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**THE INTERPRETATION OF ‘SUBSTANTIAL AND COMPELLING’ BY
SOUTH AFRICAN COURTS AND A COMPARISON WITH MINNESOTA
SENTENCING GUIDELINES.**

BY

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DECLARATION

I, Vimbai Chikoko, student number 212533229, hereby declare that THE INTERPRETATION OF 'SUBSTANTIAL AND COMPELLING' BY SOUTH AFRICAN COURTS AND A COMPARISON WITH MINNESOTA SENTENCING GUIDELINES for LLM is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University.

It may be made available for photocopying and inter-library loan.

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Before I express my gratitude to the people who guided me throughout the journey of completing this degree, I would like to mention that this dissertation is dedicated to my loving parents, Professor Vitallis Chikoko and Dr Rita Chikoko.

I would like to thank God for giving me the gift of life and strength to complete my dissertation. My journey was full of ups and downs and it was through his grace, mercy and love that I was able to stay strong and reach the finish line. This was the most challenging thing I have yet to do in my life and I will take a lot of lessons from it. I would also like to express my gratitude to a few other important people who made this journey worthwhile and assisted me with their love, support and encouragement.

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TABLE OF CONTENTS

DECLARATION	iii
ACKNOWLEDGEMENTS	iv
TABLE OF CONTENTS	v
CHAPTER ONE	1
1. Introduction and Background of study	1
2. Motivation for the research	4
3. Rationale of the study	5
4. Key Questions asked	5
5. Research Methodology	6
6. Structure of the study	6
CHAPTER TWO	8
An examination of the constitutionality of the Criminal Law Amendment Act 105 of 1997 and an analysis of the interpretation of ‘substantial and compelling’ in <i>S v Malgas</i> and the cases that were decided before it.	8
2.1 INTRODUCTION	8
2.2 Interpretations by cases before <i>S v Malgas</i>	9
2.2.1 THE STRICT APPROACH	9
2.2.2 THE LENIENT APPROACH	15
2.2.3 THE BALANCED APPROACH	16
2.3 THE MALGAS INTERPRETATION OF SECTION 51(3)	19
2.3.1 General Approach	19
2.4 INTERPRETING ‘SUBSTANTIAL AND COMPELLING’	19
2.5 THE PRACTICAL METHOD OF INTERPRETATION PUT FORWARD IN MALGAS	22
2.6 THE APPLICATION OF THE PRACTICAL INTERPRETATION IN MALGAS	24

2.7 AN ANALYSIS OF THE INTERPRETATION GIVEN IN MALGAS	25
2.8 Constitutionality of the Criminal Law Amendment Act	27
2.9 CONCLUDING REMARKS	33
3. CHAPTER THREE	34
An analysis of the interpretations of ‘substantial and compelling’ circumstances after the <i>Malgas</i> case.	34
3.1 INTRODUCTION	34
3.2 RAPE CASES	34
3.2.1 <i>S v Abrahams</i>	35
3.2.2 <i>S v Mahomotsa</i>	36
3.2.3 <i>S v Njikelana</i>	39
3.2.4 <i>S v M</i>	41
3.2.5 <i>S v Nkomo</i>	43
3.2.6 <i>S v Vilakazi</i>	44
3.2.7 <i>S v PB</i>	48
3.2.8 <i>S v PB 2013</i>	49
3.2.9 <i>S v MS</i>	50
3.2.10 <i>S v Uithaler</i>	52
3.3 ROBBERY AND MURDER CASES	53
3.3.1 <i>S v Khathi</i>	54
3.3.2 <i>S v Mbatha</i>	56
3.3.3 <i>Mthembu v S</i>	59
3.3.4 <i>S v Chowe</i>	61
3.3.5 <i>S v Matyityi</i>	62
3.3.6 <i>S v Mahlangu</i>	66
3.3.7 <i>Buys v S</i>	69
3.3.8 <i>Mogaramedi v S</i>	71

3.3.9 <i>Montsho v The State</i>	72
3.3.10 <i>S v Ngwenya</i>	74
3.3.11 <i>S v Matjeke</i>	76
CHAPTER FOUR	78
A discussion of the Minnesota sentencing guidelines and a comparison with South Africa's mandatory minimum sentencing regime.	78
4.1 Introduction.	78
4.2 The historical development of the Minnesota Sentencing Guidelines.	79
4.3 The Guidelines.	81
4.4 THE PRESUMPTIVE SENTENCES	82
4.4.1 The grid/Matrix	82
4.4.2 Departure from the Guidelines	84
4.4.3 Factors that should not be used as reasons for departure	86
4.4.4 Factors that may be used as reasons for departure	87
4.4.4.1 Mitigating factors	87
4.4.4.2 Aggravating Factors	88
4.5 THE MANDATORY MINIMUM SENTENCES.	91
4.5.1 Departure from the Mandatory Minimum Sentences.	91
4.6 COMPARISON BETWEEN SOUTH AFRICA'S MANDATORY MINIMUM SENTENCING SYSTEM AND MINNESOTA'S SENTENCING GUIDELINES.	92
4.6.1 South Africa's Mandatory Minimum sentencing legislation.	92
4.6.2 Structure of the Criminal Law Amendment Act.	92
4.6.3 Procedural requirements.	95
4.6.4 CRITICISMS OF SOUTH AFRICA'S MANDATORY MINIMUM SENTENCES.	95
4.6.4.1 No reduced crime and the sentencing disparities have worsened.	96
4.6.4.2 There is still dissatisfaction with criminal sentencing.	98
4.6.4.3 Mandatory Minimum Sentences have caused prison overcrowding.	99
4.6.4.4 Mandatory Minimum Sentences are broad and poorly defined.	100

4.6.5 ACHIEVEMENTS BY SOUTH AFRICA’S MANDATORY MINIMUM SENTENCING REGIME.	101
4.7 The Minnesota Guidelines.	103
4.7.1 CRITICISMS AGAINST MINNESOTA SENTENCING GUIDELINES.	103
4.7.2 ACHIEVEMENTS BY THE MINNESOTA GUIDELINES.	104
5. The Comparison.	105
6. CONCLUDING REMARKS.	108
CHAPTER 5	109
5.1 INTRODUCTION	109
5.2 SUMMARY OF THE FINDINGS	110
5.2.1 The Criminal Law Amendment Act	110
5.2.2. The ‘escape clause’ in the Criminal Law Amendment Act.	112
5.2.2.1 AN ANALYSIS OF THE INTERPRETATION OF ‘SUBSTANTIAL AND COMPELLING’ IN THE DISCUSSED RAPE CASES.	115
5.2.2.2 ANALYSIS OF THE INTERPRETATION OF ‘SUBSTANTIAL AND COMPELLING’ IN THE DISCUSSED ROBBERY and MURDER CASES.	123
5.2.3 The discussion of the Minnesota Sentencing Guidelines and a comparison with South Africa’s mandatory minimum sentencing regime.	128
5.3 Discussion of Problems	130
5.3.1 The flaws of the practical interpretation that was given in <i>S v Malgas</i> .	130
5.3.2 The inconsistencies/sentencing disparities and confusion that still exists in the system.	133
5.3.3 The failure of the courts to properly inquire into the existence of substantial and compelling circumstances.	136
5.3.4 Substantial and compelling circumstances in rape cases.	139
5.3.5 Substantial and compelling circumstances in murder and robbery cases.	142
5.3.6 The problem with considering rehabilitation as a substantial and compelling circumstance.	143
6. Recommendations	144
8. Conclusions	150
BIBLIOGRAPHY	152

CHAPTER ONE

1. Introduction and Background of study

The Criminal Law Amendment Act came into operation on the 1st of May 1998.¹ It came into action for a period of two years and was capable of being extended for two years at a time by proclamation. After being extended, the principles have now been entrenched with some amendments in the Criminal Law (Sentencing) Amendment Act.² This Act changed the way in which sentencing is done in South Africa drastically.³ It provides for the imposition of mandatory minimum sentences.⁴ Mandatory minimum sentences require that a court impose a specific sentence but allows the court to impose a different sentence if that court finds that ‘substantial and compelling’ circumstances exist.⁵ The discretion to depart from the mandatory minimum sentences is contained in Section 51(3) which states that:

‘If any court referred to in ss 1 or 2 is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such a lesser sentence.’

The Act did not apply retroactively and it only applies to crimes that were committed after the 1st of May 1998.⁶ It does not apply to child offenders at all as of the year 2013.⁷ It was held that

¹ Act 105 of 1997 which will be referred to hereafter as The Act.

² Act 38 of 2007.

³ S Terblanche “Mandatory and Minimum Sentencing: Considering S51 of the Criminal Law Amendment Act 1997” (2003) 2003 (1) *Acta Juridica* 194.

⁴ Section 51 to 53 of the Criminal Law Amendment Act 105 of 1997. It is important to note that S52 is no longer applicable and the other sections have been amended.

⁵ S Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 47.

⁶ *S v Hlongwane* 2000 (2) SACR 681 (W) at 682i.

the Act limited children's constitutional rights and this limitation could not be justified.⁸ It provides for mandatory minimum sentences for a variety of serious offences (which are described in Schedule 2). Prior to the enactment of the Act, the public had also lost faith in the justice system. This was reflected in a number of newspaper reports. According to one report it was said that people were being murdered, raped, abused and hacked through gangster violence.⁹ Other reports commented as follows:

- a) Tough jail sentences have to be imposed for child abusers as this is the only way that the crime may be taken seriously and discourage offenders from committing it.¹⁰
- b) Serious crime is never going to come to an end in South Africa unless something is done about it.¹¹

According to the *S v Mofokeng*¹² case, the Criminal Law Amendment Act was enacted to restore the public's faith in the justice system i.e. give them a sense that harsher sentences were being passed for serious crimes.

In *Malgas*¹³ the legislature's intention for enacting this Act was summed up as follows: The legislature wanted an approach that was consistent and standard from the courts unless there were reasons to impose a more lenient sentence.

⁷ S 51(6) of the Criminal Law Amendment Act 105 of 1997 (as amended by s 266 of the Judicial Matters Third Amendment Act 42 of 2013) also *Centre of Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC).

⁸ *Centre of Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC) at para 49 and 63.

⁹ The Citizen 26 October 1995, quoted in Naser JJ "Mandatory Minimum sentences in the South African context" 2001 (3) *Crime Research in South Africa* 2.

¹⁰ Sowetan 10 November 1995, quoted in Naser JJ "Mandatory Minimum Sentences in the South African context" 2001 (3) *Crime Research in South Africa* 2.

¹¹ Pretoria News 26 October 1995 quoted in Naser JJ "Mandatory Minimum Sentences in the South African context" 2001 (3) *Crime research in South Africa* 2.

¹² 1999 (1) SACR (W)

¹³ *S v Malgas* 2001 (2) SA 1222 (SCA) at para 8.

Mujuzi is of the opinion that the Act was a reaction to the declaration of the death penalty as unconstitutional in the *S v Makwanyane*¹⁴ case.

The legislature's intention has been expressed similarly and the expressions are mostly along the lines of deterrence¹⁵ and combating the prevalence of violent crime in South Africa.¹⁶ Although other purposes have also been identified, the main objects seem to be that of deterrence and crime prevention.

The Act was not welcomed without criticism. It has been criticized by judicial officers and also by one of the country's sentencing experts, Professor Terblanche.¹⁷ The criticism is mainly based on the Act's poor language and the fact that the legislator's intention has been difficult to determine. There has also been disapproval of the whole scheme mainly on the premise that the Act limits the discretion of judicial officers.¹⁸ There have also been constitutional challenges on the basis that the Act is in violation of the principle of separation of powers and other constitutionally guaranteed rights.¹⁹

¹⁴1995 (3) SA 391 (CC).

¹⁵ *S v Mofokeng* 1999 (1) SACR 502(W) at 526, *S v Willemse* 1999 (1) SACR 450 (C) at 454, *S v Homareda* 1999 (2) SACR 319 (W) at 325, *S v Khanjwayo* 1999 (2) SACR 651 (O) at 658, *S v N* 2000 (1) SACR 209 (W) at 226f, *S v Boer* 2000 (2) SACR 114 (NC) at 122, *S v Eadie* 2001 (1) SACR 185 (C) at 187, *S v Kgafela* 2001 (2) SACR 207 (B) at para 23; *S v Arias* 2002 (1) SACR 518 (W).

¹⁶ *S v RO* 2010 (2) SACR at paras 40-41.

¹⁷ S Terblanche *A Guide to Sentencing in South Africa* 2ed (2007) 75 where he remarks that there is hardly any provision in the Act that is not problematic.

¹⁸ S Terblanche *A Guide to Sentencing In South Africa* 3ed (2016) 51.

¹⁹ This challenge was in *S v Dodo* 2001 (3) SA 382 (CC).

2. Motivation for the research

As previously stated, courts can only depart from the prescribed sentences if they find ‘substantial and compelling’ reasons to do so. The words ‘substantial and compelling’ were probably adopted from the Minnesota state sentencing guidelines.²⁰ The legislature did not give any guidance or define what ‘substantial and compelling’ means.²¹ It left it entirely to the courts. In general, the Act should be interpreted just like any other piece of legislation. This means that the words should be given their primary meaning, balanced by the legislator’s intention as well as the principles that are entrenched in the Constitution.²² According to *Dodo*,²³ establishing the true meaning of ‘substantial and compelling’ has proven to be difficult and has led to different interpretations of what the words actually mean. Some judicial officers have limited the discretion to ‘unusual and exceptional factors’ while some to cases of disproportionality. This indicates that the courts have divergent views about what the legislature meant and this is problematic.

The seminal judgement on how to interpret the phrase ‘substantial and compelling’ is the case of *S v Malgas*.²⁴ This case provides a step-by-step approach on how the courts should approach the decision on whether to depart from the prescribed sentences or not. Although this guidance has been given, it seems the problem has not been solved. In the case of *S v PB*,²⁵ a case that was decided over a decade after the seminal judgement in *Malgas*, the judicial officer still posed the question, ‘What are substantial and compelling circumstances?’ This dissertation seeks to

²⁰ D Van Zyl Smit ‘Mandatory Minimum Sentences and Departures from them in substantial and compelling circumstances’ (1999) 15 *SAJHR* 27.

²¹ The term ‘substantial and compelling’ is mentioned in Section 51(3) of the Criminal Law Amendment Act.

²² *S v Dzukuda* 2000(2) SACR 443 (CC) at para 38, also *Brandt v S* (2005) 2 All SA 1 (SCA) at para 9, *S v Mofokeng* 1999 (1) SACR 502 (W) at 516.

²³ *S v Dodo* at para 10.

²⁴ *S v Malgas* 2001 (2) SA 1222 (SCA).

²⁵ 2013 (2) SACR 553 (SCA) at para 21.

examine how the courts have been interpreting the phrase ‘substantial and compelling’ and if the manner in which they are interpreting it is giving effect to the intention of the legislature. Cases that were decided before the *Malgas* case will be briefly examined to determine the way they interpreted the clause and those after *Malgas* will be examined to determine whether *Malgas* has led to one uniform interpretation. More importantly a comparison will be made with the Minnesota Sentencing Guidelines where the phrase ‘substantial and compelling’ was adopted. This comparison will be necessary to determine how the state of Minnesota has dealt with problems of interpretation and if South Africa can adopt the same solutions.

3. Rationale of the study

A study into how the phrase ‘substantial and compelling’ is being interpreted by the South African courts is of great importance. The crimes that are listed in the Act are serious so it is crucial that the Act be interpreted the way the legislature intended it. Sentencing goes to the heart of how justice is being administered in a country so it is of importance that it is done properly, fairly and consistently. If flaws exist within the current system, these will need to be addressed for the proper administration of justice.

4. Key Questions asked

This dissertation seeks to address the following key questions:

- a) What were the reasons behind the enactment of Criminal Law Amendment Act which provides for mandatory minimum sentences?
- b) How have the courts been interpreting the phrase ‘substantial and compelling’?
- c) Did the practical method that was put forward in *S v Malgas* lead to one consistent way of interpreting ‘substantial and compelling’?

- d) What are the differences between the Minnesota state sentencing guidelines and how did they deal with problems of interpretation?

5. Research Methodology

The research is theoretical. Information will be gathered from journals, public books on the subject and more importantly cases that have interpreted ‘substantial and compelling’ before sentencing an offender. It is a qualitative study.

6. Structure of the study

The study will consist of five chapters.

Chapter One

Chapter One will introduce the topic and give background information on the Criminal Law Amendment Act as well as outlining the research problem and motivation behind the research.

Chapter Two

Chapter Two will discuss the constitutionality of the Act and examine how cases that were decided before *Malgas* interpreted ‘substantial and compelling’. An examination into the practical guidelines for interpretation that was done in *Malgas* will also be done.

