions of our courts.\textsuperscript{52}

In \textit{S v Mseleku}\textsuperscript{53} Pillay J held that where no mention of the provisions of the Act is made in the indictment, notwithstanding its factual framework, the provisions should be brought to the attention of the accused by the court whether he is represented or not.

3.3.2 TIME SPENT IN PRISON BEFORE SENTENCE AS A MITIGATING FACTOR

In \textit{S v Gqamana},\textsuperscript{54} Thring J considered it a mitigating factor, the fact that the accused had been in custody awaiting trial and sentence for a period of some two years and eight months (together with other factors cumulatively).

On this point, the court in \textit{S v Vilakazi and Others},\textsuperscript{55} Goldstein J, held that the court would be loathe in the absence of clear evidence to decide that the miseries of the awaiting trial period are more oppressive than those of the post sentence one.

\textsuperscript{51} Fn 36 para 3.5.3.
\textsuperscript{52} See \textit{S v Dlamini} 2000 (2) SACR 266 (T); \textit{S v Ndlovu} 2003 (1) SACR 331 (SCA); \textit{S v Makatu} 2006 (2) SACR 582 (SCA).
\textsuperscript{53} 2006 (2) SACR 574 (D).
\textsuperscript{54} 2001 (2) SACR 28 (C) at 37g-i.
\textsuperscript{55} 2000 (1) SACR 140 (W) at 148 e.
3.3.3 NEW PENALTY CLAUSES

On the question of whether the Act has created new penalty clauses for the offences listed there, the court in *S v Legoa*\(^{56}\) held that the Act does not create new offences but refers to specific forms of existing offences. Further that when the commission of those offences is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction.

3.3.4 NO RETROSPECTIVE APPLICATION

In *S v Willemse*,\(^{57}\) Foxcroft J held that section 51 of the Act does not have retroactive effect and it was therefore not applicable to offences committed before the Act came into operation on 1 May 1998.

3.4 THE SUBSEQUENT AMENDMENTS TO THE ACT

The following amendments have been effected to the Act:

(a) The Act has been rendered permanent by the repeal of sections 53(1) and (2) of the Act.\(^{58}\) In essence the requirement that the legislation be reconsidered bi-annually has been abolished.

(b) The regional courts now have jurisdiction to pass sentence of life imprisonment in respect of the offences mentioned in Part 1 of Schedule 2 to the Act.\(^{59}\) This therefore addressed the problem of the split procedure which was provided for in the erstwhile section 52. There is no more referral of cases for sentence by the High Court.

\(^{56}\) 2003 (1) SACR 13 SCA at para [18].

\(^{57}\) Fn 18 at 456 a-b.

\(^{58}\) Fn 7.

\(^{59}\) S 51(1) of the Act.
(c) The Act grants an automatic right of appeal against life imprisonment imposed by the Regional Court.\textsuperscript{60} The Regional Court’s jurisdiction to pass life imprisonment was accompanied by the automatic right to appeal to the High Court. However, this right was subsequently abolished by the Child Justice Act\textsuperscript{61} in respect of adult offenders only with effect from 1 April 2010.\textsuperscript{62} This entails that an adult offender is now required to apply for leave to appeal against life imprisonment in terms of section 309B of Act 51 of 1977.

(d) The Act prescribes that certain circumstances do not constitute substantial and compelling circumstances on a charge of rape.\textsuperscript{63} This therefore limited the deviation from the prescribed sentences in rape cases.

The relevant section reads:

“(i) The complainant’s previous sexual history;
(ii) An apparent lack of physical injury to the complainant;
(iii) An accused person’s cultural or religious beliefs about rape;
(iv) any relationship that existed between the accused and the complainant prior to the commission of the offence.”

(e) The Act creates an exception to the rule that minimum sentences cannot be suspended.\textsuperscript{64} The minimum sentences may now be suspended up to half if the offender was 16 or 17 at the time of the commission of the offence.

(f) The Act also regulates transitional arrangements in respect of cases pending committal to the High Court before 31 December 2007.\textsuperscript{65}

(g) The Act Creates new categories of murder added to Part I of Schedule 2 to the Act.\textsuperscript{66} These are the instances where the victim was killed in order to

\textsuperscript{60} S 309(1)(a)(ii) of the Criminal Procedure Act 51 of 1977.
\textsuperscript{61} No 75 of 2008.
\textsuperscript{62} Ss 84(1) and 99(1) of Act 75 of 2008.
\textsuperscript{63} S 51(3)(aA) of the Act.
\textsuperscript{64} S 51(5)(b) of the Act.
\textsuperscript{65} S 53A of the Act.
\textsuperscript{66}
unlawfully remove any body part of the victim or as a result of such unlawful removal of a body part of the victim; or the death of the victim resulted from or is directly related to any offence contemplated in section 1(a) to (e) of the Witchcraft Suppression Act.\(^{67}\)

(h) Part IV of schedule 2 to the Act has been substituted as a whole. This part now refers to the offences of treason; sedition; public violence; robbery other than robbery referred to in Part I or II of this schedule and kidnapping, if the accused had with him or her at the time a firearm which was intended for use as such, in the commission of such offence.

Other offences included in this part are escaping from lawful custody; breaking or entering any premises, whether under common law or a statutory provision, with intent to commit an offence and an offence involving an assault, when a dangerous wound is inflicted with a firearm, other than an offence referred to in Part I, II or III Schedule 2.

However the wisdom of giving the Regional Court such a high penal jurisdiction has been found to be questionable on the basis that life imprisonment is the ultimate penalty in the absence of death penalty. Furthermore it would be expected that cases which call for life imprisonment should be tried by the High Court which is the highest trial court for criminal cases in the country.\(^{68}\)

Judicial discretion and departure from the prescribed minimum sentence as provided for in section 51(3)(a) of the Act have presented some problems in practice. It is against this background that judicial discretion is discussed in the next chapter.

\(^{66}\) Para (e) and (f) of Part I of Schedule 2 of the Act.

\(^{67}\) No 3 of 1957.

CHAPTER 4
JUDICIAL DISCRETION AND DEPARTURE
FROM THE PRESCRIBED SENTENCE

4.1 INTRODUCTION

In this chapter the developmental issues relating to judicial discretion and the departure from the prescribed sentences will be discussed.

Section 51(3)(a) of the Act provides that a court which has convicted a person of an offence referred to in Part I or II of schedule 2, shall, if satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

Terblanche submits that mandatory and minimum sentences are not new or unfamiliar phenomena in the South African criminal justice system, nor has either ever been accepted without displeasure from our judiciary. He further submits that the Act is no different and that the judiciary’s basic objection against such sentences is that they reduce the courts to rubber stamps; violate the independence of the courts as well as the principle of the separation of constitutional powers. These comments are supported by the case of S v Toms; S v Bruce where Smalberger JA held that the infliction of punishment is a matter for the discretion of the trial Court; mandatory sentences reduce the normal sentencing function of the court to the level of a rubber stamp.