Chapter Three

Chapter Three is an examination of the cases that were decided after the *Malgas* case paying specific attention to whether they endorsed *Malgas*.

Chapter Four

This Chapter examines the Minnesota Sentencing Guidelines where the phrase ‘substantial and compelling’ was adopted from. A comparison is made between the two systems i.e. South Africa’s sentencing laws and that of Minnesota. This will be to determine how they have dealt with problems with interpretation and whether South Africa can learn a thing or two.

Chapter Five

This is the final chapter. It will summarize all the findings of the study, discuss the problems that exist and provide recommendations.

CHAPTER TWO

An examination of the constitutionality of the Criminal Law Amendment Act 105 of 1997 and an analysis of the interpretation of ‘substantial and compelling’ in *S v Malgas* and the cases that were decided before it.

2.1 INTRODUCTION

When the Criminal Law Amendment Act was enacted a lot of questions arose as to whether the Act was constitutional or not. The questions were mainly centered on the fact that the Act limited the powers of the judiciary by prescribing for them which sentences to impose when certain crimes are committed. The first part of this chapter discusses the interpretation that was given in *S v Malgas* for ‘substantial and compelling’²⁶ The constitutional judgment in *S v Dodo* was decided after the judgement of the Supreme Court of Appeal in *Malgas*²⁷ and will be discussed second to avoid repetition.

Before the judgement of the Supreme Court of Appeal in *S v Malgas*²⁸ there was no uniform way of interpreting ‘substantial and compelling’. The case of *S v Malgas* put forward a practical interpretation of ‘substantial and compelling’. Judge Marais saw a need to consider the question of what ‘substantial and compelling’ means afresh because the interpretations that were being placed by the other courts were ‘discordant’.²⁹ The case of *Malgas* is the seminal judgment on how courts should deal with ‘substantial and compelling circumstances’.³⁰ The second part of this chapter will be looking at how the cases that were decided before *Malgas* interpreted ‘substantial and compelling’. Thereafter, there will be an analysis of the *Malgas* judgment. The

²⁶ *S v Malgas* 2001 (2) SA 1222

²⁷ *S v Malgas* 2001 (2) SA 1222.

²⁸ *Ibid.*

²⁹ *Ibid* at para 6.

³⁰ SS Terblanche “*A Guide to Sentencing in South Africa*” 3rd ed (2016) 76.

analysis will focus on how the case interpreted “substantial and compelling” by unpacking the guidelines that were given in the case.

2.2 Interpretations by cases before *S v Malgas*

The interpretations of ‘substantial and compelling’ before the *Malgas* case can be divided into three main categories namely:

- a) Cases that used a **strict** method of interpretation
- b) Cases that used a more **lenient** approach in interpretation.
- c) Cases that used a more **balanced** approach in interpretation.

2.2.1 THE STRICT APPROACH

The interpretation in the *Mofokeng*³¹ case is described as extreme and falls under the first category of the interpretations i.e. **strict interpretation**. This case involved crimes of kidnapping and two counts of rape.³² The rape committed in this case fell under one of the ‘aggravating circumstances’ that are mentioned in Part 1 of Schedule 2 of the Act therefore warranting life imprisonment. The details of the Act will be discussed in detail in Chapter 4. Judge Stegmann was of the view that by enacting the Criminal Law Amendment Act parliament had stripped the judiciary of its discretionary powers.³³ He went on to say that for a court to simply disregard the sentences that were proposed by the legislation because it prefers its own would be ‘emasculate’ the legislation.³⁴ Stegmann J also emphasized how parliament had not given any guidance or said what ‘substantial and compelling’ means but rather left it to the courts to decide on the matter.³⁵

³¹ *S v Mofokeng* 1999 (1) SACR (W).

³² *S v Mofokeng* at page 506.

³³ *S v Mofokeng* at page 520.

³⁴ *S v Mofokeng* at page 523.

³⁵ *S v Mofokeng* at page 522.

He went on to mention that in a case where men had taken a woman and repeatedly raped her it was not easy to find circumstances that can be described as substantial and compelling to warrant a departure from the prescribed sentence.³⁶

The judge explained that in order for ‘substantial and compelling circumstances to be present, there must be exceptional factors that point to injustice in the event that the prescribed sentence is imposed.’³⁷ According to the case, factors that would be ordinarily regarded as aggravating or mitigating a sentence could not be weighed to see if they are substantial and compelling unless if they were of an unusual or exceptional kind that the parliament could not have had them in mind when they enacted the provisions.³⁸ If a court was to do this, it would mean that the court was preferring its own judgment to that of the parliament and would compromise the court’s integrity.³⁹ The judge in *Mofokeng* mentioned the following circumstances and held that they were not enough to constitute substantial and compelling circumstances. (These are also circumstances that are generally considered in rape cases):

- a) The absence of previous convictions
- b) Comparative youthfulness of the offender
- c) Unfortunate factors in their backgrounds
- d) The probable effect that liquor had on the crime
- e) The absence of dangerous weapons
- f) The fact that the complainant had not suffered any injury.⁴⁰

³⁶*S v Mofokeng* at 523.

³⁷*S v Mofokeng* at 523c.

³⁸*S v Mofokeng* at 524d.

³⁹*S v Mofokeng* at 523b.

⁴⁰*S v Mofokeng* at 523b-i.

These factors were said to be substantial but it was on the basis that they are the type of factors that the parliament had in mind when it enacted the legislation that the judge in *Mofokeng* found them not to qualify as “substantial and compelling”. They were described as ‘everyday circumstances’ and it was said that they cannot be held to be compelling in this case. On this basis both the accused persons in this case were sentenced to imprisonment for life as prescribed by the legislation.

Perhaps the striking thing about this case is that it seems to suggest that the parliament’s proposed sentences are the most appropriate and courts should not depart from them simply because they are more severe than sentences a court would impose ordinarily. Stegmann J uses the word ‘emasculate’ which suggests that courts should be careful by all means when it comes to substituting the sentences that have been ordained by the legislature. The factors that Stegmann J dismisses as everyday circumstances are the factors that are present in many cases especially rape but also other crimes. The dismissal of these factors gives the impression that substantial and compelling circumstances are rarely found or rather they can only be found in unique cases.

Smit ⁴¹is of the view that in this case Stegmann J confused circumstances that are exceptional with ‘substantial and compelling’ circumstances. He mentions that this is evident from the words he used and the pronouncement that for circumstances to qualify as ‘substantial and compelling’ there must be unusual and of an exceptional kind.

⁴¹ D Smit “Sentencing and Punishment” (1999) available at http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/28-Sentencing%20and%20Punishment.pdf accessed on 15 September 2017.

The *Mofokeng* judgment was however criticized for its extreme interpretation and the court in *Malgas* described it as an ‘erroneous’ interpretation.⁴² The court in *Malgas* went on to comment that ‘the frequency of infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not circumstances are substantial and compelling’⁴³ This means *Malgas* did not agree with the requirement in *Mofokeng* about ‘substantial and compelling’ meaning circumstances that are exceptional in nature.

There have been judgments that have agreed with the logic in *Mofokeng*. The court in *S v Boer*⁴⁴ supported the approach that was given in *Mofokeng*. *S v Zitha and Others*⁴⁵ involved rape which warranted the imposition of a sentence of life imprisonment. When it came to considering the issue of substantial and compelling circumstances the judge referred to the *Mofokeng* case and agreed with the notion that the legislature must not be emasculated.⁴⁶ It does this by quoting the case of *S v Mthembu*⁴⁷ which interpreted ‘substantial and compelling’ to mean any factors that are of solid significance than can’t be left out when deciding the issue of sentencing⁴⁸ *Zitha* was in strong disagreement with this and went on to quote the explanation that was given in *Mofokeng* then fully endorsed it.⁴⁹ This case also concludes that ‘youthfulness’ was not intended to be regarded as a substantial and compelling circumstance by the legislature⁵⁰ the following factors were disregarded:⁵¹

- a) That a life sentence provides no rehabilitation

⁴² *S v Malgas* at para 10.

⁴³ *S v Malgas* at para 10.

⁴⁴ 2002 (2) SASV 114 (NKA) 121 e-f.

⁴⁵ *S v Zitha* 1999(2) SACR 404 (W) 409 e-g.

⁴⁶ *Ibid* 410c.

⁴⁷ *S v Mthembu and Another* Case no 365/98 delivered on 22 October 1998

⁴⁸ *Ibid.* para 6-7.

⁴⁹ *S v Zitha* at page 410- 411.

⁵⁰ *S v Zitha* at page 411 i.

⁵¹ *S v Zitha* at page 417.

- b) That the accused persons had a tough background.
- c) That a life sentence would be unfair and actually punish the accused for their background.
- d) Accused was uneducated.
- e) That accused does not comprehend how wrongful his act was
- f) That the accused had never had proper guidance
- g) That the accused had been in custody since August 1998
- h) That the accused can be described as a street child and street children are often rejected by society.

In *S v Segole and Another*,⁵² the accused had been convicted on counts of robbery, kidnapping and rape.⁵³ In this case the court was obliged to impose life imprisonment on rape and 15 years on the robbery charge if substantial and compelling circumstances could not be found.⁵⁴ In making a determination of what substantial and compelling means the judge held that he is bound to the provisions in the Act and has an obligation to give effect to it. The judge also fully agreed with the sentiments shared in *Mofokeng* and held that according to the facts of that case a departure wasn't warranted as there were no substantial and compelling circumstances.⁵⁵ In *Segole* the judge also made a comment on how the facts of that particular case were of a more serious nature than the ones that were in the *Mofokeng* case.⁵⁶

⁵²*S v Segole* 1999 (2) SACR 11 (W) At 123(j).

⁵³ *Ibid* 117.

⁵⁴ *Ibid*. 122.

⁵⁵ *Ibid*. 123.

⁵⁶ *Ibid*.

In *S v Madondo*,⁵⁷ the judge emphasized that there need not be easy intervention from the courts to impose lesser sentences. He mentioned that ‘compelling reason’ was ‘more than just a disparity between what the court feels may be sufficient and the prescribed minimum’. Smit⁵⁸ comments that in *Madondo*, Judge Squires did not criticize the legislation but his main focus was to ascertain what substantial and compelling means. Squires set a high standard for departure as he focused not so much on what substantial and compelling means but made comments that a court should only depart if in that instance the prescribed sentence is so inappropriate that no reasonable court would impose it.

In the case of *S v Kgafela*⁵⁹ an accused had planned the murder of her husband by hiring an assassin to shoot him. This falls under Part 1 of Schedule 2 with a prescribed sentence of life imprisonment. In this case the court imposed the prescribed sentence commenting that because the murder was planned there was no reason to depart from the prescribed sentence. In another example, the case of *S v Majola*⁶⁰ where an accused had stabbed his girlfriend to death, a crime falling under Part 2 of Schedule 2 with a prescribed minimum sentence of 15 years. The accused was a first offender, a responsible member of the society and the crime wasn’t premeditated. Despite this, the court imposed the prescribed sentence stating that the attack was brutal and that the deceased had been pregnant.

⁵⁷ Unreported judgement of (N) case CC/99 delivered on 30 March 1999.

⁵⁸ D Van Zyl Smit ‘Sentencing and Punishment’ (1999) available at http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/28-Sentencing%20and%20Punishment.pdf
Accessed on 3 March 2017.

⁵⁹ 2001(2) BPD at 207.

⁶⁰ 2001 (1) SACR 337 (W).

2.2.2 THE LENIENT APPROACH

In the case of *S v Majafela*⁶¹ the judge was of the view that the starting point of interpretation was to give consideration to all aggravating and mitigating factors in the traditional way. With this view the new Act was only an attempt to introduce conformity and was not to be regarded as introducing any new change to the sentencing principles.⁶² This case was decided by Judge Leveson who also held the same approach in the case of *S v Mthembu and Others*⁶³ where he said that the ‘legislature did not intend the phrase to signify a stricter criterion than these previously regarded as mitigating factors’. This same approach was endorsed in the case of *S v Cimoni*⁶⁴ where the judge did not give a comprehensive definition of what ‘substantial and compelling’ means⁶⁵ but held that the nature of the circumstances (that are meant to warrant a departure from the prescribed sentence) must be such that to convince the reasonable mind that a lesser sentence is a proper one and that it is justified after regard has been had to the aggravating and mitigating factors as well as the interests of society weighed against the interests of the offence.

This approach is so broad that it allows a court to consider factors it would normally regard as relevant to sentence and as a result impose a sentence of its choice.⁶⁶ In this case factors like absence of physical injury, youthfulness, the lack of previous convictions, the fact that the accused showed remorse and that there were prospects of rehabilitation were regarded as

⁶¹ Delivered on 22 October 1998 in the WLD.

⁶² South African Law Commission “South African Law Commission Discussion Paper 91: Sentencing (A New Sentencing Framework)” 2000 available at <http://www.justice.gov.za/salrc/dpapers/dp91.pdf> accessed on 15 September 2017 at page 28.

⁶³ Unreported case, Case No 365/98.

⁶⁴ Unreported judgment of the ECD, case CC 11/99m delivered on 28 April 1999.

⁶⁵ D Van Zyl Smit ‘Sentencing and Punishment’ (1999) available at http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/28-Sentencing%20and%20Punishment.pdf Accessed on 3 March 2017 at 28-2A.

⁶⁶ Ibid. 28-10A.

substantial and compelling.⁶⁷ These same circumstances were not regarded as substantial and compelling in the *Mofokeng* case.

2.2.3 THE BALANCED APPROACH

In the case of *S v Blaauw*⁶⁸ the judge held that it had not been specified that the circumstances needed to be exceptional and that in order to determine whether a departure from the prescribed sentences was warranted, one had to look at the cumulative effect of the aggravating and mitigating factors of a case. If in light of these the sentence would be grossly inappropriate then there would be need for imposing a lighter sentence otherwise the judge would have to impose the prescribed sentence.⁶⁹

The approach adopted in *Blaauw* is described as a more balanced approach of interpretation.⁷⁰ This balanced approach has more to commend it as it allows the courts to keep some discretion and not undermine the intention of the legislature.⁷¹ It has also been described as difficult to apply as it requires the courts to consider all aggravating and mitigating circumstances as it does traditionally.⁷² The cases of *S v Homoreda*,⁷³ *S v Shongwe*⁷⁴ and *S v Dithotze*⁷⁵ also agreed with this approach.

⁶⁷ *S v Cimani* at page 6.

⁶⁸ *S v Blaauw* 1999 (2) SACR (W) 295.

⁶⁹ *Ibid.* at 311 a-h.

⁷⁰ S Roth, *South African Mandatory Minimum Sentencing: Reform Required* (2008) available at <http://lawweb3.law.umn.edu/uploads/gV/8l/gV8lYrhMXKzaPTdE5enYZg/Roth-Final-Online-PDF-04.07.09.pdf>

accessed on 21 February 2017 at page 38.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ 1999 (2) SACR 319 (W) at 320 a-c.

⁷⁴ 1999 (2) SACR 220 (O) at 221 i-j.

⁷⁵ 1999(2) SACR 314 (W) at 315 b-d.

In *S v Abrahams*⁷⁶ it was held that an offender who had raped his own daughter was not a threat to society and this was a mitigating factor that could be considered along with others in deciding to depart from the prescribed minimum sentence. In *S v Jansen*⁷⁷ the court held that the words substantial and compelling meant that the court had to consider all the available mitigating factors to see if they carry enough weight for the court to depart from the prescribed sentence.

The judge *S v Swartz*⁷⁸ also expressed the same view⁷⁹ as that of *Jansen* and mentioned that the key to interpreting ‘substantial and compelling’ was in looking at the crime first, in particular the moral blameworthiness that could be attached to that crime and the circumstances in which it was committed. The judge was of the view that this limits the factors that have to be considered when trying to determine whether substantial and compelling circumstances exist.⁸⁰ This logic is also followed by the case of *S v Van Wyk*⁸¹ where the approach that if a minimum sentence induces some shock then this would justify departure from the minimum sentence. After rejecting this approach this case interpreted ‘substantial and compelling’ to mean the circumstances that were previously referred to as mitigating factors.

An example that shows the application of the approach of considering mitigating factors can be seen in the case of *S v Shongwe*⁸² where an accused had raped a 9 year old. Since the girl was below the age of 16 years this meant that the offence fell under Part 1 of Schedule 2 with life imprisonment as the prescribed sentence. The accused however did not receive the prescribed

⁷⁶ 2001 (2) SACR 116 (C) at 121 (e).

⁷⁷ 1999(2) SACR 368 (C) at 377 (h) – (i).

⁷⁸ 1999 (2) SACR 380 (C).

⁷⁹ Ibid. 386b.

⁸⁰ South African Law Commission “South African Law Commission Discussion Paper 91: Sentencing (A New Sentencing Framework)” 2000 available at <http://www.justice.gov.za/salrc/dpapers/dp91.pdf> accessed on 15 September 2017 at page 31.

⁸¹ 2000 (1) SACR 45 (C) at (g)-(h).

⁸² 1999 (2) SASV 220 (O) at 221 (h) – (i) 222(a).

sentence after consideration of mitigating factors. The factors that the court considered were that the accused was 47 years old, had not clashed with the law for a period of 20 years, was married with two children and had fixed employment for 9 years, the fact that the complainant was his son's stepdaughter etc. The court then held that imposing a life sentence on the accused would be shocking, excessive and out of proportion and for this reason the court imposed a sentence of 15 years.

It is clear that before the *Malgas*⁸³ judgment there have been divergent views about how 'substantial and compelling' should be interpreted. Interpretations were either strict, lenient or balanced. The lenient approach in *Mofokeng*⁸⁴ emphasizes the fact that the legislature saw it fit that the prescribed sentences be imposed for the specific crime. This approach also emphasizes the need for strict and severe sentences and believes the prescribed sentences should only be departed from in the event of exceptional circumstances. It is seen that it is not only *Mofokeng* that agreed with this approach as it was adopted by some cases that followed. Some cases adopted a more lenient approach. The lenient approach focuses more on what are usually regarded as mitigating factors in sentencing and it is left to the judge to make an assessment of whether the prescribed sentence would be fair. When it comes to the balanced approach of interpretation, the judge has to look at the cumulative effect of these circumstances and then come to a conclusion on whether the prescribed sentence would be just or not.

The intention of the legislature was that the court's' response to crime be consistent. If judges are interpreting 'substantial and compelling' inconsistently and following different standards, then they are not giving effect to the intention that the legislature had.

⁸³ 2001 (1) SACR 469 (SCA).

⁸⁴ 1999 (1) SACR (W).

2.3 THE MALGAS INTERPRETATION OF SECTION 51(3)

2.3.1 General Approach

The views of the Supreme Court of Appeal, as set out in *S v Malgas* fall to be discussed. Guidance was definitely needed on how a court must approach a case where the mandatory minimum sentences have to be applied. Generally, the provisions have to be read in light of the values that are enshrined in the Constitution.⁸⁵ As the provisions were initially meant to be in effect temporarily, the courts must bear this in mind as well as they make an attempt to interpret what is meant.⁸⁶ The fact that the prescribed sentences were enacted to deal with serious crime is also of great importance when it comes to interpretation. This means that the courts are required to approach the question of sentencing conscious of the fact that the legislature has ordained the prescribed sentences as the ones that should be ordinarily imposed for the crimes listed.⁸⁷ The intention of the legislature when it enacted these provisions was to standardize the response of the courts to the commission of these serious crimes, make the sentences severe and also achieve consistency.⁸⁸ It is therefore of great importance to view the sentences as ones that have been deemed appropriate by the legislature.

2.4 INTERPRETING ‘SUBSTANTIAL AND COMPELLING’

The Act states that when a court is satisfied that substantial and compelling circumstances exist in a particular case, it can then deviate from the prescribed sentence. The court is to enter the circumstances it deems substantial and compelling on record and spell them out.⁸⁹

⁸⁵ *S v Malgas* at para 7.

⁸⁶ *S v Malgas* at para 7.

⁸⁷ *S v Malgas* at para 8.

⁸⁸ *S v Malgas* at para 8.

⁸⁹ *S v Malgas* at para 9.

The central thrust of the words ‘substantial and compelling’ is that prescribed sentences are not to be departed from lightly or for ‘flimsy reasons’ like sympathy, circumstances or information that is favorable to the offender, the ‘first offender’ theory, any doubt to the efficiency of the legislation that the judicial officer might have, differences in the degree of participation or circumstances of co-offenders.⁹⁰ There has been no indication from the legislature that the traditional factors that are considered when it comes to sentencing should be excluded from the consideration of what ‘substantial and compelling’ means.⁹¹ This means that the mitigating and aggravating factors that are usually taken into account during sentences do have a role to play. What it means is that the totality of these circumstances that are traditionally taken into account should be enough to justify a departure.⁹² In previous cases, for example in *S v Mofokeng* (which used a strict method in interpreting the provision), there has been suggestions that the factors ordinarily taken into account in the sentencing process should be eliminated and that for factors to qualify as ‘substantial and compelling’ they must be ‘exceptional or rare’.⁹³

Some courts which have had to deal with the problem have resorted to adopting thoughts that are used by judges hearing appeal cases. This is problematic because this wasn’t the intention of the legislature.⁹⁴ The courts are supposed to consider the particular circumstances of each case and all the factors that are relevant to sentencing and then afterwards impose a sentence it sees fit.⁹⁵ Therefore, a court that is exercising appellate jurisdiction cannot approach the question of sentencing as if it were the trial court then substitute the sentence arrived at simply because it prefers it. This can’t be done in the absence of material misdirection by the trial court.⁹⁶ When

⁹⁰ *S v Malgas* para 9.

⁹¹ *S v Malgas* at para 9.

⁹² *S v Malgas* at para 9.

⁹³ *S v Malgas* at para 10.

⁹⁴ *S v Malgas* at para 11.

⁹⁵ *S v Malgas* at para 12.

⁹⁶ *S v Malgas* at para 12.

applying Section 51, the trial court must not act like an appellate court during the process. This is so because it is not in this situation confronted by previous exercise of judicial discretion but faced with a statutory directive to impose a particular sentence according to the schedules in the act. In doing this, the trial court is doing so for the first time and there would have been no prior considerations.⁹⁷ Cases that suggest that such an approach to the section is the correct one are erroneous as they unjustifiably limit the power that is given to a trial court by Section 51(3) to conclude when a lesser sentence is justified.⁹⁸

The fact that the legislature has refrained from giving any guidance as was done in Minnesota is significant.⁹⁹ It shows that the legislature deliberately left it to the courts to establish what it means. In doing so, they must however treat the prescribed sentences as being suitable for the crimes and must not depart from them unless there is weighty justification to do so.¹⁰⁰ A departure is justified by making reference to circumstances which can be seen to be substantial and compelling.¹⁰¹

Questions have been raised as to how ‘substantial and compelling’ should be examined. The questions center upon it being examined as two words or as one. It was held in *Malgas* that the words substantial and compelling must be examined conjointly as the legislature refrained from using the word ‘or’ in favor of the word ‘and’.¹⁰² It is not possible to list all circumstances that rank as substantial and compelling and those that do not.¹⁰³ One just has to keep in mind that the prescribed sentences are regarded as ordinarily appropriate and personal distaste for the legislation is not enough to warrant a departure. When justifying a departure, the court must be

⁹⁷ *S v Malgas* at para 14.

⁹⁸ *S v Malgas* at para 15.

⁹⁹ *S v Malgas* at para 18.

¹⁰⁰ *S v Malgas* at para 18.

¹⁰¹ *S v Malgas* at para 18.

¹⁰² *S v Malgas* at para 19.

¹⁰³ *S v Malgas* at para 20.

careful of rationalizing circumstances of an offender that are not sufficient enough to be regarded as ‘substantial and compelling’. There is no harm for a court to use, as a starting point, past sentencing patterns as a provisional standard for comparisons when deciding whether the prescribed sentence is unjust or just. However courts must not use mere discrepancy between them as a sole criterion for departure as more is required from them.¹⁰⁴

When a court feels ‘uneasy’ about a prescribed sentence and this unease hardens into a conviction that an injustice will be done by imposing the sentence, it can be a result of the court not being satisfied that the circumstances of that case render the prescribed sentence disproportionate to the crime, the criminal and the legitimate needs of the society. If the unease is as a result of a consideration of certain circumstances then the court is entitled to characterize those circumstances as substantial and compelling.¹⁰⁵ The injustice need not be shocking; the mere fact that an injustice will occur when the prescribed sentence is imposed will suffice.¹⁰⁶ It is not right to suppose that it is only factors diminishing moral guilt of the offender that will qualify as substantial and compelling.¹⁰⁷ It is clear that the courts are a freer to depart from the prescribed sentences than has been said in the previously decided cases and it is up to the courts to judge whether or not circumstances of a particular case justify a departure.¹⁰⁸

2.5 THE PRACTICAL METHOD OF INTERPRETATION PUT FORWARD IN MALGAS

In paragraph 25 of the *Malgas* case, the judge summarized a practical interpretation for the courts to use when they are faced with the question of what constitutes ‘substantial and compelling’ circumstances. The summary is as follows:

¹⁰⁴ *S v Malgas* at para 21.

¹⁰⁵ *S v Malgas* at para 22.

¹⁰⁶ *S v Malgas* at para 23.

¹⁰⁷ *S v Malgas* at para 24.

¹⁰⁸ *S v Malgas* at para 25.

1. Section 51 hasn't limited the discretion that the courts have when imposing sentences in respect of the offences that are listed in the Schedules.
2. Courts are required to approach the sentencing exercise conscious of the fact that the prescribed sentences should ordinarily be imposed in the absence of substantial and compelling circumstances.
3. Crimes listed are to be given severe, consistent and standardized responses from the courts unless there are convincing reasons for a different purpose.
4. The prescribed sentences are not to be departed from 'lightly or for flimsy reasons'. Circumstances or information favorable to the offender, undue sympathy, reluctance to imprison first offenders, personal doubts of the judicial officer relating to the efficiency of the legislation and marginal differences in the personal circumstances or degrees of participation between co offenders are to be excluded.
5. Emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it but this does not mean that all the other considerations have to be rejected.
6. All the factors that are traditionally taken into account in sentencing continue to play a role with none of them excluded.
7. The ultimate impact of all the circumstances must be measured against the yardstick 'substantial and compelling' and the factors must cumulatively justify a departure.
8. It is constricting to use the concepts developed in dealing with appeals as a criterion.
9. If upon the consideration of all circumstances a sentencing court is satisfied that the prescribed sentence would be unjust i.e. disproportionate to the crime, criminal and the needs of the society resulting in an injustice, it is entitled to impose a lesser sentence.
10. It must always be taken into account that the crimes listed in the Act have been singled out for severe punishment.

2.6 THE APPLICATION OF THE PRACTICAL INTERPRETATION IN MALGAS

After laying down the method of interpreting ‘substantial and compelling’ Judge Marais went on to apply it to the facts of the case¹⁰⁹ In the *Malgas* case, the appellant had been convicted for murder and sentenced to imprisonment for life. The appellant had shot the deceased in the head while he lay asleep at his home. Appellant had been living for about a month in the deceased’s house with his wife (Carol) and children. A quarrel had taken place between the deceased and his wife and later the deceased had told the appellant that he loved her and the appellant had replied that she wanted nothing to do with him. The deceased then locked himself in the bathroom and fired a shot causing his wife and the appellant to think that he had committed suicide but he later emerged and had drinks with friends until half past 1 in the morning.

After 3 am, Carol woke the appellant and gave her a pair of gloves, a jersey and a firearm. Appellant was then instructed to wear the gloves to avoid her fingerprints appearing and to wear a jersey so that there are no gunpowder marks and traces of blood would not be on her attire. Appellant was then told by Carol to shoot the deceased or Carol would burn the house down with petrol. Carol reminded her that the deceased had struck her the previous evening and that she had to shoot him. With the help of Carol, the appellant then attempted to pass off that what had occurred was an act of suicide but the appellant later confessed to a friend leading to her arrest.

In the court a quo the judge had concluded that the circumstances of this case could not be regarded as ‘substantial and compelling’ and regarded himself bound by the approach that was used in the *Mofokeng* case as he was in agreement with that approach.¹¹⁰ The judge had accepted that carol had been the instigator but did not consider it a weighty factor when measured against the fact that the appellant had killed the deceased. The appellant’s remorse was considered but its

¹⁰⁹ S v *Malgas* at para 26 – 29.

¹¹⁰ S v *Malgas* at para 30.

importance was minimized by the judge stating that that subsequent remorse was not something exceptional. After balancing these factors, the court a quo found that they did not amount to substantial and compelling circumstances.¹¹¹

When it came to considering the appeal and applying the new method of interpretation, Judge Marais said the following:

Although there was planning and premeditation and the crime was carried out in the execution of a common purpose and there is need for a severe punishment, the personal circumstances of the accused i.e. her youth, clean record, her vulnerability to Carol's influence and the fact that she was dragooned into the commission of the offence by a domineering personality are strong mitigating factors. The fact that she showed remorse and is young enough to make rehabilitation a prospect even after a long period of imprisonment were also among the facts that were noted by Marais. He held that these circumstances cumulatively regarded, satisfied the judge that a sentence of life imprisonment would be unjust and qualified as substantial and compelling circumstances. The appellant was therefore sentenced to 25 years imprisonment and life imprisonment was set aside.¹¹²

2.7 AN ANALYSIS OF THE INTERPRETATION GIVEN IN MALGAS

Malgas is the seminal judgment on how courts should deal with the issue of what 'substantial and compelling circumstances mean.¹¹³ According to Terblanche,¹¹⁴ the essence of the *Malgas* decision can be separated into the following four aspects:

¹¹¹ *S v Malgas* at para 32.

¹¹² *S v Malgas* at para 34.

¹¹³ SS Terblanche "A Guide To Sentencing in South Africa" 3rd edition (2016) 76

¹¹⁴ *Ibid.* 76-77

- a) The sentences prescribed by the legislature are the point of departure as the sentencing court does not start the sentencing process from a ‘clean slate’.¹¹⁵ The prescribed sentences should be ordinarily imposed and not be departed from for unjustified reasons.
- b) When the circumstances of a particular case warrant a departure from the prescribed sentences, the court should not hesitate to depart. As the case mentioned, courts are now freer to depart from the prescribed sentences than they were in the past.
- c) All the traditional factors that are relevant to sentencing should be weighed in order to determine whether a departure is called for and it is the cumulative effect of these factors that will point the court to one way or the other.¹¹⁶
- d) The judicial officers must consider whether the prescribed sentences leave them with a sense of ‘unease’.

In *S v Kgafela*,¹¹⁷ the judge was of the opinion that ‘substantial and compelling’ had not been ‘textually’ interpreted but had been relegated to the effect of an instinctive reaction and response. The instinctive response takes 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 the interests of society. In short, the judge is of the view that in *Malgas*, the judge did not define but rather put forward an approach or mentioned how judges should react when faced with this problem.

Another view was that *Malgas* has resulted in a hybrid sentencing scheme that uses techniques from the sentencing guidelines to depart from the legislatively prescribed sentencing practices. The result of this is that lesser sentences are imposed on the accused based on factors related to

¹¹⁵ *S v Mabuza* 2009 (2) SACR 435 (SCA) at para 20.

¹¹⁶ *S v Malgas* at para 9.

¹¹⁷ 2001 (2) SACR 207 (B).

the crime as opposed to the victim. The long-term results are a sentencing scheme that misuses factors to depart from the mandatory minimums.¹¹⁸ While others are happy that *Malgas* has brought certainty to the interpretation and application of Section 51,¹¹⁹ another viewpoint is that *Malgas* did not define substantial and compelling but rather put forward an approach that uses the traditional guidelines to depart from the prescribed sentences. Others are of the view that *Malgas* should be followed because there are not over or under emphasizing of any of the circumstances that could take place and this means that a proper balance will be struck.¹²⁰

In the case of *DPP KZN v Ngcobo*¹²¹ it was mentioned that the case of *Malgas* is a good starting point when it comes to trying to make a conclusion on whether to depart from the prescribed minimum sentences. It was also said in this case that the principles that were mentioned in *Malgas* are ‘enduring’ and ‘uncomplicated’.

2.8 Constitutionality of the Criminal Law Amendment Act

After the enactment of the minimum sentencing legislation, it was foreseeable that this piece of legislation would come under constitutional scrutiny. This is mainly because by prescribing a sentence that should be imposed in a particular circumstance, the Act strips the judiciary of its discretion in one way or the other (thereby violating the constitutional principle of separation of

¹¹⁸ N Kubista ‘Substantial and compelling circumstances: Sentencing of rapists under the Mandatory Minimum Sentencing Scheme’ (2005) 18 *South African Journal of Criminal Justice* 81.

¹¹⁹ V Bafobekhaya “Application of prescribed minimum sentencing legislation on juvenile offenders in South Africa” (2005) accessed at http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/2671/Momoti_LLM_2005.pdf?sequence=1 accessed on 6 March 2017 at page 34.

¹²⁰ Ibid. 44.