The term “substantial and compelling circumstances” is new to South African law and it is not defined in the Act. However, in terms of section 51(3)(aA) of the Act some guidance has now been provided to identify the factors that shall not constitute substantial and compelling circumstances in respect of the offence of rape. This phrase appears to have been borrowed from the American sentencing practice

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70 Fn 4 at 806h – 807b; 822c-d and 830j - 831b.
entitled Minnesota Sentencing Guidelines. However, Van Zyl Smit\textsuperscript{71} affirms that the term “substantial and compelling circumstances” is not found in South African law but appears to have been borrowed from modern American sentencing practice. In \textit{S v Malgas}\textsuperscript{72} the court held that it was significant to note that the legislature had refrained from giving such guidance as was done in Minnesota from where the concept of “substantial and compelling circumstances” was derived.

The Minnesota Sentencing Guidelines provide a list of factors that may be regarded as substantial and compelling circumstances, for example:

(a) the fact that the victim was an aggressor in the incident;

(b) the offender played a minor role in the commission of the offence or participated as a result of coercion or duress;

(c) the offender as a result of physical or mental impairment, lacked substantial capacity when the offence was committed and finally;

(d) any other substantial ground which tends to excuse the offender’s culpability.

However, voluntary use of drugs or alcohol may not be considered as far as the offender’s impairment or lack of substantial capacity. Likewise a list of factors that may not be considered as grounds for departure is provided in these guidelines, which includes race; sex; educational background and marital status. It is noted that these guidelines focus mainly on the seriousness of the offence and the moral blameworthiness of the accused in respect of the crime. The fact that the Act does not define substantial and compelling circumstances in the same fashion as in Minnesota has become a matter of real concern. Roth\textsuperscript{73} expresses the view that failure of Parliament to define this term has undermined the Act’s endeavour to promote uniformity. The Commission also recognised this as a weakness which may

\textsuperscript{71} “Mandatory minimum sentence and departures from them in substantial and compelling circumstances (1999) 15 SAJHR 270 at 271.

\textsuperscript{72} 2001 (1) SACR 469 (SCA) at para [18].

\textsuperscript{73} Fn 32.
be cured through the interpretation of the words by re-introducing the existing principles.

Van Zyl Smit\textsuperscript{74} submits that in the past when confronted with mandatory sentences for murder without extenuating circumstances, South African courts proved adept at developing criteria for identifying mitigating circumstances by including all those circumstances that diminished the moral blameworthiness of the offender’s conduct. He further submits that although the application of this test was not uncontroversial, it greatly widened the discretion of the courts whilst still structuring the decision-making process. He submits further that the current legislation demands a similar judicial initiative in determining what circumstances are relevant to deciding whether ‘substantial and compelling circumstances’ exist. Finally he submits that if this is done rigorously and systematically it could go a long way towards balancing the clear legislative desire to encourage the courts to impose heavier sentences on the grounds of deterrence or incapacitation, with the avoidance of sentences that are grossly disproportionate to the specific crimes committed.

The Minnesota approach of focussing on the seriousness of the offence and moral blameworthiness of the offender was also confirmed by Davis J in \textit{S v Schwartz and Another}\textsuperscript{75} where he emphasised the principle of just deserts or the retributive theory. Kruger\textsuperscript{76} also holds the view that section 51 shifts the emphasis to the objective gravity of the offence and the public’s need for effective sanctions against it.

4.2 \textbf{THE INTERPRETATION OF THE PHRASE “SUBSTANTIAL AND COMPELLING CIRCUMSTANCES”}

The meaning of the phrase substantial and compelling circumstances has been considered in a number of cases where the minimum sentence prescribed by section 51 has been passed, thus presenting three different extremes of the spectrum. At the one extreme there is a case of \textit{S v Motokeng and Another}\textsuperscript{77} where Stegmann J

\textsuperscript{74} Fn 56 at 275 – 276.
\textsuperscript{75} 1999 (2) SACR 380 (C) at 387 g.
\textsuperscript{76} Kruger \textit{Hiemstra’s Criminal Procedure (Commentary) [Issue 2]} 19.
\textsuperscript{77} 1999 (1) SACR 502 (W).
was of the view that this phrase leaves the trial court with almost no discretion and in fact compelled the court to impose the minimum sentence.

The court further held:

“Therefore, I consider it to be clear enough that, for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstance that is exceptional in nature and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, that it can rightly be described as ‘compelling’ the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified”.

The learned judge further held that “substantial and compelling circumstances” mean the factors of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2. This judgement was followed in *S v Segole and Another* where Jordaan AJ held that “substantial and compelling circumstances” would be some circumstance so exceptional in nature and so obviously exposing injustice of the statutorily prescribed sentence, that it compelled the conclusion that lesser than the prescribed sentence is justified.

This approach was again followed in *S v Zitha and Others* where Goldstone J held that the Legislature has laid down heavy minimum sentences in most, if not all the cases, which would seem substantially in excess of those imposed by the courts until now. Roth refers to this approach as a strict interpretation.

At the other extreme in *S v Majalefa and Another* Leveson J was of the opinion that the expression “substantial and compelling circumstances” was intended to denote factors of solid material significance in relation to all other component factors which must irresistibly be taken into consideration for the purpose of sentence. The sentence must not lead to an injustice. In other words the court was of the view that

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78 Fn 53 at 523 c-d.
79 Fn 53 at 524 c-d.
80 1999 (2) SACR 115 (W).
81 Fn 44
82 Fn 32 pg 5.
83 Fn 42 pg 6.
the words “substantial and compelling” were just a confirmation of the traditional
discretionary principles of sentencing and that the consideration of aggravating and
mitigating circumstances should still remain a point of departure. Roth\(^84\) refers to this
as a lenient interpretation.

Both extremes were endorsed in the other divisions of the High Court. In \(S \text{ v } Madondo\)\(^85\) Squires J emphasised that the intention of parliament was that penalties
for rape of a girl under the age of 16 should be increased and that the court would
not easily intervene to impose a lesser sentence as compelling reasons for doing so
would not be lightly found. He explained that a “compelling” reason meant more than
just a disparity between what the court feels may be sufficient and the prescribed
minimum. The court further that to consider such a difference alone as constituting
compelling reasons would be subversive of the legislature’s intention. He explained
that compelling was a “strong” word that meant “‘almost irresistible’, constituting at
least a strongly sensed obligation”. He went on to state that factors such as the age
of the girl; “nearly sixteen years or sixteen months”, or whether she was physically
harmed or not, would usually not come into play for the purpose of sentencing under
the new Act.