¹²¹ 2009 (2) SACR 361 (SCA) at para 12.

powers). According to Nesor, the constitutionality of the provisions in the Act is/was disputed on two grounds namely:¹²²

- a) It is accepted that any piece of legislation that directs a court to impose sentences that are not proportional to the severity of crime may be unconstitutional on the grounds that the punishment that is imposed ends up being ‘cruel’ ‘inhumane’ and of a ‘degrading nature’.
- b) It is argued that mandatory minimum sentences infringe on the accused’s right to a fair trial. This argument is based on the fact that under mandatory minimum sentences there is a ‘fragmentation’ of the trial. The trial court pronounces an accused guilty and a judge from the High Court must impose the sentence.¹²³ The accused will be detained for this long period between being found guilty and the sentencing.

Chief Justice Corbett commented in *S v Bruce, S v Toms*¹²⁴ that mandatory minimum sentences were an undesirable intrusion by the legislator on the judge's discretion to determine the punishment given to people convicted of statutory offences and that the enactment of the provisions is calculated to produce grave injustice.¹²⁵ The leading case relating to constitutional review of the legislation is *S v Dodo*.¹²⁶ The constitutional challenge in the *Dodo* case was based on three grounds which are:

- 1) Whether the statute is in violation of the constitutional doctrine of separation of powers. (The text of the Final Constitution does not explicitly refer to the doctrine of separation of powers) This doctrine dictates that there is a separation of powers between the three

¹²² JJ Nesor “Mandatory Minimum Sentences in the South African context” (2001) 3 *Crime Research in South Africa* 5.

¹²³ It is important to note that this process has changed.

¹²⁴ 1990 2 802 (A).

¹²⁵ *S v Bruce, S v Toms* 1990 2 SA 802 (A) 817 C-D.

¹²⁶ 2001(3) SA 382 (CC).

branches of government namely the judiciary, the executive and the legislature. It further dictates however that there should be appropriate checks between these branches to ensure accountability, responsiveness and openness.¹²⁷

- 2) Whether section 51 (1) read with section 51(3) (a) compels the High Court to pass a sentence that violates section 12 (1) (e) of the Constitution which states that there is a right not to be punished in a ‘cruel, inhuman or degrading way’?¹²⁸
- 3) Whether section 51(1) read with section 51(3) (a) of The Act is inconsistent with section 35(3) (c) of the Constitution which guarantees to every accused person the right to ‘a public trial before an ordinary court’. This argument is in the sense that a court bound by Section 51(1) is no longer an ‘ordinary’ court.¹²⁹

In dealing with the issue of separation of powers, the court in *S v Dodo* concluded that, while our constitution recognizes the doctrine of separation of powers, ‘such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons’.¹³⁰

The court went on to mention that both the legislature and the judiciary have legitimate concerns when it comes to sentencing¹³¹ but however ‘the concomitant authority of other branches in the field of sentencing must not infringe the authority of the courts in this regard’.¹³² The court also

¹²⁷ Constitutional Principle VI contained in Schedule 4 of the Interim Constitution.

¹²⁸ *S v Dodo* at para 34.

¹²⁹ *S v Dodo* at para 42.

¹³⁰ *S v Dodo* at para 33.1.

¹³¹ *S v Dodo* at para 33.2.

¹³² *S v Dodo* at para 33.3.

concluded that it is ‘sufficient to hold that the legislature is not empowered to compel any court to pass a sentence that is inconsistent with the Constitution’.¹³³

In essence, the court is stating or rather putting forward that inasmuch as there is a separation of powers between the judiciary and the legislature, one can’t say the legislature has the sole authority in determining sentences. This is because both branches have a legitimate interest in the severity of sentences. This justifies the enactment of mandatory minimum sentences by the legislature and supports that the principle of separation of powers is not violated.

In dealing with the issue of section 12(1) (e) of the Constitution, the court in *Dodo* held that section 51(1) of the Act does not require the court to impose a sentence of life imprisonment where it would be inconsistent with the offender’s right in section 12(1) (e). This is because of the determinative test articulated in Paragraph I of the summary in *Malgas*,¹³⁴ which provides that “If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing the sentence, it is entitled to impose a lesser sentence.” This makes it clear that the sentencing court is not obliged to impose a sentence that will be in violation of section 12.

In dealing with the issue of violation of section 35(3) (c), the court held that ‘the failure of the separation of powers argument and the conclusion that section 51(1) is not inconsistent with the Constitution for any other reason has fatal consequences for the section 35(3) argument.’¹³⁵ It concluded that this the Act would only violate this section of the Constitution if section 51 (1) has ‘some material effect on their independence or if it deprives them of some judicial function

¹³³ *S v Dodo* at para 33.5.

¹³⁴ *S v Malgas* at para 25.

¹³⁵ *S v Dodo* at para 43.

of such a nature that they could no longer properly be classified as ordinary courts'¹³⁶ and this was not the case. The court in *Dodo* thereby rightfully concluded that section 51 was not in contravention of any constitutional principle.

The *Dodo* case silenced the constitutional argument against mandatory minimum sentences. They continue to be in effect and the courts are now focusing more on interpretation issues than challenging the system itself. This makes an enquiry into how 'substantial and compelling' is being interpreted a very necessary one.

This judgment is important because it confirmed the *Malgas* decision i.e. the practical approach to interpreting 'substantial and compelling'. Of more importance is the fact that it is a constitutional judgement meaning that it entrenched the principles that were put forward in *Malgas*. Proportionality is the central feature of *Dodo's* confirmation of the *Malgas* case,¹³⁷ which makes it necessary to discuss this case. Although the *Malgas* case does not explicitly mention proportionality except for the part where it described an unjust sentence as one that will be 'disproportionate to the crime, the criminal and the needs of the society',¹³⁸ it is clear that one of the intentions of the legislature was not for the courts to impose disproportionate sentences.

The constitutional judgment in *Dodo* was of the view that it was unnecessary to consider the divergent views that had been given by previous courts on what substantial and compelling means. It mentioned this on the basis that the *Malgas* case had put forward a practical method of interpreting what substantial and compelling means.¹³⁹ It described the step-by- step method put forward in *Malgas* as an 'overarching guideline' and one that must be employed by all judicial officers who are faced with the problem of deciding whether or not they should depart from the

¹³⁶ *S v Dodo* at para 44.

¹³⁷ SS Terblanche *A Guide to Sentencing Law in South Africa* 3ed (2016).

¹³⁸ *S v Malgas* at para 22.

¹³⁹ *S v Dodo* at para 11.

prescribed sentence.¹⁴⁰ This shows that the CC in *Dodo* was in full agreement with the method of interpretation that was given in the *Malgas* case.

That being said, proportionality is a key element when it comes to deciding which sentence to impose. It was discussed in detail in the *Vilakazi*¹⁴¹ case which is also a confirmation judgement when it comes to the principles that were put forward in the *Malgas* case.

In *Dodo* it is mentioned that proportionality is a key factor in determining whether punishment is ‘cruel, inhuman or degrading’ particularly where the issue is how much time an offender should stay in prison.¹⁴² Proportionality is at the heart of the inquiry because the Constitution stipulates that a person may not be deprived of his/her freedom without just cause.¹⁴³ *Dodo* ‘decreed’ the constitutional requirement of proportionality when it comes to the imposition of sentences.¹⁴⁴ The ‘proportionality’ requirement applies whether a court imposes a sentence using the mandatory minimum sentencing principles or the usual principles that govern the imposition of sentences.¹⁴⁵ So this means that when a sentence is not proportional it automatically means that it is unconstitutional as well.¹⁴⁶ According to Terblanche, there have been several other judgments that have mentioned proportionality¹⁴⁷. One of them is *Vilakazi*,¹⁴⁸ where proportionality was a key factor in striking down a sentence of life imprisonment that had been imposed by the court a quo for rape. Even though the prescribed sentences should be followed

¹⁴⁰ Ibid.

¹⁴¹ 2009 (1) SACR 552.

¹⁴² SS Terblanche *A Guide to Sentencing in South Africa* (2013) quoting from *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 94, 197 also Hoctor (2004) 121 SALJ 304 at 308.

¹⁴³ Section 12(1) (a) of the Constitution of the Republic of South Africa.

¹⁴⁴ SS Terblanche *A Guide to Sentencing in South Africa* 2ed (2013) 83.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ 2009(1) SACR 552 (SCA).

when they apply, ‘proportionality to the seriousness of the offence is a higher value which overrides the prescriptions’.¹⁴⁹

The *Dodo* case is in full agreement with all the steps that were put forward in *Malgas* as a way of interpreting ‘substantial and compelling’. It quotes all the guidelines in its judgement and leaves none. And most importantly it puts forward that any judicial officer faced with the question of whether or not to depart from a prescribed sentence should use the guidelines in the *Malgas* case.

2.9 CONCLUDING REMARKS

According to the judgement of the Constitutional Court in the *Dodo* case, the Criminal Law Amendment Act is in line with the Bill of Rights. Therefore, there was no need to strike the piece of legislation down on the basis that it was not in line with the Constitution.

The court in *Malgas* rejected the interpretations that limited ‘substantial and compelling’ to factors that are exceptional or factors that the legislature could not have had in mind when they enacted the legislature. The judgement did not give a ‘textual’ interpretation or define what the terms mean but made it clear that the words are to be viewed and interpreted conjointly. The approach that the judgement said was to be used when it comes to determining whether a lesser sentence should be imposed is one where the mitigating factors that are traditionally considered in the sentencing process have to be looked at. After looking at these factors, their cumulative effect must be weighed against the yardstick of ‘substantial and compelling’. It is after this exercise that a court will be able to determine whether to depart from the prescribed sentence or

¹⁴⁹ SS Terblanche *A Guide to Sentencing in South Africa* 2ed (2013) 83.

not. The judgment also emphasizes that the prescribed sentences are not to be departed from lightly and at the same time strict interpretation is erroneous.

3. CHAPTER THREE

An analysis of the interpretations of ‘substantial and compelling’ circumstances after the *Malgas* case.

3.1 INTRODUCTION

The previous Chapter discussed the judgment of the Supreme Court of Appeal in *S v Malgas*.¹⁵⁰ This chapter will now examine how the South African courts have reacted to the *Malgas* interpretation of the phrase ‘substantial and compelling’. This will be done by an analysis of the cases that were decided after *Malgas* taking a specific look at whether they endorsed *Malgas* or are in disagreement with the proposed method of interpretation. Analysis will focus on rape, robbery and murder cases specifically looking at how ‘substantial and compelling’ is being interpreted and whether the courts have adopted one uniform way of interpretation when it comes to the various crimes. This chapter will outline the facts of each case and reasoning of the judicial officer. A critical analysis of the judgements will be done in the final chapter.

3.2 RAPE CASES

The rape cases will be discussed in chronological order. The cases that will be discussed are *S v Abrahams*,¹⁵¹ *S v Mahomotsa*,¹⁵² *S v Njikelana*,¹⁵³ *S v M*,¹⁵⁴ *S v Nkomo*,¹⁵⁵ *S v Vilakazi*,¹⁵⁶ *S v*

¹⁵⁰ 2001 (2) SA 1222 (SCA)

¹⁵¹ 2002 (1) SACR 166 (CC).

¹⁵² 2002 (2) SACR 435 (SCA).

¹⁵³ 2003 (2) SACR 166 (C).

¹⁵⁴ 2007 (2) SACR 60 (W).

¹⁵⁵ 2007 (2) SACR 198 (SCA).

PB,¹⁵⁷ *S v PB*,¹⁵⁸ *S v MS*¹⁵⁹ and *S v Uithaler*.¹⁶⁰ It is important to note that with rape cases, there has been some guidance on what should not be considered as substantial and compelling circumstances justifying the imposition of a lesser sentence. The following are listed:¹⁶¹

- a) The complainant's sexual history.
- b) Apparent lack of physical injury to the complainant
- c) Any religious or cultural beliefs that the accused has about rape.
- d) Any relationship that existed between the complainant and the accused person prior the commission of the crime.

3.2.1 *S v Abrahams*

In the case of *S v Abrahams* the Supreme Court of Appeal overturned a decision of the High court where a sentence of seven years had been imposed on an accused who had raped his 14 year old daughter.¹⁶² It had been held in the High Court that the fact that the accused was not a threat to society was a mitigating factor that could be considered in deciding whether or not to impose life imprisonment. The SCA held that the High Court had misdirected itself in imposing a sentence of 7 years. SCA held that the judge had erred in failing to take into account the sexual jealousy and the possessiveness that had motivated the rape.¹⁶³

¹⁵⁶ 2009 (1) SACR 552 (SCA).

¹⁵⁷ 2011(1) SACR 448 (SCA)

¹⁵⁸ 2013 (2) SACR 553 (SCA)

¹⁵⁹ 2014 (1) SACR 174 (GNP).

¹⁶⁰ 2015 (1) SACR 174 (WCC).

¹⁶¹ Section 51(3) of the Criminal Law Amendment Act 105 of 1997.

¹⁶² "Memorandum on Mandatory Minimum Sentencing" accessed at http://www.ghjru.uct.ac.za/sites/default/files/image_tool/images/242/parliamentary/Memorandum-Mandatory-Minimum-Sentencing.pdf accessed on 11 September 2017 at page 16.

¹⁶³ *S v Abrahams* 124g-125g.

In this judgement it was remarked that any suggestion that rape within a family is in any way acceptable is wrong. It was held that the High Court had failed to take into account the damage that the complainant had suffered as a result of the rape. The 7 year sentence was accordingly substituted with one for 12 years.¹⁶⁴

3.2.2 *S v Mahomotsa*

In *S v Mahomotsa* the accused had been charged with two counts of rape. He was sentenced to six years' imprisonment for the first charge and 10 years' imprisonment for the second one. This was after it had been found that substantial and compelling circumstances existed and the prescribed sentence of life imprisonment had to be departed from.¹⁶⁵ Both of the complainants had been raped more than once and it had been alleged by the court that they were fifteen years old.¹⁶⁶ The court a quo had used the test that was set in the *Mofokeng* case which states that for factors to qualify as substantial and compelling they must be exceptional in nature.¹⁶⁷ The Appeal Court mentioned how this test was rejected in *Malgas* (factors need not be exceptional in nature to qualify as substantial and compelling).¹⁶⁸ The Appeal Court noted that inasmuch as the court a quo had followed the test that was put forward in *Malgas* it had 'erred materially'.¹⁶⁹

In an inquiry to find out whether substantial and compelling circumstances existed, the court a quo considered the aggravating and mitigating circumstances of the case.¹⁷⁰ The mitigating factors that were considered by the court a quo were that the accused was young, he had spent

¹⁶⁴ "Memorandum on Mandatory Minimum Sentencing" accessed at http://www.ghju.uct.ac.za/sites/default/files/image_tool/images/242/parliamentary/Memorandum-Mandatory-Minimum-Sentencing.pdf accessed on 11 September 2017 at page 16.

¹⁶⁵ *S v Mahomotsa* at para 2.

¹⁶⁶ *S v Mahomotsa* at para 8.

¹⁶⁷ *S v Mahomotsa* at para 9.

¹⁶⁸ *S v Mahomotsa* at para 10.

¹⁶⁹ *S v Mahomotsa* at para 10.

¹⁷⁰ *S v Mahomotsa* at para 10.

eight months in prison at the time of sentencing, and the complainant had sustained no physical or psychological damage from the rape as they had been already sexually active.¹⁷¹ The aggravating factors considered were that the accused had a previous conviction of having sex with a girl less than 16 years, the accused committed a second offence while awaiting trial for the first one and he had lied that he was 17 years old when he was 23 in order to get a lighter sentence.¹⁷²

The Appeal Court held that the court a quo had erred in finding that no physical or psychological damage was suffered by the complainants as a result of the rape.¹⁷³ It mentioned that while it is ‘theoretically’ possible that a victim of rape may not suffer any other psychological damage other than that which is experienced during the rape, this is ‘highly unlikely’.¹⁷⁴ The Appeal Court further mentioned that the fact that the complainants were young girls makes it even more unlikely that they would not have suffered any psychological damage as a result of the rape.¹⁷⁵ It held that it is impossible to quantify psychological damage and neither is it right to approach the question of sentencing assuming that no psychological harm was done.¹⁷⁶

In deciding whether the court a quo had not misdirected itself by arriving at the decision that there were substantial and compelling circumstances in casu, the Appeal court had to look at the aggravating and mitigating circumstances that were considered. A man’s virility was held not to play any role in the sentencing process as this would have the effect of taking away the moral blameworthiness of accused people in most rape cases. It was held that the court a quo had misdirected itself in this regard and there was need by the Appeal Court to consider the

¹⁷¹ *S v Mahomotsa* at para 10.

¹⁷² *S v Mahomotsa* at para 10.

¹⁷³ *S v Mahomotsa* at para 11.

¹⁷⁴ *S v Mahomotsa* at para 11.

¹⁷⁵ *S v Mahomotsa* at para 11.

¹⁷⁶ *S v Mahomotsa* at para 11

sentences afresh because of this.¹⁷⁷ There was emphasis¹⁷⁸ about how the *Malgas* case held that the prescribed sentences should not be departed from for ‘flimsy reasons’. The Appeal Court mentioned how the sentence of life imprisonment was the one that had to be ordinarily imposed in this case as the complainants had been raped more than once.¹⁷⁹

It was held that the fact that the complainant in the other count had had sexual intercourse two days before she was raped was not a factor that had to be taken in favor of the accused. It was irrelevant according to the appeal court.¹⁸⁰ The fact that the accused had lied about his age which had been taken as an aggravating factor was also held not to be sufficient. This was because the accused had given his correct age of 23 before the start of the trial.¹⁸¹

The Appeal Court put emphasis on the fact that just because a particular instance of rape falls within the categories delineated in the Act, it doesn’t mean life imprisonment has to be imposed. This it held as one of the ways put forward by the *Malgas* and *Dodo* case in interpreting the prescribed sentences.¹⁸² In the event that substantial and compelling circumstances are found, the court can deviate from the prescribed sentence.¹⁸³ Furthermore, *Mahomotsa* emphasizes that there are differences in seriousness when it comes to rape cases and these differences play a crucial role in the sentencing process.¹⁸⁴ *Mahomotsa*¹⁸⁵ quotes *S v Abrahams*¹⁸⁶ which mentions that some rapes are more serious than others and life imprisonment should only be reserved for

¹⁷⁷ *S v Mahomotsa* at para 13.

¹⁷⁸ *S v Mahomotsa* at para 14.

¹⁷⁹ *S v Mahomotsa* at para 14.

¹⁸⁰ *S v Mahomotsa* at para 15.

¹⁸¹ *S v Mahomotsa* at para 15.

¹⁸² *S v Mahomotsa* at para 18.

¹⁸³ *S v Mahomotsa* at para 18.

¹⁸⁴ *S v Mahomotsa* at para 18.

¹⁸⁵ *S v Mahomotsa* at para 18.

¹⁸⁶ 2002 (1) SACR 116 (SCA).

those cases where there are no substantial and compelling circumstances that justify the imposition of a lesser sentence.

The Appeal Court went on to consider the sentences that had been imposed by the court a quo. It held that in respect of the first count, the accused youthfulness and other personal circumstances such as the fact that his previous conviction (though sexual) did not involve non-consensual sex favor departure from the prescribed minimum. The learned judge went on to say that the same could not be said about the second charge. This was because within a period of two months after the accused had been released into the custody of his grandmother he committed a similar offence.¹⁸⁷ After giving careful consideration to all the aspects involved in the case, the appeal court described the *Mahomotsa* case as a 'borderline' one.¹⁸⁸ The judge was of the view that the prescribed sentence of life imprisonment was too severe in this case and would result in an unjust sentence even after considering the second charge.¹⁸⁹ The judge goes on to mention that the sentences that were prescribed by the court a quo did not reflect the seriousness of the offence and described them as 'woefully inadequate'.¹⁹⁰ He then imposed a sentence of 8 years for the first count and 12 years for the second count.¹⁹¹

3.2.3 *S v Njikelana*

In *S v Njikelana*¹⁹² the accused had raped the complainant more than once. At the time of the commission of the offence the complainant was 16 years old 8 months.¹⁹³ Before considering if life imprisonment was the appropriate sentence, Thring J lists all of the guidelines that were put

¹⁸⁷ *S v Mahomotsa* at para 20.

¹⁸⁸ *S v Mahomotsa* at para 22.

¹⁸⁹ *S v Mahomotsa* at para 22.

¹⁹⁰ *S v Mahomotsa* at para 26.

¹⁹¹ *S v Mahomotsa* at para 27.

¹⁹² *S v Njikelana* 2003 (2) SACR 166 (C).

¹⁹³ *S v Njikelana* at page 168.

forward in the *Malgas* case. Thring J goes on to mention that the Constitutional Court in the *Dodo* case endorsed *Malgas* therefore these guidelines are of great importance.¹⁹⁴

The cumulative effect of the following circumstances was held to justify a departure from the sentence of life imprisonment that had to be ordinarily imposed in this case:¹⁹⁵

- a) The accused was a fairly young man. He was 24 years old at the time of the commission of the crime. It was held that from the facts it can be concluded that he is ‘somewhat immature’ as on the night of the crime he was socializing with someone who was nine years younger than him at the time.
- b) The accused had no previous convictions.
- c) The accused was uneducated and had no degree of sophistication.
- d) On the day the crime was committed, the accused had consumed a lot of liquor. Thring J remarked that alcohol reduces a person's ability to resist temptation and it reduces inhibitions. Thring J also noted that prior to the rape, the complainant had been drinking with the accused as friends and this shows that this rape had not been planned over a long period of time.
- e) The complainant was not seriously injured. The lacerations were described by the doctor as ‘superficial’ and she had no permanent injury but only a small scar on her forehead. It was noted that even though the complainant had not sustained any serious physical injuries she had suffered mental trauma and distress. She had become emotionally unstable, forgetful and withdrawn after the crime. Her schoolwork had also suffered.

¹⁹⁴ *S v Njikelana* at page 173.

¹⁹⁵ *S v Njikelana* at page 174.

- f) The accused had been in custody for 35 months awaiting trial and sentencing. According to Thring J, this was too long a time and therefore unreasonable to subject the accused to a sentence of life imprisonment.

Like any other case, the aggravating circumstances had to be weighed against the mitigating factors. The aggravating circumstances that were identified in this case were as follows:¹⁹⁶

- a) The accused had pushed the complainant off a bridge even though she had not sustained serious injuries as a result of that.
- b) The accused had use a degree of force in raping the complainant.
- c) The accused had abused the relationship he had with the complainant. They had been drinking together and the complainant viewed him as a friend.

Despite this, Thring J held that the sentence of life imprisonment would be unjust in this case. The accused was then sentenced to 14 years' imprisonment.¹⁹⁷

3.2.4 *S v M*

This case involves the rape of a minor. The accused had raped his stepdaughter when she was 14 and 15 years old. This case emphasizes what was put forward in *Malgas* that the judicial officers should treat the prescribed sentences as the punishment that has been ordained by the legislature for the specific crimes.¹⁹⁸ It also emphasizes that the cumulative impact of the normal factors that

¹⁹⁶*S v Njikelana* at page 175.

¹⁹⁷*S v Njikelana* at page 175.

¹⁹⁸ *S v M* at para 10.

are taken into account is what determines whether a court it to depart from the prescribed sentences or not.¹⁹⁹

The mitigating factors that existed in this case were as follows:

- a) The accused was a first offender and had a clean record prior the commission of the offence.
- b) He had tendered a plea of guilty.
- c) There had been no harm inflicted on the victim.
- d) He had spent nearly 12 months in custody.

Judge Satchwell however went on to mention that there is no authority that states that just because an accused has a previous clean record, that in itself can be taken as one of the factors that justify departure from the prescribed sentences.²⁰⁰ He also held that a plea of guilty in this particular case did not amount to a substantial and compelling circumstance either.²⁰¹ Another important thing to note from this judgement is that Satchwell mentioned that in a rape case where the child is under 16 years, absence of bodily harm should not constitute a substantial and compelling circumstance.²⁰²

In conclusion, Judge Satchwell said:²⁰³

“I have noted that the accused is a first offender and that he has spent nearly 12 months in custody, that he pleaded guilty, and that no violence, other than that of the rapes themselves, were perpetrated by him upon his victim. For the reasons I have given, I do not find that any of these factors individually constitute

¹⁹⁹ Ibid. at para 15.

²⁰⁰ *S v M* at para 69.

²⁰¹ *S v M* at para 80.

²⁰² *S v M* at para 89.

²⁰³ *S v M* at para 115.

substantial and compelling circumstances. Nor do I find that, in combination, they constitute weighty consideration to justify departure from the prescribed sentence.”

She went on to impose a sentence of life imprisonment.²⁰⁴

3.2.5 *S v Nkomo*

In *S v Nkomo* the appellant was convicted of rape and kidnapping. He had laced the complainant’s cold drink with alcohol and forced her into a hotel room and raped her. The complainant tried to escape but appellant put her back into the hotel room and raped her four more times during the night. The complainant was kicked, slapped and asked to perform oral sex. When the complainant escaped the following morning she went to the police station. The appellant was arrested and charged then sentenced to three years on the kidnapping charge and referred to the High Court for sentencing on the rape charge. The High Court did not find any substantial and compelling circumstances and therefore sentenced him to life imprisonment.²⁰⁵

The appellant appealed against the sentence of life imprisonment. His appeal was allowed and the sentence of life imprisonment was set aside and replaced with 16 years’ imprisonment. This was on the basis of the following circumstances which the Appeal Court found to be substantial and compelling:²⁰⁶

- a) The appellant was young; He was 29 at the time of the commission of the rape.
- b) The appellant was employed.
- c) There were chances of rehabilitation.²⁰⁷

²⁰⁴ *S v M* at para 117.

²⁰⁵ J D Mujuzi “Prospect of rehabilitation as a substantial and compelling circumstance to avoid imposing life imprisonment in SA: A comment on *S v Nkomo*” (2008) (21) (1) *South African Journal of Criminal Justice* 4.

²⁰⁶ *S v Nkomo* at para 13.

²⁰⁷ *Ibid.*

3.2.6 *S v Vilakazi*

In this case, the appellant was charged and convicted on one count of rape. The victim was 16 years old. This case quoted extensively from the *Malgas* case and the judgment of the Constitutional Court in *Dodo*. It stressed that punishment must always be proportionate to the particular offender for human beings are not to be treated as ‘ends to themselves and never as a means to an end’.²⁰⁸ This court emphasized proportionality by stating that ‘the essence of the cases of *Malgas* and *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice’.²⁰⁹ Terblanche refers to this case as the confirmation judgement of what was held in *Malgas*.²¹⁰

According to the Act, if a victim is of the age of 16, the prescribed sentence is life imprisonment. In this case the High Court had found that there were no substantial and compelling circumstances and had imposed life imprisonment.²¹¹

In this case, the judge passed a comment about the mandatory minimum sentencing regime when it comes to sentencing in rape cases. He mentioned that it was striking that there is no gradation between 10 years’ imprisonment and life imprisonment. The 10 years prescribed for rape progress immediately to life imprisonment once any aggravating factors are present. This is irrespective of how many aggravating factors there are, the degree in which they are present or whether the offender is a first offender or a repeat offender.²¹² The judge in *Vilakazi* was of the

²⁰⁸ 2009(1) SACR 552 (SCA) at para 3.

²⁰⁹ *S v Vilakazi* at paragraph 18.

²¹⁰ S Terblanche *a Guide to Sentencing in South Africa* 3ed (2016) 78.

²¹¹ *S v Vilakazi* at para 7.

²¹² *S v Vilakazi* at para 13.

view that the only solution to dealing with this problem (as it results in disproportionate sentences) is to approach the Act in the manner that was laid down in the *Malgas* case.

The case went on to consider the *Malgas* case. It stated that it is clear from the terms that were used in *Malgas* that before every court imposes a prescribed sentence it has to assess upon the consideration of all the circumstances of the case, whether the prescribed sentence is proportionate to the particular offence that has been committed. This is to be done taking into account all the factors that are traditionally considered in the sentencing process.²¹³ *Vilakazi* quoted from paragraph 14 of *Malgas* which stresses that in the event that substantial and compelling circumstances exist, a court is free to depart from the prescribed sentence. *Vilakazi* further emphasized how erroneous the *Mofokeng* judgement by saying that the *Malgas* case does not say that the prescribed sentences must be imposed as the norm and are to be only departed from only as the exception.²¹⁴

In paragraph 17, *Vilakazi* emphasizes again that for factors to qualify as substantial and compelling they need not be exceptional. The correct approach is that courts are to approach every case conscious of the fact that the legislature has ordained the prescribed sentences as proper for the crimes that are listed. In *Vilakazi* the court a quo had held that prescribed sentences must be imposed in ‘typical cases’ and may be departed from where the case is ‘atypical’. This was said to find no support in the *Malgas* judgement, furthermore, there was no guidance on what a ‘typical’ case was like or guidance on how a ‘typical’ case can be identified.²¹⁵ Any circumstances that would render the prescribed sentence disproportionate to the crime that is listed in the Act would qualify as substantial and compelling and therefore

²¹³ *S v Vilakazi* at para 15.

²¹⁴ *S v Vilakazi* at para 16.

²¹⁵ *S v Vilakazi* at para 19.

justify the imposition of a lesser sentence.²¹⁶ When it comes to disproportionality the question arises about how a court decides whether the sentence is disproportionate to the crime that would have been committed. *Vilakazi* mentioned that this is a question that will be decided by the courts upon the consideration of all the circumstances involved in that case. This it mentioned with the case of *Malgas* in mind. This is evident from the fact that after mentioning it, *Vilakazi* goes on to say that the essence of the *Malgas* and the *Dodo* case is that disproportionate sentences are not to be imposed for whatever reasons and that the courts should not be ‘vehicles of injustice’.²¹⁷

It is important to note that the *Vilakazi* judgement agreed with and applied the logic that was put forward in the *Malgas* case. Paragraph 20 is one of the clear indications among many. In this paragraph *Vilakazi* seems to have discovered the essence of the whole *Malgas* judgement and attempts to sum it up in a simple way and suggesting that this is the correct method of interpretation. Here it was emphasized that there was now no need to revisit constructions of the Act that were considered in the *Malgas* case as the essence of the judgement was that courts are never compelled to impose a disproportionate sentence. The case of whether a sentence is disproportionate or not is to be determined by considering all the material circumstances of the case keeping in mind what the legislature has ordained for that particular crime. Most importantly the prescribed sentence doesn’t need to be ‘shockingly unjust’ before a court can depart from it. It is enough for the sentence to be departed from mainly because it would be unjust.²¹⁸

The Appeal Court in *Vilakazi* was of the view that the court a quo had not made a proper evaluation of the circumstances in which the offence had been committed. If there had been any

²¹⁶ Ibid.

²¹⁷ *S v Vilakazi* at para 18.

²¹⁸ *S v Vilakazi* at para 20.

evaluation, it was mentioned that it was ‘superficial’.²¹⁹ The clear impression that was got from the court a quo was that the prescribed sentence was going to be imposed unless the personal circumstances of the appellant were ‘exceptional.’ *Vilakazi* mentioned that this approach is not permissible according to the test that was set down in the *Malgas* case. It emphasized that *Malgas* required a court to apply its mind as to whether the sentence was proportional to the crime that has been committed and it was clear that the Appeal court felt that the court a quo had not done so.²²⁰

It was on this basis that the Appeal Court felt that the decision that had been taken by the court a quo could not stand. It therefore went on to do an evaluation on whether life imprisonment was the appropriate sentence in accordance with the approach that had been laid down in *Malgas*.²²¹ In making the evaluation the Appeal court mentioned that it had given all the material facts from the record but was going to choose to highlight some of them in order to make a determination whether the maximum sentence would be proportionate to the crime that had been committed.²²²

The Appeal Court highlighted on the facts that there hadn’t been no ‘extraneous’ violence and no physical injury other than that inherent to the offence had been caused, there had been no threat of ‘extraneous’ violence, the appellant had worn a condom which had at least minimized the risk of pregnancy and the transfer of STI’s and the complainants evidence that she was raped twice is curious bearing in mind that the appellant was any charged with 1 count.²²³

Personal circumstances like whether the accused is married or single, how many children one has, whether one is employed or not were said to be under the ‘flimsy’ grounds that were

²¹⁹ *S v Vilakazi* at para 30.

²²⁰ *Ibid.*

²²¹ *S v Vilakazi* at para 31.

²²² *S v Vilakazi* at para 55.

²²³ *Ibid.*

mentioned in *Malgas*. The Appeal Court however mentioned that these factors could be useful in another respect.²²⁴ The question of whether an accused can be expected to offend again is a material consideration when it comes to sentencing according to this case. It was said that this can be determined by looking at the circumstances of the person in question.²²⁵ In casu, the appellant was 30 years old and hadn't been in trouble with the law before, he had stable employment and a stable family. The Appeal Court was of the view that these circumstances did not portray the accused in a negative way or speak badly about his character.²²⁶

The court now went on to view all the factors as a whole. It found that the complainant's age had been the feature that was more aggravating in the whole case. The judge was of the view that the age itself didn't justify what would otherwise have been a sentence of 10 years to be replaced by the maximum sentence of life imprisonment.²²⁷ After consideration of all these factors, the appeal court in *Vilakazi* held that a sentence of fifteen years would be substantial to emphasize the gravity of the offence that was in question. It held that making the accused pay for the rest of his life was a 'grossly disproportionate' sentence.²²⁸

3.2.7 *S v PB*

In the case of *S v PB*²²⁹ the judgement of the trial court held that there had been no substantial and compelling circumstances and that departing from the prescribed sentences would be to do what was warned against in the *Malgas* case about not departing for flimsy reasons and 'speculative hypotheses favorable to the offender'. The court quoted a lot from the *Malgas*

²²⁴ *S v Vilakazi* at para 58

²²⁵ *Ibid.*

²²⁶ *S v Vilakazi* at para 58.