The third approach is the one that falls somewhere between the above two extremes.
This approach was followed in \(S \text{ v } Blaauw\)\(^86\) where Borchers J found that the Act did
narrow the discretion that the courts had previously had to impose sentence and that
it did so more rigorously than if the court had merely had to find that there were
circumstances that justified it departing from prescribed sentence.

The court further held that the legislature has not seen it fit to describe what factors
may or may not be considered. Further that the court is still able to have regard to all
the factors which would traditionally have been considered in imposing sentence.
That a court should not consider each factor in isolation but view them cumulatively
and if, on doing so, the court forms the view that, bearing in mind all the factors,
aggravating as well as mitigating, a sentence of life imprisonment would be grossly

\(^{84}\) Fn 67.

\(^{85}\) Unreported judgment of the NPD, case CC22/99, delivered on 30 March 1999.

\(^{86}\) Fn 41.
disproportionate to the crime committed or, to put it differently, startlingly inappropriate or offensive to its sense of justice, then it should find that substantial and compelling circumstances exist for departing from the prescribed sentence of life imprisonment. That in such circumstances a court would not be substituting its own discretion for that of the Legislature, for the Legislature had not intended that unfair or grossly disproportionate sentences should be imposed.\(^{87}\)

In supporting the approach in *S v Blaauw*, Willis J in *S v Dithotze\(^ {88}\) decided that the court is still able to have regard to all factors which would traditionally have been relevant in imposing sentence, if the court, after considering all factors, forms the view that a sentence of life imprisonment would be grossly disproportionate to the crime committed or disturbingly inappropriate or offensive to its sense of justice, it should find that substantial and compelling circumstances exist for departing from a prescribed sentence of life imprisonment. In *S v Jansen\(^ {89}\) Davis J held that, in considering the imposition of a minimum sentence in terms of sections 51, 52 and 53 of Act, the court is to consider all available mitigating factors to determine whether they are of substantial weight thus enabling the court to exercise its discretion to provide for a reduced sentence. The court further held that the term “substantial and compelling circumstances” refers to weight rather than to exception.

*In S v Van Wyk\(^ {90}\) Davis J held that the Act derived its jurisprudential heritage from Minnesota Sentencing Guidelines. The court further held that the phrase “substantial and compelling circumstances” included all those factors which had previously been referred to as mitigating circumstances and included all the circumstances which might indicate a diminished moral blameworthiness on the part of the offender.

In the seminal judgment of *S v Malgas\(^ {91}\) the court provided some important guidelines to be considered when interpreting the term “substantial and compelling circumstances”. Marais JA held that the court may not depart from the specified sentences lightly and for flimsy reasons which could not withstand scrutiny. The

\(^{87}\) Fn 61 at 311 f-i.

\(^{88}\) 1999 (2) SACR 324 (W).

\(^{89}\) 1999 (2) SACR 368 (C).

\(^{90}\) 2000 (1) SACR 45 (C).

\(^{91}\) Fn 72.
court further held that no factors are excluded from consideration and that what the term was apt to convey, is that the cumulative impact of those circumstances must be such as to justify a departure. He further rejected the dicta which suggest that for circumstances to quality as substantial and compelling they must be “exceptional” in the sense of seldom encountered or rare further that it would be an impossible task to attempt to catalogue exhaustively either those circumstances or combinations of circumstances which could rank as substantial and compelling and those which could not. He further held that what stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than have been supposed to be in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. He then summarised the step by step procedure to be followed in applying the test to the actual sentencing situation.92

The interpretation of “substantial and compelling circumstances” as enunciated in S v Malgas was affirmed by Ackerman J in S v Dodo.93 The court held that this interpretation was an overarching guideline that the court endorsed as a practical method to be employed by all judicial officers faced with the application of section 51 of the Act. Further that It had to be refined and particularised on a case by case basis, as the need arose. Further that It steered an appropriate path, which the Legislature doubtless intended, respecting the legislature’s decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by section 51 of the Act and at the same time promoting the spirit, purport and objects of the Bill of Rights. The court also emphasised that in considering the existence of substantial and compelling circumstances, a court is not prohibited by the Act from weighing all the usual considerations traditionally relevant to sentence.94

The court also found that section 51(1) is not unconstitutional, stating that under the Constitution there is no absolute separation between judiciary, legislative and executive functions. The court held further that the legislature and the executive

92 Para 25
93 2001 (1) SACR 594 (CC).
94 Fn 67para [40].
share an interest in the punishment to be imposed by the courts. Further that section 51(1) does not have the effect of depriving the courts of their sentencing powers in such a manner and to such degree that they can no longer be described as “ordinary” courts. In S v Abrahams, Cameron J A (as he then was) in interpreting the phrase “substantial and compelling circumstances”, recognised that some rapes are worse than the others and held that the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such sentence is inappropriate and unjust. The court further referred to the weighing of all the circumstances of a case, while giving due regard to the legislative benchmark created by the Act and taking into account special circumstances of a case. The court then confirmed that there were substantial and compelling circumstances but felt that the sentence of seven years imprisonment was not appropriate and increased it to twelve years imprisonment.

Mpati J A in S v Mahomotsa referred to the decisions in Malgas and Dodo, and held that, which sentence should be imposed once substantial and compelling circumstances are found to exist, is within the sentencing discretion of the trial court, subject of course to the obligation cast upon it by the Act to take due cognisance of the legislature’s desire for firmer punishment than that which may have been thought to be appropriate in the past. The court further held that even in cases falling within the categories delineated in the Act, there are bound to be differences in the degree of their seriousness. Further that there should be no misunderstanding about this as they will all be serious but some will be more serious than others and that subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment.

95 Fn 67 paras [22] and [23].
96 Fn 67 paras [44] and [45].
97 2002 (1) SACR 116 (SCA).
98 Fn 69 at para [29].
99 Fn 69 at para [31] and particular circumstance considered being the 16 months that the accused had spent in prison prior to sentence.
100 2002 (2) SACR 435 (SCA) at para [18].
In *S v Vermeulen*, Mthiyane JA held that factors advanced as being “substantial and compelling” enough to lead to a lesser sentence cannot be considered *in vacuo*; due weight must be given to them in the context of the case, together with all the aggravating factors and the interests of the community.

In *S v Mvamvu*, Mthiyane JA considered the guidelines I and J as set out in *S v Malgas* and held that bearing the benchmark in mind, the court must give due weight to the aggravating and mitigating circumstances and the special circumstances of a particular case. In *Director of Public Prosecutions, KwaZulu- Natal v Ngcobo and Others* Navsa JA referring to Malgas decision held that a departure from the prescribed minimum sentence is justified if an injustice would result from imposing such sentence.

The Constitutional Court per Cameron J in *Centre of Child Law v Minister of Justice and Constitutional Development and Others* also affirmed the interpretation adopted in *S v Malgas*, stating that under the minimum sentencing regime the discretion entrusted to courts of law was not expunged, but was substantially constrained.

He further held that for sentencing courts it was no longer to be business as usual:

“First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or a particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short the Legislature aimed at ensuring a severe standardised, and consistent response from the courts to the commission of such crimes unless there were and could be seen to be truly convincing reasons for a different response”

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101 2004 (2) SACR 174 (SCA) para [28].
102 2005 (1) SACR 54 (SCA).
103 Fn 74 at para [18].
104 2009 (2) SACR 361 (SCA).
105 Fn 25.
The court followed the same interpretation in *S v Ntsheno*,\(^{106}\) where Willis J concluded that Stegmann J was wrong in his interpretation of substantial and compelling circumstances, and his conclusion that he was obliged to impose prescribed minimum sentence. He further held that the very factors in this case which Stegmann J considered could not be taken into account had to be considered, for example, the absence of previous convictions, the comparative youthfulness of the offenders, the unfortunate factors in their backgrounds, the probable effect upon them of the liquor which they had taken, the absence of dangerous weapons and the fact that the complainant had not suffered serious injury. He further held that upon reading the evidence as a whole, it would not seem to be undue speculation in favour of the appellant to conclude that he acted under the influence of at least some of the others upon considering the aggregate effect of all the factors mentioned herein.

He found that minimum sentence was clearly disproportionate to the crime hence he ultimately found that substantial and compelling circumstances existed. He then set aside the sentence of life imprisonment and substituted same with 19 years imprisonment on each count of rape but ordered the sentences to run concurrently. However, it is interesting to note that the appellant had been sentenced to life imprisonment as accused no 2 together with accused no 1 by Stegmann J in the case of *S v Motokeng and Another*.\(^{107}\) When the court affirmed the Malgas approach in *S v Selebi*,\(^{108}\) Joffe J held that the courts in departing from the minimum sentence prescribed, they are to respect, and not merely pay lip service to, the Legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.\(^{109}\)

In *S v Matityi*\(^{110}\) the court as per Ponnan JA held that Malgas had set out how the minimum sentencing regime should be approached and in particular how the inquiry into substantial and compelling circumstances is to be conducted by a court.\(^{111}\)

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\(^{106}\) 2010 (1) SACR 295 (GSJ).
\(^{107}\) Fn 19.
\(^{108}\) Judgment of the South Gauteng High Court in Johannesburg case no SS 25/2009 delivered on 3.8.2010 and yet to be reported.
\(^{109}\) Fn 92 para [6].
\(^{110}\) 2011 (1) SACR 40 (SCA).
\(^{111}\) Fn 94 para [11].
4.3 CRITICISM OF MALGAS DECISION

This decision has not been free from criticism, despite the fact that it has been widely recognised by the courts for its seminal nature on the interpretation of the term “substantial and compelling circumstances”.

In *S v Kgafela* Friedman JP remarked that the terms “substantial and compelling circumstances” had not been textually interpreted in *S v Malgas* but had been relegated to the effect of an instinctive reaction, and response, taking refuge in the notion of injustice or unjust sentences, resulting in the imposition of a lesser sentence bearing in mind the well-known triad of the criminal, the crime and interests of the society. He further held that the court had failed to interpret what was meant by this phrase. In *S v Vuma* Du Toit AJ had the following to say “however, since S51 of the Act has received the nod of approval from both the Supreme Court of Appeal in, for example, *S v Malgas*, and the Constitutional Court in *S v Dodo*, I am precluded from questioning its validity or Constitutionality and must per force interpret it as best I can and give effect to the intention of the Legislature in enacting it but I would be failing in my duty if in doing so I did not always voice my protest at what is surely the most invasive piece of legislation enacted since the advent of the democratic South Africa and I respectfully associate myself with the sentiments expressed by Stegmann J in *S v Motokeng and Another*.

It is submitted that, despite criticism, the decision in *Malgas* has laid the foundation for the interpretation of the “term substantial and compelling circumstances” by our courts. The approach adopted by the court in *Malgas* clearly endorses the view expressed by van Zyl Smit. This is supported by Du Toit *et al* who submit that the approach adopted by the court in *Malgas* will remain valid despite the changes to the Act which came into operation on 31 December 2007. It is further submitted that the sentencing regime adopted in section 51 of the Act falls squarely within the four corners of the sentencing model entitled the Minnesota Sentencing Guidelines.

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112 2003 (1) SACR 597 (W) at 599 B-D.
113 Fn 58.
114 Fn 53 pg 18 D6, Service 42, 2009.
While the problems attending judicial discretion and the departure from the prescribed minimum sentence appear to have been settled, it is also necessary to review the other relevant provisions of the Act which are discussed in the next chapter.
CHAPTER 5
THE APPLICATION OF MINIMUM SENTENCES

5.1 INTRODUCTION

In this chapter the application of minimum sentences will be discussed under the headings below.

5.2 SUSPENSION OF PRESCRIBED MINIMUM SENTENCE

Section 297(4) of the Criminal Procedure Act, 1977 reads:

“where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years or any condition referred to in paragraph (a) (i) of subsection (1).”

Section 51(5)(a) of the Act, clearly provides that the sentence under section 51 may not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977. However, a lesser sentence that the court imposes upon finding substantial and compelling circumstances can be suspended in terms of section 297 of the Criminal Procedure Act, 1977. This arises from the fact that, the court retains its ordinary sentencing jurisdiction once substantial and compelling circumstances are found to exist.

Section 276(3) of the Criminal Procedure Act 51 of 1977 reads:

“Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1977 (Act No 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court –

(a) from imposing imprisonment together with correctional supervision; or

(b) from imposing the punishment referred to in subsection (1)(h) or (i) in respect of any offence, whether under common law or statutory provision irrespective of whether the law in question provides for such or any other punishment; Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court is obliged to impose a
sentence contemplated in section 51(1) or (2), read with section 52, of the Criminal Law Amendment Act, 1977."

Section 276(3)(b) of the Criminal Procedure Act, 1977, clearly provides, that correctional supervision cannot be imposed when the court is obliged to impose a sentence contemplated in section 51(1) or (2) of the Act.

Section 51(5)(b) of the Act has brought about a change in the sense that it allows a court to suspend half of the prescribed minimum sentence if the accused was between the age of 16 and 18 years at the time of the commission of an offence in question. The position of this category of the accused and the interpretation of this section is dealt with below.\textsuperscript{115}

5.3 SENTENCING JURISDICTION OF THE COURTS IN TERMS OF THE ACT

5.3.1 THE POSITION OF THE DISTRICT COURTS

Section 51(1) and (2) of the Act makes reference to only the High Courts and the Regional Courts respectively. The Act does not refer to district courts at all. Terblanche\textsuperscript{116} submits that it was indeed the intention of the legislature not to affect the district magistrates’ courts at all, and that they should disregard the provisions of the Act.