²²⁷ *S v Vilakazi* at para 59.

²²⁸ *Ibid.*

²²⁹ 2011(1) SACR 448 (SCA).

judgement but not in relation to all the aspects that were mentioned in the practical guideline. The judgment stressed more on how the prescribed sentences should be a point of departure.

3.2.8 *S v PB 2013*

In this judgment there were a total of five judges as opposed to the other two cases where the bench consisted of three judges. In this case it was repeated that the prescribed sentences should not be departed from for flimsy reasons.²³⁰ The court also posed a very important question, what it described as ‘the most difficult question’. This question is ‘What are substantial and compelling circumstances’? Terblanche finds this question surprising as the cases of *Malgas* and *Dodo* were supposed to have provided an answer to this question and the courts have had fifteen years to develop the practical interpretation that was put forward in *Malgas*.²³¹ In giving a comment, the case of *S v PB* ‘complained’ that the term substantial and compelling circumstances can be stretched to mean so many things and that it can even accommodate ordinary mitigating circumstances that are ordinarily taken into account during sentencing. It was held that the process of determining substantial and compelling circumstances involve making a value judgement.²³²

S v PB finds the *Malgas* case very ‘illuminating and helpful’, in particular the paragraph which talks about how when a court feels uneasy about the prescribed sentence they are entitled to depart.²³³

²³⁰ Ibid.

²³¹ Ibid.

²³² 2013 (2) SACR 553 (SCA) at para 21.

²³³ S Terblanche *A Guide to Sentencing in South Africa* 2ed (2013) 81.

3.2.9 *S v MS*

In the case of *S v MS*²³⁴ the appellant had been convicted in the regional court for six counts of raping his eleven-year-old step-daughter. He had been sentenced to six terms of life imprisonment which were to run concurrently. This had happened while Mrs KS and gone to a funeral and left four children in the care of the appellant.²³⁵ Upon Mrs KS's return, she noticed that the complainant was sick, could not walk properly and spent most of her time in bed. The complainant only reported the rape five days later and alleged that the appellant had taken all the children's blankets from their bedroom and told them to sleep in his room.²³⁶ Appellant had threatened to kill the complainant and went on to rape her for six consecutive nights.²³⁷ The complainant was under the belief that the appellant would kill her as there was a knife close to her head.²³⁸

Victor J remarked that the appellant's attitude reflected an approach to women (especially his stepdaughter) that wasn't impressive. It shows that he views women as people he can do anything he pleases with.²³⁹ Victor J described the attack as brutal and what made it more brutal was that it had been done to an eleven year old who had been placed under his care. He further emphasized that the prescribed sentences should never be departed from for 'flimsy' reasons.²⁴⁰ With regards to how he was going to go about with the sentencing appeal, Victor J mentioned

²³⁴ 2014 (1) SACR 59 (GNP).

²³⁵ *S v MS* at para 5.

²³⁶ *S v MS* at para 6.

²³⁷ *S v MS* at para 12.

²³⁸ *S v MS* at para 14.

²³⁹ *S v MS* at para 25.

²⁴⁰ *S v MS* at para 25.

that he was going to start by taking into account the traditional factors that must be considered when it comes to sentencing.²⁴¹

In this case the court a quo had considered the Criminal Law Sentencing Amendment Act which lists certain factors that should not be taken into account when considering substantial and compelling circumstances in rape cases.²⁴² The aggravating circumstances that were considered were the following:²⁴³

- a) The victim impact study report.
- b) The fact that the appellant was HIV positive.
- c) The substantial amount of planning it had taken to execute the crime bearing in mind that there was a missing key in the bedroom the children normally slept in.
- d) The complainant will carry emotional scars for the rest of her life. After the rape she had become fearful, did not socialize and had dropped out of school for two years.

Victor J found none of the personal circumstances that were considered by the court a quo to be substantial and compelling. These were the following:²⁴⁴

- a) The appellant had a low schooling level.
- b) He had to take care of his ill mother from a young age.

It was held that at the age of 44 these scars from childhood could not have influenced the appellant to rape his stepdaughter. Furthermore, he had not shown any remorse and no

²⁴¹ *S v MS* at para 25.

²⁴² *S v MS* at para 26

²⁴³ *S v MS* at para 27

²⁴⁴ *S v MS* at para 29

personality disorders had been suggested.²⁴⁵ Victor J described this as ‘the worst possible kind of rape’ and dismissed the appeal which meant the six terms of life imprisonment stood.²⁴⁶

3.2.10 *S v Uithaler*

The case of *S v Uithaler*²⁴⁷ is a more recent case and it can be able to give us a clear picture of case the appellant and the co accused were charged with two counts of rape. The appellant pleaded guilty to both counts. They had approached the complainant and her male companion and then forced the complainant to accompany him to the nearby bushes where he raped her vaginally and anally. The co-accused did the same²⁴⁸. The appellant was sentenced to 28 years’ imprisonment after finding that substantial and compelling circumstances existed for the imposition of a lesser sentence. The Appeal Court mentioned that *Malgas* reminds all the courts that they should keep in mind what the legislature has ordained for a specific crime and take that sentence as the one that should ordinarily be imposed in the event that that crime is committed. It also emphasizes on the fact that *Malgas* mentioned that in the event that substantial and compelling circumstances are present, a court should deviate from the prescribed sentence.²⁴⁹ The circumstances that were taken into account by the court a quo were the following:²⁵⁰

- 1) The fact that the appellant was a first offender.
- 2) The fact that the appellant had pleaded guilty
- 3) The appellant had not used excessive force in the commission of the crime.
- 4) The complainant had suffered no physical injuries

²⁴⁵ *S v MS* at para 29

²⁴⁶ *S v MS* at para 33

²⁴⁷ 2015 (1) SACR 174 (WCC)

²⁴⁸ *S v Uithaler* at para 3

²⁴⁹ *S v Uithaler* at para 11.

²⁵⁰ *S v Uithaler* at para 12.

5) The appellant was relatively youthful

This was the list of factors that the court a quo considered as substantial and compelling. The Appeal Court found it necessary to comment on the fact that because the appellant had not used excessive force, this was taken as a factor that could play a part in the reduction of the sentence. The Appeal Court was of the view that the fact that an accused has not used excessive force in the commission of a rape, does not make the crime of rape 'less reprehensible'.²⁵¹ To emphasize this point, the court quoted the case of *S v MM*²⁵² which mentioned that rape violates a person's most intimate private space. Even if there isn't any violent assault on the complainant, rape is still a 'violent and traumatic infringement'.

In this case it was held that the sentence of 28 years was inappropriate and it was substituted with a sentence of 20 years by the appeal court.²⁵³

3.3 ROBBERY AND MURDER CASES

The robbery and murder cases that will be discussed are *S v Khathi*,²⁵⁴ *S v Mbatha*,²⁵⁵ *S v Chowe*,²⁵⁶ *S v Matyityi*,²⁵⁷ *S v Mahlangu*,²⁵⁸ *Mthembu v S*,²⁵⁹ *Buys v S*,²⁶⁰ *Mogaramedi v S*,²⁶¹

²⁵¹ *S v Uithaler* at para 12.

²⁵² 2013 (2) SACR 292 (SCA).

²⁵³ *S v Uithaler* at para 22.

²⁵⁴ 2008 (2) SACR 689 (W).

²⁵⁵ 2009 (2) SACR 623 (KZP).

²⁵⁶ 2010 (1) SACR 141 (GNP).

²⁵⁷ 2011 (1) SACR 40 (SCA).

²⁵⁸ 2012 (2) SACR 373 (GSJ).

²⁵⁹ 2012 (1) SACR 517 (SCA).

²⁶⁰ (2014) ZAEGHC13 26 March 2014.

²⁶¹ 2015 (1) SACR 427 (GP).

Montsho v S,²⁶² *S v Ngwenya*²⁶³ and *S v Matjeke*.²⁶⁴ It is important to note that in the cases of *Matyityi* and *Mahlangu* the accused persons were charged with both murder and robbery.

3.3.1 *S v Khathi*

The case of *S v Khathi*²⁶⁵ involved the murder of a traffic officer. Mr Khathi had murdered a traffic officer who had been enforcing law under the South African Police Service Act.²⁶⁶ According to the mandatory minimum sentencing laws this warrants a sentence of life imprisonment.

As a starting point, Moshidi J took into account the traditional factors that are taken into account at the beginning of the sentencing enquiry namely deterrence, rehabilitation, prevention and retribution.²⁶⁷ He went on to consider the aggravating factors which he described as ‘conspicuous’ and listed as follows:²⁶⁸

- a) The murder had been premeditated and the way it was committed was ‘vicious’.
- b) The accused was armed with a deadly weapon.
- c) The deceased was shot 8 times at close range and the intention was to steal his firearm and it is common knowledge that weapons are stolen to commit more crime.
- d) The deceased was a law enforcement officer and this was highlighted as a major aggravating factor.
- e) The deceased had been fairly young and had left behind a widow.
- f) The accused had two previous convictions.

²⁶² (20572/2014) [2015] ZASCA 187.

²⁶³ ZAGPPHC 552 7 August 2015.

²⁶⁴ (049/2016) [2016] ZAGPJHC 129 (7 June 2016).

²⁶⁵ *S v Khathi* 2008 (2) SACR 589 (W).

²⁶⁶ 68 of 1995.

²⁶⁷ *S v Khathi* supra at para 3.

²⁶⁸ *S v Khathi* supra at para 4.

With regards to whether a traffic officer falls into the definition of law enforcement officer, Moshidi J held that there is no valid justification for differentiating between a member of the traffic police and a law enforcement officer.²⁶⁹ The following personal circumstances of the accused were mentioned:²⁷⁰

- a) The accused was 27 years of age
- b) He had low levels of education.
- c) He had a minor daughter aged 7 years old and was unmarried.

Moshidi J held that there was nothing extraordinary in the personal circumstances of the accused.²⁷¹ The case of *S v Malgas* was quoted with emphasis on the principle that the prescribed sentences should not be departed from for ‘flimsy reasons’.²⁷²

After considering all the principles of sentencing and taking into account the personal circumstances of the accused, Moshidi J held that there were no substantial and compelling circumstances in this case and went on to impose the prescribed sentence of life imprisonment. He remarked that in cases such as these where members who hold public office are murdered, there is a need to protect society as well as the law enforcement officers and their families and dependents.²⁷³

²⁶⁹ *S v Khathi* supra at para 6.

²⁷⁰ *S v Khathi* supra at para 8.

²⁷¹ *S v Khathi* supra at para 8.

²⁷² *S v Khathi* supra at para 9.

²⁷³ *Ibid.*

3.3.2 *S v Mbatha*

The *Mbatha* case involved a murder. The appellant a 46 year old man had shot and killed the deceased, who was a 49 year old man.²⁷⁴ The appellant and the deceased had been having a discussion about damages worth R2000 that had arisen. Something occurred during the discussion that made the appellant lose control and shoot the deceased.²⁷⁵ The murder fell within Section 51(2) of the Act therefore warranting a sentence of 15 years unless substantial and compelling circumstances were to be shown to exist. A sentence in excess of this had been imposed by the trial court. They had imposed a sentence of 20 years. The appeal was against this sentence.²⁷⁶

Wallis J acknowledged that the *Malgas* case is the authority when it comes to dealing with mandatory minimum sentences.²⁷⁷ He goes on to mention that in the Act there is no provision corresponding to Section 51(3) (a) where the departure from the prescribed sentences is upwards rather than downwards but he is of the view that the remarks or guidelines that were put in *Malgas* are of equal application in a case where a court is considering imposing a sentence that is greater than the prescribed minimum.²⁷⁸ Interestingly enough, Wallis J mentions that despite this it is not a requirement for imposing a greater sentence that there should be substantial and compelling circumstances justifying the imposition of that greater sentence.²⁷⁹

Wallis J proposes the following approach for when a court wants to impose a greater sentence than the prescribed one. The starting point should be the sentence that has been statutorily

²⁷⁴ *S v Mbatha* 2009 (2) SACR 623 (KZP) at para 1.

²⁷⁵ *S v Mbatha* at para 10.

²⁷⁶ *S v Mbatha* at para 10.

²⁷⁷ *S v Mbatha* at para 13.

²⁷⁸ *S v Mbatha* at para 17.

²⁷⁹ *S v Mbatha* at para 18.

prescribed.²⁸⁰ After that, the court needs to make an identification of circumstances that make that particular case out of the ordinary and different from the other cases so as to make the prescribed sentence inadequate.²⁸¹ The court has to ask itself questions about whether in that particular case there exists factors that create a distinction that is material between that case and other cases involving the same offence.²⁸² In his view, this enquiry is ‘converse’ one that is taken when considering the existence of substantial and compelling circumstances. The courts must however keep in mind that in the case of imposing a greater sentence, the court’s discretion is much wider and flexible and not limited by the ‘statutory yardstick’.²⁸³

There was therefore a need according to the proposed approach, to identify the aggravating circumstances that made this case out of the ordinary. Wallis J mentioned that these aggravating factors must be clearly articulated by a court.²⁸⁴ Afterwards there should be a weighing of any factors that point in the opposite direction. When this balance is in favor of the imposition of a greater sentence then a court may do so.²⁸⁵

The court a quo had not expressly mentioned that it was contemplating imposing a sentence that was greater than the prescribed minimum. This was held to be an irregularity by Wallis J.²⁸⁶ There was also no indication that the court a quo had viewed the prescribed minimum sentences as a starting point with the intention of identifying the aggravating circumstances that justified imposition of a greater sentence.²⁸⁷

²⁸⁰ *S v Mbatha* at para 19.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *S v Mbatha* at para 20.

²⁸⁵ *Ibid.*

²⁸⁶ *S v Mbatha* at para 26.

²⁸⁷ According to Wallis J at para 29.

With regards to the factors that had been characterized as aggravating by the court a quo, Wallis J was of the view that they had been incorrectly characterized.²⁸⁸ He points out that the appellant's lack of remorse was wrongly used against him.²⁸⁹ His lack of remorse had been deduced from the fact that he had given an incorrect version of events in the courts. According to Wallis J this was different from those cases where the accused's lack of remorse can be seen through his/her 'past criminality, punishment and recidivism'.²⁹⁰ Inferring an accused's lack of remorse from his choice to exercise his constitutional right to remain silent has its dangers according to Wallis J. Worse is when this is treated as an aggravating circumstance. It was held that it is probably for this reason that remorse comes into the scale only in mitigation rather than as an aggravating circumstance.²⁹¹

The second aggravating factor that had been used by the court a quo was the fact that after having shot the deceased, the appellant continued to fire a second shot in the presence of the deceased's son. Wallis J highlights the insignificance of this and also adds that it cannot burden the moral blameworthiness of the offender that the second shot was in the presence of the deceased's son.

The last aggravating factor that was considered was that the deceased and the appellant had a good relationship and that there were on good terms. Wallis J was unable to see how this was considered to be an aggravating factor.²⁹²

It was held that there had been a misdirection by the trial court with regards to the aggravating circumstances and there was also no attempt to weigh in the mitigating factors.²⁹³ It was for this

²⁸⁸ *S v Mbatha* at para 30.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *S v Mbatha* at para 31.

²⁹² *S v Mbatha* at para 33.

reason that the appeal was upheld and the matter was remitted back to the trial court for sentencing.²⁹⁴

3.3.3 *Mthembu v S*

In this case the appellant had been indicted in the KZN High Court on a charge of murder. His defense was that he had acted in self-defence in order to defend himself against the knife attack by the deceased. His defense was rejected and he was charged and sentenced to 18 years imprisonment, a sentence in excess of the prescribed one.²⁹⁵

What had to be decided by the Appeal Court was the correctness of the *Mbatha* case. The *Mbatha* case had prescribed steps that a court wanting to impose a higher sentences than the prescribed one should take.²⁹⁶ It has been long accepted by the courts that once a court finds that the cumulative impact of all the circumstances justifies the imposition of a higher sentence then a court has no constraints in imposing one.²⁹⁷ In commenting on the *Mbatha* decision, it was mentioned that the fact that subsection 2 of Section 51 of the Act stipulates that the sentence that should be imposed should not be ‘less than’ is the clear indicator that the legislation did not in any way intend to fetter the discretion of the sentencing court as *Mbatha* puts it.²⁹⁸ Ponnan JA and Petse AJA went on to emphasize the *Malgas* principle that the courts are freer to depart from the prescribed sentences and the discretion of when to depart has been deliberately left to them by the legislature.²⁹⁹

²⁹³ *S v Mbatha* at para 34.