The question whether this legislation affected the district courts had presented itself before some provincial divisions of the High Court but it was left undecided.\textsuperscript{117} However, in \textit{Jimenez v S}\textsuperscript{118} Lewis AJA settled this question once and for all by holding that district magistrates’ courts are not bound to impose the minimum sentences prescribed. Olivier JA adopted a different approach but agreed with Lewis AJA and stated that a district court is not entitled to apply the minimum sentence

\textsuperscript{115} Para 4.4.2.
\textsuperscript{116} Fn 69.
\textsuperscript{117} \textit{S v Khanjwayo}; \textit{S v Mihlali} 1999 (2) SACR 651 (O) and \textit{S v McCoulagh} 2000 (1) SACR 542 (W).
\textsuperscript{118} 2003] 1 All SA 535 (SCA) para [4].
provisions under consideration and that the Criminal Law Amendment Act 105 of 1997 is clear and unambiguous in this respect.\footnote{Para [11].}

\section*{5.3.2 REGIONAL AND THE HIGH COURTS}

The position of these courts was governed by section 52 of the Act prior to the repeal of sections 52 and 53 of the Act on 31 December 2007. Whereas these sections have been repealed and in view of the transitional provisions as contained in section 53A of the Act, it is necessary that the provisions of the defunct section 52 be discussed. Section 53A of the Act provides for the cases that were pending in the Regional Court under section 52 of the Act as on the 31 December 2007. Prior to 31 December 2007 the position was that a Regional Court convicting the accused of an offence referred to in Part I of Schedule 2 of the Act, would commit the accused to the High Court for sentence.

This arose from the fact that the regional court does not have jurisdiction, in terms of its ordinary jurisdiction to impose the mandatory life imprisonment prescribed after conviction of such offence and it was only logical for such a case to be transferred to the High Court for sentencing. Terblanche\footnote{Fn 79 at pg 12.} holds the view that, in fact, the whole of section 52 would have had little practical purpose, if it was not intended specifically for this purpose. This view appears to have been endorsed by some divisions of the High Court.\footnote{S v Ibrahim 1999 (1) SACR 106 (C) at 110-111; S v Jansen fn 64 and S v Mdatjiece unreported (W) as quoted in Ibrahim’s case.} However some courts took an opposite view in this regard raising reservations about, among other things, the poor draftsman ship of this legislation and found the procedure in section 52 unpopular. In \textit{S v Mofokeng and Another},\footnote{Fn 19 at 512g.} Stegmann J expressed the view that if mandatory life imprisonment was to be imposed the entire trial should take place in the High Court. In \textit{S v Swartz and Another},\footnote{Fn 75 at 383 c-d.} Davis J expressed himself as follows:

\begin{quote}
\footnote{\textit{S v Mofokeng and Another},\footnote{\textit{S v Swartz and Another},\footnote{Para [11].} \footnote{Fn 79 at pg 12.} \footnote{S v Ibrahim 1999 (1) SACR 106 (C) at 110-111; S v Jansen fn 64 and S v Mdatjiece unreported (W) as quoted in Ibrahim’s case.} \footnote{Fn 19 at 512g.} \footnote{Fn 75 at 383 c-d.}}\end{quote}
“this court now finds itself in the position of a chain novelist. The first chapter has been written by another court and this Court is now expected to complete the work on the basis of a framework determined by another author. It is a most unsatisfactory system.”

Where the Regional Court convicted the accused of an offence not attracting minimum sentence simultaneously with the offence referred to in Part I of Schedule 2 to the Act, the regional court was required to simultaneously commit the accused for sentencing by the High Court in respect of all the counts. In *S v Shezi and Another*,124 the court held that if the regional court sentenced the accused in respect of the offences not attracting minimum sentence, the High Court will set those sentences aside and impose the sentence afresh.

The jurisdictional facts for the application of section 52 of the Act were spelt out by Stegmann J in *S v Mofokeng and Another*125 as follows:

(a) a regional court must have convicted an accused of an offence committed after the commencement of sections 51 and 52 on 1 May 1998;

(b) the offence must be one referred to in Schedule 2 of Act 105 of 1997;

(c) the magistrate must not have imposed sentence;

(d) the accused was not under the age of sixteen years at the time of the commission of the act that constituted the offence;

(e) the Schedule 2 offence must be one in respect of which section 51 invests a regional court with penal jurisdiction;

(f) the magistrate must have formed the opinion that the offence merits punishment in excess of the penal jurisdiction of the regional court in terms of section 51;

(g) the magistrate must have stopped the proceedings and committed the accused for sentencing to the High Court having jurisdiction;

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124 2003 (2) SACR 547 (W).
125 Fn 19 at 510 a-f.
Once the accused was committed to the High Court for sentencing, the following procedure would obtain in the High Court:

1. If on the record there was doubt whether the conviction was in accordance with justice, the judge would direct an inquiry to the regional court magistrate as contemplated in section 52(3)(b) of the Act.

2. (a) If the accused pleaded guilty in the regional court, that plea would stand unless the accused satisfied the court that the plea or any admissions made were incorrectly recorded. Unless the court was satisfied that the plea of guilty was incorrectly recorded or was not satisfied that the accused was guilty, the court would make a formal finding of guilty and proceed with sentencing.\textsuperscript{126}

(b) If the accused pleaded not guilty in the regional court, the judgment of the regional court would stand and be sufficient for the high Court to pass sentence.\textsuperscript{127}

(c) If there was doubt about the conviction, the high court would direct an inquiry to the regional court magistrate.

(d) Doubt about the correctness of the conviction could be raised by a reading of the record or in the form of submissions by counsel for the accused or the state.

(e) If counsel raised issues constituting cause for doubt, the judge would decide whether such doubt warranted an inquiry to the magistrate. If it did not, the judge would proceed with sentencing.

\textsuperscript{126} S 52(2)(a) and (b).
\textsuperscript{127} S 52(3)(d).
(f) If the magistrate’s response eliminated all doubt, the judge confirmed the conviction and proceeded with the sentence proceedings.\textsuperscript{128}

3. If the judge or the legal representative of the accused was still not satisfied that the conviction was in order, the legal representative could request the judge to call further witnesses. The court could, of course, also call witnesses. Such calling of witness did not infringe on the right of the accused not to be exposed twice to the same offence (double jeopardy).\textsuperscript{129}

4. The judge decided whether such witnesses were to be called or not.\textsuperscript{130}

5. The accused could not be forced to testify, even if he or she testified in the regional court.\textsuperscript{131}

6. Only in exceptional circumstances could the findings on the merits be revisited at the sentencing stage.\textsuperscript{132}

7. The accused’s fundamental constitutional right to a fair trial had to be borne in mind at all times.

8. The judge had to make rulings from time to time to ensure that the accused and defence witnesses were not treated unjustly or unfairly.

The constitutional validity of section 52 was challenged in \textit{S v Dzukuda}\textsuperscript{133} and the court held that this section was not unconstitutional.

\textsuperscript{128} Fn 88.
\textsuperscript{129} \textit{S v Dzukuda and Others; S v Tshilo} 2000 (2) SACR 443 (CC) para [36].
\textsuperscript{130} \textit{S v Njikelana} 2003 (2) SACR 166 (C) at 168 d-e where the court was not prepared to consider imposing a very heavy sentence, such as life imprisonment, without first hearing at least the essence of the evidence on which the regional court based its decision.
\textsuperscript{131} Fn 90 para [42].
\textsuperscript{132} Fn 90 para [40].
\textsuperscript{133} Fn 128.
5.4 CHILD OFFENDERS

5.4.1 CHILDREN UNDER THE AGE OF 16 YEARS

Section 51 (7) of the Act clearly provides that section 51 does not apply to the accused person who was under the age of 16 years at the time of the commission of an offence in question. What is important in this category of children is the date on which the offence was committed. In S v Nkosi, Cachalia J held that the Act was not applicable to children under the age of 16 and that this meant that a court was unencumbered by any legislative prescriptions in deciding an appropriate form of punishment for such offender. Terblanche is of the view that, this means that the general principles regarding sentencing of children should be followed in this category of children.

5.4.2 CHILDREN BETWEEN 16 AND 18 YEARS OF AGE

Prior to 31 December 2007, the position of this category of children was governed by the defunct section 51(3)(b) of the Act which was repealed by Act 38 of 2007. This section read as follows:

“If any court referred to in subsection (1) and (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.”

Terblanche in dealing with this category of children submits as follows:

“Therefore, if a regional court convicts an offender of 16 or 17 years old at the time of the commission of the offence, of an offence referred to in subsection 51(1) and it does not decide that the prescribed sentence of life imprisonment should be imposed, it need not enter any specific reasons on the record and can impose any appropriate sentence within its jurisdiction. It is only required to enter reasons on the record if it decides to impose a sentence referred to in subsection (1), and then, due to the provisions of subsections 52(1) and 51(1), the regional court must stop the proceedings and refer the offender to the High Court for

134 2002 (1) SACR 135 (W) at 141 b-c.
135 Fn 36 at 69, para 3.7.1.
sentencing. Although such an interpretation does not fit seamlessly into every provision of sections 51 to 53, neither does any other. However, it is submitted that this literal interpretation serves the interests of the criminal justice system as a whole and those of the juvenile offender in particular."

The meaning of this section has occasioned some debate, with conflicting decision of the High Courts as to how to approach minimum sentences where this category of children is involved.

In S v Blaauw,\textsuperscript{137} Van Heerden J held that a court was not obliged in terms of section 51(3)(b) to impose the minimum sentence on a child who, at the time of the commission of the offence was 16 or 17 years old, unless the state satisfied the court that the circumstances justified the imposition of such sentence.

The court in S v Nkosi\textsuperscript{138} held that the express wording of this section only required a court to justify a decision to impose the prescribed sentence by entering its reasons on the record. It held further, that the wording did not limit the court’s discretion to impose an appropriate sentence on this class of offender. Held, further that a court was therefore free to apply the usual sentencing criteria in deciding on an appropriate sentence for a child between the ages of 16 and 18.

However in Direkteur Van Openbare Vervolgings, Transvaal v Makwetsja\textsuperscript{139} Bertelmann J held that minimum sentences should be imposed on children between 16 and 18 years only in extreme cases, but that does not mean that the Legislature did not intend that the minimum sentences are applicable to everyone above the age of 16 years. That the Legislature decreed in section 51(3)(b) that a court must make doubly sure that the prescribed minimum sentence is appropriate for a child between the ages of 16 and 18 years followed the established approach of all civilized countries that the youth of children should be accepted as a mitigating circumstance which would normally lead to a lesser sentence unless there are extreme aggravating factors present.

\textsuperscript{137} Fn 26.
\textsuperscript{138} Fn 99 at 141 i-j.
\textsuperscript{139} 2004 (2) SACR 1 (T) para [44] and [47].
The debate was laid to rest in *S v B*,\textsuperscript{140} where Ponnan AJA held that the minimum sentencing legislation must be read in the light of the values enshrined in the Constitution of the Republic of South Africa, 1996, and interpreted in a manner that respects those values. Further that section 51 distinguishes between adult offenders and child offenders. That section 28 of the Constitution defines a child as a person under the age of 18 years. Further that two categories of child offenders are envisaged by the Act; first, those below the age of 16; and second, those between the ages of 16 and 18.\textsuperscript{141}

The court further held that for child offenders between the ages of 16 and 18, the sentencing court starts with a clean slate subject to the weighting effect of the statutorily prescribed minimum sentences, the sentencing court is free to impose. That it may decide in the exercise of its sentencing discretion to impose the minimum sentence prescribed by section 51(2) for an offence of the kind specified in Schedule 2.\textsuperscript{142} The court referred to case of *V v United Kingdom*\textsuperscript{143} in disapproving of the approach in *Makwetsja*.\textsuperscript{144}

The court further held that for a court to expect a child offender under 18 to establish the existence of substantial and compelling circumstances in order to escape the prescribed minimum sentence, would amount to burdening such child offender in the same way as an offender over 18. The court held that this would infringe the principle that imprisonment as a sentencing option should be used for child offenders as a last resort and only for the shortest appropriate period of time.\textsuperscript{145} The court also affirmed the approach in *Blaauw* and *Nkosi* decisions endorsing that these judgments accorded generally with internationally recognized trends and constitutionally acceptable principles relating to the sentencing of child offenders.\textsuperscript{146}

\textsuperscript{140} 2006 (1) SACR 311 (SCA).
\textsuperscript{141} Fn 105 para [9].
\textsuperscript{142} Fn 105 para [11].
\textsuperscript{143} 30 EHRR 121 para 118.
\textsuperscript{144} Fn 138.
\textsuperscript{145} Fn 105 para [22].
\textsuperscript{146} Fn 105 para [23].
Finally the court summarised the sentencing principles in this category as follows:

“(a) The legislative scheme entails that the fact that an offender is under 18 although over 16 at the time of the offence automatically confers a discretion on the sentencing Court which is without more, free to depart from the prescribed minimum sentence.

(b) In consequence, the sentencing Court is generally free to apply the usual sentencing criteria in deciding on an appropriate sentence.

(c) The offender under 18 though over 16 does not have to establish the existence of substantial and compelling circumstances because s 51(3) finds no application to him or her.

(d) By contrast with the class of offender under 16, however, the statutory scheme requires that the sentencing Court should take into account the fact that the Legislature has ordinarily ordained the prescribed sentences for the offences in question. This operates as a weighting factor in the sentencing process.