²⁹⁴ *S v Mbatha* at para 37.

²⁹⁵ *Mthembu v S* at para 2.

²⁹⁶ *Mthembu v S* at para 4.

²⁹⁷ *Director of Public Prosecutions v Venter* 2009 (1) SACR 165 (SCA).

²⁹⁸ *Mthembu v S* at para 8.

²⁹⁹ *Mthembu v S* para 10.

What follows then from this is that, where a court finds substantial and compelling circumstances to exist, it may exercise its decision to depart upwards or downwards.³⁰⁰ The difference is that there is no indication that a court must enter the substantial and compelling circumstances on record when it chooses to impose a higher sentence.³⁰¹ *Mthembu* goes on to disagree with what was decided in the *Mbatha* case regarding the issue that the defense must be made aware if a higher sentence is in contemplation by the judicial officer. *Mthembu* disagrees that failure to do such results in a defect in the proceedings.³⁰² While it is true that an offender or accused should be made aware that minimum sentencing legislation will apply in their case, the same cannot be said for when a judicial officer contemplates imposing a higher sentence than the prescribed minimum.³⁰³ It is also added that there was no such duty before the coming into operation of minimum sentencing legislation and the Act does not make any provision for such a duty as well.³⁰⁴

It was therefore held that Wallis J's approach in *Mbatha* that failure to 'apprise' the defense that a higher sentence is in contemplation cannot be endorsed.³⁰⁵

The learned judge had identified the following personal circumstances of the appellant:³⁰⁶

- a) He had shown regret.
- b) He was a first offender.
- c) He was a good candidate for reformation.

³⁰⁰ *Mthembu v S* para 11.

³⁰¹ According to subsections 3 (a) mentioned in *Mthembu v S* at para 12.

³⁰² *Mthembu v S* at para 13.

³⁰³ *Mthembu v S* at para 13.

³⁰⁴ *Mthembu v S* at para 14.

³⁰⁵ *Mthembu v S* at para 15.

³⁰⁶ *Mthembu v S* at para 20.

The incident was however identified as one which fell under road rage and there had to be a weighing of society's legitimate interest to drive on the roads without the risk of being murdered with the accused's personal circumstances.³⁰⁷ The case had been compared with the case of *S v Sehlako*³⁰⁸ which had similar facts and had a sentence of 18 years imposed on the offender. The court had found no differences with this case and had imposed the same sentence on the offender. The Appeal Court found no defects with this sentence and the appeal was dismissed.³⁰⁹

3.3.4 *S v Chowe*

In the *Chowe*³¹⁰ case, the appellant had been convicted by the regional court in Soshanguve and one of the counts was robbery with aggravating circumstances.³¹¹ Appellant had been sentenced to the prescribed 15 years imprisonment for this charge.³¹² Appellant had unlawfully robbed the complainant of his Nokia phone with aggravating circumstances being present as a firearm had been used.³¹³ In the court a quo the following circumstances had been considered:³¹⁴

- a) The appellant was 26 years old, he was single and had a child who was 7 years old.
- b) The appellant was employed at SASKO and was earning R3000 a month.
- c) The appellant had a previous conviction of housebreaking and theft but since this did not relate to robbery in any way, the court a quo treated him as a first offender.
- d) The value of the item that had been stolen was R600

³⁰⁷ *Mthembu v S* at para 20.

³⁰⁸ 1999 (1) SACR 67 (W).

³⁰⁹ *Mthembu v S* at para 20 -21.

³¹⁰ 2010 (1) SACR 141 (GNP).

³¹¹ *S v Chowe* at para 1.

³¹² *S v Chowe* at para 1.

³¹³ *S v Chowe* at para 2.

³¹⁴ *S v Chowe* at para 17.

The court a quo had mentioned the *Malgas* case and put emphasis on the fact that in *Malgas* it was held that regard had to be had to all the traditional factors that are taken into account when sentencing. The court a quo also emphasized that for circumstances to qualify as ‘substantial and compelling’ they need not be rare or exceptional.³¹⁵ The interesting part about this judgement is that Mavundla J was of the opinion that in order to consider whether substantial and compelling circumstances exist one had to consider the following things:³¹⁶

- a) The prospect of rehabilitation has to be considered.
- b) One has to look at the value of the goods that have been stolen.
- c) The manner in which the offence was committed should be looked at.
- d) One must look at whether any physical harm was inflicted during the commission of the crime.

In this case, Mavundla J held that the appellant was 26 years old and this made him a good prospect of rehabilitation, the value of the goods that had been stolen was only R600, the complainant had not been harmed in any way and only had a firearm pointed at them. He held that the combination of these factors amounted to substantial and compelling circumstances.³¹⁷ It was on this basis that the sentence of 15 years was substituted with one of 10 years.³¹⁸

3.3.5 *S v Matyityi*

In the Supreme Court judgement of *S v Matyityi*,³¹⁹ Anthony Cannon’s vehicle had been smashed and he had been struck in the face. He was robbed of his phone, cash and bank card. He

³¹⁵ *S v Chowe* at para 18.

³¹⁶ *S v Chowe* at para 25.

³¹⁷ *S v Chowe* at para 27.

³¹⁸ *S v Chowe* at para 28(2).

³¹⁹ 2011 (1) SACR 40 (SCA).

was then driven to a secluded place where his hands were bound and he was then secured to a tree.³²⁰ He gave his attackers a false ATM pin and later gave him a correct one and he eventually managed to free himself when they had gone to try and withdraw money. He then made his way to his uncle's house to get assistance.³²¹ The same assailants struck again, but this time on a couple. They also smashed the window and snatched the key. The boyfriend was beaten down and the guy who had smashed the car's window fondled the girlfriend's breasts and touched her inappropriately. They drove to a secluded area where they raped the woman who was in the car and removed a set of speakers from the car. They then dropped the two victims off. The lady managed to drive to Frere State Hospital but unfortunately her boyfriend was pronounced dead upon their arrival.³²²

The three perpetrators were indicted in the Eastern Cape High Court on one charge of murder and rape and two charges of robbery.³²³ The respondent unlike his co-accused expressed a willingness to plead guilty. Their trials were separated and he was sentenced to 25 years' imprisonment for murder and rape. This was appealed in the *Matyityi* judgment as it was felt that this sentence was too lenient. The *Matyityi* judgement was an appeal for the charges of murder and rape only.³²⁴ According the Criminal Law Amendment Act the prescribed sentences for each of the crimes of murder and rape is life imprisonment unless there are substantial and compelling circumstances. In the judgement of the court a quo of the *Matyityi* case, the court had imposed a prescribed sentence in view of the accused's age and the remorse the accused had displayed during the trial.³²⁵

³²⁰ *S v Matyityi* para 1.

³²¹ *S v Matyityi* para 2.

³²² *S v Matyityi* para 5.

³²³ *S v Matyityi* para 7.

³²⁴ *S v Matyityi* para 8.

³²⁵ *S v Matyityi* para 9.

Before considering whether these amounted to substantial and compelling circumstances, Judge Ponnann expressed his views about what a just sentencing regime would comprise of. Quoting from the case of *Samuels v The State*,³²⁶ the judge said that a just penal policy is one that makes a consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before the court.³²⁷ He goes on to mention that the penal policy should be victim centered, i.e. where the victim is offered a role in the sentencing process through being allowed to describe any physical or emotional pain that they went through because of the crime as well as any social or economic effects that the crime might have had or will have in the future.³²⁸

The Appeal Court noted that the court a quo in imposing their sentence did not understand that the starting point wasn't a clean slate upon which it was free to inscribe whatever sentence it though appropriate. The starting point was actually the prescribed sentences in the Act.³²⁹ This is a point that was emphasized in the *Malgas*³³⁰ case. *Malgas* clearly states that courts are to approach the question of sentencing knowing fully that the legislature had 'ordained' the prescribed sentences as appropriate for the specific crimes listed.³³¹ It is evident that *Matyityi* is endorsing *Malgas* and following the guidelines that it put forward. *Matyityi* goes on to quote paragraph 9 from the *Malgas* case which emphasizes the point that the prescribed sentences are not to be departed from for 'flimsy' reasons and that 'hypotheses favorable to the offender, sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy or legislation'.

³²⁶ (262/03) (2010) ZASCA 113 (September 2010).

³²⁷ *S v Matyityi* at para 16.

³²⁸ *Ibid.*

³²⁹ *S v Matyityi* at para 18.

³³⁰ *S v Malgas* at para 8.

³³¹ *Ibid.*

The Appeal Court went on to take a closer look at the facts of the case. They noted that the two incidences were five days apart, the respondent had been the ringleader in both the incidents, the two incidents had been executed with great brutality and the respondent was involved when it came to driving the car and all the other necessary things that had to be done for the successful completion of the crime.³³² The damage done to the victims was also highlighted in an attempt to justify that the sentence that had been imposed by the court a quo had not been properly considered.³³³ The judge found that there was nothing that could lessen the moral blameworthiness of the offender.³³⁴ The two reasons that had been advanced for departing from the prescribed minimum sentences were shown to have no factual basis. The judge in the court a quo had ignored the gravity of the offence and chose to focus on the personal interests of the offender. This was what the legislature was guarding against when it enacted the Act. The Act wants a severe, standardized and consistent response from the courts when it comes to serious crime. The judge in the court a quo had been motivated by maudlin sympathy and this is not sufficient enough to qualify as ‘substantial and compelling’.³³⁵

In paragraph 23, the court in *Matyityi* further emphasizes what was put forward by the *Malgas* case. It mentions how courts are quick to depart from the prescribed sentences for the flimsiest of reasons and how courts despite them having personal doubts as to the efficacy of this legislation, should implement those sentences.³³⁶ In conclusion, the Appeal Court in *Matyityi* held that the accused’s age and the remorse he had displayed during the trial did not amount to substantial and compelling circumstances.³³⁷ This decision was arrived at using the method of interpretation that was put forward in the *Malgas* case. The sentence by the court a quo was held to be

³³² *S v Matyityi* at para 19.

³³³ *S v Matyityi* at para 20.

³³⁴ *S v Matyityi* at para 21.

³³⁵ *Ibid.*

³³⁶ *S v Matyityi* at para 23.

³³⁷ *S v Matyityi* at para 24.

disproportionate to the crime and the interests of the society.³³⁸ The sentence of 25 years was therefore substituted to imprisonment for life for both the rape charge and the murder charge.³³⁹

3.3.6 *S v Mahlangu*

The case of *S v Mahlangu*³⁴⁰ involved robbery with aggravating circumstances (which warrants a sentence of 15 years), unlawful possession of firearms and ammunition (carry a maximum sentence) and murder that is committed in the course of a robbery (warranting life imprisonment). In this case, Judge Satchwell was obliged to impose a sentence of 15 years in respect of the robbery and life imprisonment on the other charge if substantial and compelling circumstances did not exist.

Satchwell went on to consider the circumstances of the case. Firstly, he mentioned the ages of the accused persons. Accused 1 was 20 years old, accused 2 was 25 years old and accused 3 was almost 22 at the time of the commission of the crime.³⁴¹ The judge remarked that this age group is one that the courts usually describe as youthful and people in this age group usually have youthfulness taken as a mitigating factor when it comes to sentencing.³⁴² The people in this age group are treated more leniently when it comes to sentencing because they are thought to be less mature and prone to influence and are sometimes irresponsible.³⁴³ Satchwell was however quick to say that youthfulness is not an automatic factor when it comes to determining what substantial and compelling circumstances are.³⁴⁴ In the present case the youngest one had exercised the most

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ *S v Mahlangu* 2012(2) SACR 373 (GSJ).

³⁴¹ *S v Mahlangu* at page 2.

³⁴² Ibid.

³⁴³ *S v Mahlangu* at page 3

³⁴⁴ Ibid.

influence.³⁴⁵ The judge also mentioned that youthfulness ceases to be a mitigating factor when it is weighed against factors like the gravity of the offence. The gravity of an offence outweighs youthfulness.³⁴⁶

The next factor that was considered was the amount of time the accused persons had spent in custody. They had been incarcerated for 1 year 11 months without having been found guilty. Accused 1 was however serving a sentence of two years imprisonment for theft so this consideration excludes him.³⁴⁷ It was noted that being an incarcerated person is very hard, especially for prisoners awaiting trial. Prisoners who are awaiting trial do not receive benefits of remission, parole or amnesties.³⁴⁸ Accused 2 and 3 had suffered great hardships while awaiting trial and this was a factor that the judge decided to take into account.³⁴⁹

The third factor was the circumstances under which the accused persons had grown up. Some of the parents were in employment and some were not. None of the accused persons had completed high school and had had training for any skills.³⁵⁰ They had been doing piece jobs but never had enough to take care of themselves or their family.³⁵¹ The judge remarked that in such circumstances there is a great temptation to go for the quicker ways to make money through theft and robbery.³⁵² Satchwell then made an important comment that despite this, it was important to note that the accused persons had not only committed theft and robbery but they had committed murder as well. This was important to bear in mind.³⁵³ The second important comment that

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ *S v Mahlangu* at page 4

³⁴⁸ Ibid.

³⁴⁹ *S v Mahlangu* at page 5

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid.

Judge Satchwell made was that there are a lot of young people that grow up under the same circumstances as the accused persons and it's not all of them that turn to crime as a means of survival.³⁵⁴

The fourth factor that was taken into account was that the murder had been premeditated.³⁵⁵ This is an aggravating factor. The final factor Judge Satchwell took into account was that the accused persons had each played different roles in the execution of the crime.³⁵⁶ Accused 1 had been the leader as he had a lot of information regarding the victims.³⁵⁷

These were the five factors that Judge Satchwell took into account in order to make a decision whether substantial and compelling circumstances existed in this case. After this, she went on to consider the *Malgas* case. It referred to this case as the one that is consulted with regards to any matters that involve minimum sentencing legislation. The following points put forward in the *Malgas* judgment were emphasized in this case³⁵⁸:

- 1) The judge mentioned that *Malgas* held that the reason for enactment of the minimum sentencing legislation was so there is a 'severe, standardized and consistent' response from the courts with regard to crime.
- 2) This case emphasized the point put forward in *Malgas* that the emphasis now has shifted to the gravity of the crime
- 3) Thirdly, another point from *Malgas* that was emphasized is that for factors to qualify as substantial and compelling there must be truly convincing reasons.

³⁵⁴ *S v Mahlangu* at page 6.

³⁵⁵ *Ibid.*

³⁵⁶ *S v Mahlangu* at page 7.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

- 4) The judgment in *Mahlangu* also reiterated that the cumulative impact of all the circumstances must be measured against the yardstick of substantial and compelling in order to make a determination.³⁵⁹

It is important to note how Judge Satchwell summed up the task before him. In her own words

‘I as the sentencing court, I’m obliged to take into account all the relevant factors and look at their combined impact to see whether they are convincing enough to justify a deviation from the prescribed minimum sentence’.³⁶⁰

She then went on to consider the factors. In favor of the accused persons was the fact that they were relatively young and two of them had been in custody for a long time. Against them was the fact that the crime they had committed was brutal.³⁶¹ In light of this, Satchwell J concluded that there existed no substantial and compelling circumstances in this case. She went on to impose life imprisonment for the murder and 15 years in respect of the robbery.

3.3.7 Buys v S

In the case of *Buys v S*³⁶² the appellant had been charged with robbery with aggravating circumstances and had pleaded guilty to the charges. He was sentenced to 15 years imprisonment as prescribed and the regional magistrate court had not found any substantial and compelling circumstances.³⁶³ The appellant had jumped over a wall, gained access to a guesthouse and had held a certain Mrs. E.N with a toy gun (which at that time she believed was a real firearm). The

³⁵⁹ *S v Mahlangu* at page 8.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² (2014) ZAECGHC13 26 March 2014.