(e) It follows on this approach that where the provisions of section 51(2) apply, the regional court retains its competence to finalise the matter contrary to the conclusion in *Makwetsja.*”

This approach was affirmed by the Supreme Court of Appeal per Brand JA in *S v Gagu and Another.* In the recent Constitutional Court judgment of *Centre for Child Law v Minister of Justice and Constitutional Development and Others* the majority confirmed the High Court ruling on the constitutional validity of the current section 51(5)(b) and section 51(b) of the Act. The court acknowledged that the current Amendments to the Act had been necessitated by the Supreme Court in *S v B* above which had ruled that the regime did not apply to children under the age of 18. The Constitutional Court further recognised that instead of excluding the children under the age of 18 years from the regime the government, in creating sections 51(5)(b) and 51(6), had reverted to its original objective of including 16 and 17 year old offenders in the minimum sentencing regime and to exclude only the under 16s. The court further held that the Bill of Rights in our Constitution amply embodies these internationally accepted principles and that its provisions merely need to be given their intended effect. The court further held that no maintainable justification has been advanced for including 16 and 17 years olds in the minimum sentencing

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147 Fn 105 para [24].
148 2006 (1) SACR 547 (SCA).
149 Fn 25.
regime. Further that Legislation cannot take away the right of 16 and 17 year olds to be detained only as a last resort, and for the shortest appropriate period of time, without reasons being provided that specifically relate to this group and explain the need to change the Constitutional disposition applying to them.\textsuperscript{150} Further that such an approach was based on several international law instruments which count in favour of the view that minimum sentences should not apply to child offenders.\textsuperscript{151}

Finally the court declared sections 51(1) and (2) unconstitutional and invalid to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence. The court further declared sections 51(5)(b) and 51(6) inconsistent with the Constitution and invalid. The court further held that to remedy the defect section 51(6) of the Act is to read as though it provides as follows:

“This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) and (2).”

The effect of this judgment is that the position of this category of children is now very clear and that the Act needs to be amended accordingly and as a matter of urgency in order to avoid any further confusion in practice. The rest of the provisions of the Act are self-explanatory hence they are not discussed in this study. The impact of and response, to minimum sentence legislation will be discussed in the next chapter.

\textsuperscript{150} Fn 25 para [63].
\textsuperscript{151} Fn 25 para [61].
CHAPTER 6
THE IMPACT OF AND RESPONSE TO MINIMUM SENTENCE LEGISLATION

6.1 INTRODUCTION

In this chapter the impact and the responses to minimum sentence legislation will be discussed.

In 1998 the then Minister of Justice appointed a new project committee which was chaired by Professor Dirk van Zyl Smith to investigate sentencing reform and the position of the victims of the criminal justice system. Between June 1999 and January 2000 the committee undertook empirical studies on the sentencing patterns pre and post the introduction of the Act. This also included the attitudes of the key role players towards the Act. In this regard the Commission subcontracted the University of Cape Town’s Institute of Criminology to perform the quantitative aspect of the research where after a report was developed in June 2000.\(^{152}\) The Institute of Security Studies and Technikon South Africa conducted a parallel qualitative investigation into the attitudes of the judicial officers and the other role players to the act, and sentencing in general.\(^{153}\)

Another research was conducted by Hlakanaphila Analytics who were commissioned by the Open Society Foundation of South Africa.\(^{154}\) This project was to find the actual impact of the act compared to its stated objectives and whether the concerns that had been raised were valid. This research methodology, like that of the Commission, involved interviews with role players in the justice system, a review of the relevant case law, analysis of data from SAPS, NPA and the Department of Correctional service, and a survey of closed cases involving serious offences in three Regional Courts.

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\(^{153}\) Fn 134 para 4.1.

\(^{154}\) Fn 45.
Following on these reports the response and impact of this legislation are briefly discussed as follows:

**6.2 JUDICIAL INDEPENDENCE/DISCRETION**

The research revealed that the concerns regarding judicial independence were not born out after the *Malgas* decision which came up with a clear interpretation of the phrase "substantial and compelling circumstances" as provided for in section 51(3) of the Act.

**6.3 PRISON OVERCROWDING**

This Act made a substantial contribution to changing the profile of South Africa’s sentenced prison population. However the effects of the Act were not immediate. First, for the first two years of its operation, there was no impact at all. This was due to the time lag from the date of implementation of the Act, the commission of offences after that date and detection, prosecution, conviction and sentencing.¹⁵⁵

Secondly, it is argued that the impact of the increased jurisdiction of the lower courts at around the same time may also have to be factored in, for example, the magistrate’s court’s maximum was increased from 1 to 3 years and Regional courts from 10 years to 15 years.¹⁵⁶

Judge Fagan is of the view that the effect of the act has been to greatly increase the number of prisoners serving long and life sentences.¹⁵⁷ While Giffard and Munting¹⁵⁸ concede that the increase was facilitated and consolidated by these two factors they hold the view that the initial impetus came from elsewhere *ie* a combination of public and political pressure on the courts to increase the severity of the sentences and the increase in the jurisdiction of the Magistrate’s courts. However, according to

¹⁵⁶ Sloth-Nielsen and Ehlers fn 30 pg 10.
¹⁵⁷ The Advocate (April 2005) 33.
¹⁵⁸ Fn 136 pg 25.
Redpath and O'Donovan,\(^{159}\) prison overcrowding is not a result of minimum sentencing because sentencing is respect of offences committed after the act came into operation take several years to be served. They further submit that minimum sentencing and associated parole rules will have a profound future impact on overcrowding of prisons. Terblanche\(^{160}\) submits that the magistrates, in particular, considered the message from parliament to be clear; sentences for most crimes were too lenient and had to be increased substantially and they responded to this message immediately. He also refers to the new Correctional Services Act\(^{161}\) for example, section 73 read with 73(5)(a) with regard to the release of prisoners serving life imprisonment, on parole.

### 6.4 PREVENTION OF CRIME

According to the literature, the impact of the Act on crime level is negligible.\(^{162}\) They support the view that the severity of sentence tends not to operate as a deferent to crime but instead only high rates of detection of crime act as a deterrent.\(^{163}\) The authors further illustrated this by referring to pick pocketing which was a capital offence in Victorian England. Notwithstanding the punishment of this offence by public hangings, offenders did not believe that they would be caught hence they were not deterred by the nature of sentence. The authors hold the view that sentences, even the death penalty, are irrelevant to criminals if they do not believe they will be caught. This view was also adopted in *Makwanyane* case.\(^{164}\) Sloth- Nielson and Ehlers\(^{165}\) support the view that the impact of the Act is negligible where they assert as follows:

“It can therefore be concluded that at present there is little in the way of reliable evidence that the new sentencing law has reduced crime in general, or that the commission of the specific offences targeted by this law has been curbed."


\(^{162}\) Redpath and O’Donovan fn 31 pg 47.

\(^{163}\) Fn 140 pg 9.

\(^{164}\) Fn 22.

\(^{165}\) Fn 10 pg 12.
6.5 CONSISTENCY IN SENTENCING

As in the discussion in paragraph 5.3 above, the perception has been that the Act has had very little impact if any on the consistency in sentencing. According to Terblanche\textsuperscript{166} the minimum sentences legislation has, if anything, worsened the disparities and inconsistencies that prevail in relation to the offences targeted by law. Sloth-Nielson and Ehlers\textsuperscript{167} refer to the arguments submitted by the Western Cape Consortium on violence against women, where the latter had reservations about Mahamotsa and Abrahams cases which recognised the degrees in seriousness of the offences as delineated in the Act for purposes of sentence. It is submitted, though, that despite this concern, the court in these two cases acknowledged that, the trial court should take cognisance of the legislature’s desire for firmer punishment than that which may have been thought to be appropriate in the past. It is further submitted that by this conclusion the court was re-affirming and not changing the Malgas test.

For instance the Court in Malgas acknowledged that the court must take cognisance of the fact that it was not business as usual and that the courts are required to approach the imposition of sentence conscious of the fact that the Legislature had ordained the particular minimum sentence.

The positive impact is also highlighted by Terblanche\textsuperscript{168} where he submits that the Magistrates had positively considered the massage, from the Parliament, to increase sentences to be clear. The research also acknowledged that sentences had increased since the introduction of the Act although they generally remained below those that were prescribed as minimum sentences.\textsuperscript{169}

\textsuperscript{166} Fn 136.
\textsuperscript{167} Fn 146.
\textsuperscript{168} Fn 141 pg 14.
\textsuperscript{169} Fn 134 para 3.3.7.
6.6 COURT EFFICIENCY

Prior to the current amendments to the Act there was general criticism of the Act about the split procedure which was believed to be clogging the rolls in the High Court. Now that the Act has been amended accordingly such criticism appears to be waning.

6.7 NON-EXTENSION OR RENEWAL OF THE MINIMUM SENTENCE LEGISLATION

The Act has been rendered permanent despite all criticism about it not being a good piece of legislation and anticipation that it was not going to be extended. It is important to note that most of the criticism levelled against the Act was addressed by the current amendments to the Act, for example, the abolition of the split procedure.

6.8 CONSTITUTIONALITY OF THE ACT

The concerns about the constitutionality of the Act were addressed by the Constitutional Court in *S v Dodo*[^77] where it was decided that section 51(1) of the Act was not unconstitutional in that there was no violation of the accused's right to fair trial in section 35(3)(c) of the Constitution.

Having considered the impact of and response to the Act, a possible solution to the problem will be advanced in the next chapter.

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[^77]: Fn 77.
CHAPTER 7
CONCLUSION AND RECOMMENDATIONS

The stated intention of the act has been discussed at length in chapter 2 above. This included, *inter alia*, consistency in sentencing, the public perceptions that sentences were not sufficiently served and deterrence. The main aim or objective of this study is to establish if the intention of the legislature has been achieved by the Act. In my view the Act has achieved its purpose to a certain extent.

The discussion of the impact of the Act in chapter 6 above revealed that not enough evidence can be found to support the criticism that existed when the Act was at its infant stage. The current amendments to the Act were implemented in response to the proposals that were aimed at improving the Act. Now that this piece of legislation is permanent there is a clear understanding of it through the judicial guidelines, for example, the *Malgas* decision. The trend in many recent decisions of our courts reflects a clear understanding of the correct approach to the interpretation of section 51 of the Act and in particular the phrase “substantial and compelling circumstances.” This has therefore enhanced consistency and parity in the sentencing process.

In response to the question of whether there is a need for a further legislation to regulate the sentencing framework in South Africa, it is advanced that the Act in its current form appears to have taken care of some recommendations by the Commission, thus preparing a fertile ground for the improvement of sentencing in South Africa. It appears though that the current amendments to the Act do not cover all the recommendations as proposed in the Sentencing Framework Bill. In the circumstances there is still a need to forge this Bill ahead in order to clearly regulate the sentencing framework in South Africa. This proposal finds support from Terblanche171 who recommends that the legislature should pass legislation containing the primary sentencing principles as advised by the Law Commission as well as legislation to encourage appeal courts to pass guideline judgments. Further that the appellate courts should become more active in providing guidelines in judgments requiring increased consistency from the court and that the government

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171 Fn 140 pgs 39 to 40.
should seriously consider establishing a formal sentencing advisory body which, based on research and following the gathering of relevant information, can advise the government regarding sentencing policy. He further submits that this approach will permit sentencing to evolve rather than to be jerked in a certain direction.\textsuperscript{172} It is finally submitted that the South African sentencing system is in dire need of reform and that the State should take the lead in executing the necessary changes, and to do so as a role model for our Society.\textsuperscript{173}

However Sloth-Nielsen and Ehlers\textsuperscript{174} support the Sentencing Framework Bill, but hold the view that it never formally entered the public arena due to two possible factors: the identified disapproval from some judges regarding the possible limiting of their discretion and the fact that there was no co-ordinated strategy or response from civil society.

The Commission proposed that as a start, sentencing principles should be clearly articulated in legislation.\textsuperscript{175} It also proposed six potential sentencing schemes as reflected in paragraph 1.2 above. Further to this the Commission recommended the establishment of a sentencing council for a particular category or sub-category of offences. The envisaged functions of the proposed Council include the development of sentencing guidelines, wide research and consultation before developing guidelines, collection and publication of sentencing data, reporting on the efficacy and cost effectiveness of the sentencing options, determination of the value of fine units and the making of policy recommendations to develop community penalties.\textsuperscript{176} It was proposed that the majority of the members should be from the judiciary, as they are responsible for sentencing and in this way they will have a major input on the shaping of the guidelines themselves.\textsuperscript{177} It is submitted that is an ideal proposition to be applied for South Africa.

\begin{footnotesize}
\textsuperscript{172} Fn 140 pg 41.
\textsuperscript{173} Fn 140 pg 52.
\textsuperscript{174} Fn 30 pgs 16 and 17.
\textsuperscript{175} The Sentencing Framework Bill released in 2000.
\textsuperscript{176} Fn 22 para 2.9.
\textsuperscript{177} Fn 72.
\end{footnotesize}
However, in order to achieve this, it is recommended that the government of South Africa should engage in a proper co-ordination of the strategy or response from the civil society regarding the Sentencing Framework Bill. The government should also acknowledge the need for judicial guidance in improving sentencing in South Africa as exhibited by the *Malgas*\(^{178}\) judgment which clearly dispels the myth of judicial objection to developing sentencing principles in South Africa. The Commission has already conducted a research on the models of sentencing globally and all that needs to be done is to adapt same to the South African environment.

\(^{178}\) Fn 72.
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