³⁶³ *S v Buys* at para 1.

appellant had then proceeded to take several items from the room to the value of R40 000.³⁶⁴ The basis of the appeal was that the appellant's personal circumstances had not been accorded proper recognition and this was done by overemphasizing the seriousness of the crime that had been committed.³⁶⁵

The Appeal Court then had to examine the personal circumstances of the accused in order to ensure that they had not been underemphasized. The circumstances that existed were that the appellant was the youngest of 5 children and had been raised by a single mother. He was also the father of a baby boy who lived with his unemployed mother. The appellant did not earn a lot of money.³⁶⁶ The defence had also highlighted the fact that the appellant had shown remorse as he had pleaded guilty and gave evidence in court to that effect. There was also no real danger during the commission of the crime as a toy gun had been used and no person was injured in the process except the appellant himself who had been bitten by police dogs.³⁶⁷ In addition, all the goods that the appellant had taken from the guest house had been recovered and no damage had been done to the property.³⁶⁸

The Appeal Court went on to evaluate this circumstances. The first thing that was mentioned was that the appellant had not been a first offender and had shown no real appreciation of the seriousness of the crime that he had committed.³⁶⁹ It was held that the fact that there had been in absence of violence when the crime was committed did not amount to a substantial and compelling circumstance as it was only due to the fact that Mrs. E.N had cooperated with the

³⁶⁴ *S v Buys* at para 5.

³⁶⁵ *S v Buys* at para 7.

³⁶⁶ *S v Buys* at para 8.

³⁶⁷ *S v Buys* at para 9.2.

³⁶⁸ *S v Buys* at para 9.3.

³⁶⁹ *S v Buys* at para 12.

appellant's instructions.³⁷⁰ The Appeal Court highlighted that the appellant had gained access by jumping over a wall that had been built for safety. The guests who had lost their possessions were highly unlikely to return to the guest house meaning that the business of the owner had been significantly affected as a result of the crime the appellant had committed.³⁷¹

It was also highlighted that luxury items had been stolen.³⁷² It was also held significant for the purposes of sentencing to note that within the period where the appellant had a suspended sentence for theft he had committed an armed robbery.³⁷³ After analyzing the personal factors, it was held that the seriousness of the crime was significant and it outweighed the personal circumstances of the accused.

3.3.8 *Mogaramedi v S*

In this case, the appellant had been convicted on a charge of murder in the North Gauteng High Court and had been sentenced to life imprisonment.³⁷⁴ The appellant had been a sangoma 10 years before committing the offence. He had been asked to get the genitals of a close female relative as part of his initiation. He lured his young sister and while she was sleeping he hit her with an axe twice on the head. He was arrested while in possession of the genital organ.³⁷⁵

The personal circumstances that had been taken into account by the court a quo were:³⁷⁶

- a) The accused was 49 years old, a first offender and had been working as a security guard and had been in custody months prior to the sentencing.

³⁷⁰ *S v Buys* at para 13.

³⁷¹ *S v Buys* at para 14.

³⁷² *S v Buys* at para 15.

³⁷³ *S v Buys* at para 16.

³⁷⁴ *S v Mogaramedi* at para 1.

³⁷⁵ *S v Mogaramedi* at para 4

³⁷⁶ *S v Mogaramedi* at para 32.

- b) The accused has three children.
- c) He had been a practicing sangoma for 10 years.

Despite this, it was held that this case was one of ‘exceptional seriousness’ and the court had to send a strong message to the public that such a crime will not be taken lightly.³⁷⁷ The following aggravating circumstances were held to warrant the imposition of the prescribed sentence of life imprisonment:³⁷⁸

- a) The aim of the offence had been to unlawfully remove the genital organs of the deceased.
- b) The appellant had attacked the deceased while she slept, hitting her twice in the head with an axe and stabbing her underneath her left breast until she had died. He then proceeded to cut off her genital organ.
- c) The crime was described as a ‘heinous, callous, brutal’ murder against the appellant’s own sister, a person who trusted him. It was mentioned that the appellant had shown a disregard for human life and the fact that he had carefully planned the crime did not make things any better.

3.3.9 *Montsho v The State*

In *Montsho*³⁷⁹ the appellant had been convicted of murder and sentenced to life imprisonment after the court had found that substantial and compelling circumstances were not present.³⁸⁰ The appellant had put the deceased on the ground, undressed him and then went on to inflict twelve stab wounds with his knife. Afterwards he had thrown the knife away and left the scene leaving

³⁷⁷ *S v Mogaramedi* at para 36.

³⁷⁸ *S v Mogaramedi* at para 33.

³⁷⁹ (20572/2014) [2015] ZASCA 187 (27 November 2015).

³⁸⁰ *S v Montsho* at para 3.

the deceased lying helplessly on the ground crying.³⁸¹ The Appeal court had to make a determination on whether the trial court had erred in finding that there were no substantial and compelling circumstances warranting a departure from the prescribed sentence of life imprisonment.

The court acknowledged that the starting point when it comes to dealing with the minimum sentencing regime is the case of *Malgas*.³⁸² Counsel of the appellant had put forward the following mitigating factors with the view that these were enough to warrant a departure from life imprisonment:³⁸³

- a) The appellant was 25 years old at the time of the commission of the crime.
- b) The appellant had pleaded guilty to the charge and this showed that he had remorse for his actions.
- c) The appellant had one previous conviction of assault.
- d) He had worked as a traditional healer.
- e) He was unmarried.
- f) He had been diagnosed with an antisocial personality disorder and was described as narcissistic.

The court in *Montsho* took instructions from *Matyityi* regarding the question of whether a plea of guilty amounts to remorse.³⁸⁴ In *Matyityi*³⁸⁵ a plea of guilty was held to be a neutral factor and it was emphasized that there is a difference between regret and remorse. It was remarked that whether or not an accused is remorseful is a factual question that is to be deduced from the

³⁸¹ *S v Montsho* at para 6.

³⁸² *S v Montsho* at para 15.

³⁸³ *S v Montsho* at para 16.

³⁸⁴ *S v Montsho* at para 16.

³⁸⁵ *S v Matyityi* at para 13.

actions of the accused and not merely what he/she says in court. The appellant had alleged that he did not remember why he had taken the deceased away and this shows that he minimized the moral culpability he had and this goes against him being remorseful.³⁸⁶

On his own version of events the appellant had said that after the murder he had become scared and was in fear of how the community would react. This shows that he was more concerned about his own wellbeing.³⁸⁷ The factor that was put forward about the appellant being 25 years old was struck down on the basis that there was nothing to show that he was an immature person.³⁸⁸ Counsel of the appellant conceded that the mitigating factors they had put forward were neutral but argued that if viewed cumulatively they could amount to substantial and compelling circumstances. The court did not understand how this could be and reiterated *Malgas*³⁸⁹ remarks that sentences should not be departed from for ‘flimsy reasons and speculative hypotheses favorable to the offender’.³⁹⁰

In conclusion, it was found that there were no substantial and compelling circumstances and the appeal was dismissed. The murder was described as ‘appalling’, ‘horrific’ and ‘heinous’ and that life imprisonment was the only appropriate sentence.³⁹¹

3.3.10 *S v Ngwenya*

The *Ngwenya* case involved a charge of robbery with aggravating circumstances. The court a quo imposes the prescribed 15 years of imprisonment for the charge.³⁹² Counsel for the appellant

³⁸⁶ *S v Montsho* at para 17.

³⁸⁷ *S v Montsho* at para 18.

³⁸⁸ *S v Montsho* at para 18.

³⁸⁹ *S v Malgas* at para 9.

³⁹⁰ *S v Montsho* at para 18.

³⁹¹ *S v Montsho* at para 20.

³⁹² *S v Ngwenya* ZAGPPHC 552 7 August 2015 at para 1.

argued that the following factors had not been given due weight by the court a quo in deciding whether substantial and compelling circumstances existed³⁹³:

- a) Appellant was employed and he was the breadwinner of his extended family.
- b) The incarceration would have negative effects on his minor children.
- c) There was no evidence that the appellant would offend again.
- d) The appellant could be rehabilitated through a shorter term of imprisonment.

Counsel for the state argued that the Supreme Court of Appeal should confirm the sentence because the personal circumstances of the appellant had been taken into account by the court a quo. They also highlighted the following factors:³⁹⁴

- a) The victim had been robbed while a firearm was pointed at their head.
- b) The victim had received threats of death.
- c) At that time the appellant was a member of the South African Police Service and had abused his position of trust.

The SCA went on to highlight the seriousness of the crime of robbery and mentioned that the fact that it has been listed under the crimes which warrant mandatory minimum sentences shows that the parliament views it as a very serious crime.³⁹⁵ The fact that the appellant was a member of the SAPS did not work in his favor. The SCA highlighted that it is a societal need that police officers who take advantage of members of the public be removed from the society. It was also

³⁹³ *S v Ngwenya* ZAGPPHC 552 7 August 2015 at para 12.

³⁹⁴ *S v Ngwenya* supra at para 13.

³⁹⁵ *S v Ngwenya* supra at para 16.

highlighted that they must be taught a lesson in order to deter other police officers from committing similar crimes.³⁹⁶

After taking into account the personal circumstances of the appellant the SCA found that there were no substantial and compelling circumstances in this case and went on to impose the prescribed sentence of 15 years.³⁹⁷

3.3.11 *S v Matjeke*

In *Matjeke* the accused was convicted of premeditated murder and robbery with aggravating circumstances.³⁹⁸ Judge Ratshibvumo made remarks that when it comes to sentencing under minimum Sentence legislation, the approach has now become well developed.³⁹⁹ The following points made in the *Malgas* case were emphasized:

- a) The courts must approach crimes with prescribed sentences conscious of the fact that the legislature has ordained life imprisonment for those crimes.
- b) The prescribed sentences should not be departed from for ‘light flimsy’ reasons.⁴⁰⁰
- c) The cumulative impact of all the factors must be measured against the yardstick of ‘substantial and compelling’ to see if a departure is warranted.⁴⁰¹
- d) The ‘proportionality’ element was emphasized using the *Vilakazi* case.⁴⁰²

These were the points that this case emphasized from the *Malgas* case. Judge Ratshibvumo went on to list the following factors which he held to be substantial and compelling in this case:⁴⁰³

³⁹⁶ *S v Ngwenya* supra at para 16.

³⁹⁷ *S v Ngwenya* supra at para 18.

³⁹⁸ *S v Matjeke* at para 1.

³⁹⁹ *S v Matjeke* at para 11.

⁴⁰⁰ *S v Matjeke* at para 12.

⁴⁰¹ *S v Matjeke* at para 12.

⁴⁰² *S v Matjeke* at para 13.

- a) Accused had consumed alcohol which had influenced him.
- b) His motor vehicle had been shot at and two of his passengers had been struck with bullets.
- c) The accused had surrendered himself to the police and had not concealed the fact that he was a driver.
- d) The prescribed sentences are disproportionate to the offender, the crime and the legitimate needs of the society.

⁴⁰³ *S v Matjeke* at para 20.

CHAPTER FOUR

A discussion of the Minnesota sentencing guidelines and a comparison with South Africa's mandatory minimum sentencing regime.

4.1 Introduction.

As can be seen from the previous chapters, there are problems with consistency in interpreting the provisions in the Act. This chapter will discuss the sentencing guidelines of the state of Minnesota in the United States of America to establish whether the South African sentencing system can adopt some solutions to the problem of interpreting 'substantial and compelling'. The term 'substantial and compelling' is said to have been taken from the Minnesota guidelines. Van Zyl Smit mentions that this term is not found in South African law but it appears to have been taken from modern American sentencing practices.⁴⁰⁴

Since the year 1994 there were problems with the sentencing system (as discussed in Chapter 1). One of the responses from the government regarding these sentencing problems was asking the South African Law Commission to investigate and find proper solutions. It was then that a committee under the leadership of Leonora Van der Heever was appointed.⁴⁰⁵ The committee was opposed to the imposition of mandatory minimum sentences but it decided to launch an investigation into the matter.⁴⁰⁶ To aid in the investigation, it developed an issue paper which was open to public comment and one of the options for reform in that issue paper was the

⁴⁰⁴ D Van Zyl Smit "Mandatory Minimum Sentence and departures from them in substantial and compelling circumstances" (1999) 15 *SAJHR* 271.

⁴⁰⁵ South African Law Commission Report Project 82 *Sentencing (A new sentencing framework)* 2000 accessed at http://www.justice.gov.za/salrc/reports/r_prj82_sentencing%202000dec.pdf accessed on 31 July 2017 5.

⁴⁰⁶ *Ibid.*

enactment of sentencing guidelines with the Minnesota sentencing guidelines in the USA cited as the best example.⁴⁰⁷ It is for this reason that this Chapter will look at these guidelines.

After the Sentencing Guidelines are discussed, there will be a comparison with the South African Mandatory Minimum sentencing laws. Minnesota is of great importance as it is said that the phrase ‘substantial and compelling’ was probably adopted from its sentencing guidelines.⁴⁰⁸ Finally, the criticisms that have been labelled against the Minnesota guidelines and South Africa’s mandatory minimum sentencing regime will be discussed.

4.2 The historical development of the Minnesota Sentencing Guidelines.

In May 1980, the state of Minnesota was the first American states to put into effect a sentencing system that includes the use of sentencing guidelines.⁴⁰⁹ In the early 1970’s there had been an ‘indeterminate’ scheme that was in place.⁴¹⁰ The sentences were not fixed but they were in wide ranges such as ‘15-25years’.⁴¹¹ As a result, there were a lot of sentencing disparities that existed in the system.⁴¹² It was because of this that an independent sentencing commission was tasked to come up with binding sentencing guidelines. The policy makers wanted sentences that were

⁴⁰⁷ South African Law Commission Report Project 82 *Sentencing (A new sentencing framework)* 2000 accessed at http://www.justice.gov.za/salrc/reports/r_prj82_sentencing%20_2000dec.pdf accessed on 31 July 2017 6.

⁴⁰⁸ D Van Zyl Smit “Mandatory Minimum Sentences and departures from them in substantial and compelling circumstances” (1999) 15 *SAJHR* 270.

⁴⁰⁹ SS Terblanche “Sentencing Guidelines for South Africa: Lessons from elsewhere” (2003) 120(4) *South African Law Journal* 861.

⁴¹⁰ Ibid 863.

⁴¹¹ Ibid 863.

⁴¹² Franklin E Zimring et al *Punishment and Democracy: Three Strikes and You Are Out in California* (2001) 212

uniform and predictable. Legislators also felt that the parole board was disregarding the seriousness of certain offences by releasing offenders sooner than expected.⁴¹³

The Commission that was established comprises of eleven members that are appointed by the governor. The members include:⁴¹⁴

- a) a state supreme court justice
- b) two trial court judges
- c) prosecuting attorney
- d) defense attorney
- e) commissioner of corrections
- f) parole board chair
- g) 3 citizen members one of which must be the victim of a crime.

The Commission decided to adopt a grid system as part of the sentencing guidelines. The decision to adopt the grid or matrix that is used in the Minnesota guidelines was influenced by a variety of factors. It was influenced by existing federal and state parole guidelines, previous experiments that had been done with voluntary sentencing guidelines and the statutory directives that had been given to the commission when they were drafting the guidelines. The directives were that the recommended sentences had to be based on ‘reasonable offence and offender characteristics’ and they had to take consideration of existing sentencing practices.⁴¹⁵

⁴¹³ AJ Morley “Minnesota Sentencing Guidelines Commission: An analysis of sentence fairness and prison population” (2014) *Celebrating Scholarship and Creativity Day* accessed at http://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?article=1004&context=elce_cscday on 25 August 2017 4

⁴¹⁴ Ibid.

⁴¹⁵ F Richard, “Sentencing Guidelines in Minnesota 1978-2003” (2005) *Crime and Justice* 131 accessed at http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1501&context=faculty_articles on 22 August 2017 146.

The Commission's research found that when it comes to sentencing the two most influential factors when it came to determining a sentence are the offender's criminal history score and the type of offence they committed.⁴¹⁶

4.3 The Guidelines.

The Sentencing Guidelines in the state of Minnesota embody the following principles:⁴¹⁷

- Sentencing must be neutral to race, age, social or economic status, and gender of an offender.
- The severity of a sentence should increase in proportion to offence severity or the offender's' history or both.
- Commitment to Commissioner of Corrections is the most severe sanction but it is not the only severe option that is available to the courts.
- To avoid prison overcrowding, confinement should only be for those offenders who are convicted of serious offences or those who have long criminal histories.
- Although the guidelines are advisory, the presumptive sentences have been deemed appropriate and departure from them should only be done when there are 'substantial and compelling' circumstances that can be identified and put on record.

The Sentencing Guidelines consist of two types of sentences which are:

- Presumptive Sentences⁴¹⁸ - These are the sentences that are found on what are called grids. They are named 'presumptive' because they are presumed to be appropriate for certain offences that share the same type of severity and certain characteristics.

⁴¹⁶ Ibid.

⁴¹⁷ "Minnesota Sentencing Guidelines and Commentary 2017" available at <http://mn.gov/msgc-stat/documents/2017Guidelines/2017Guidelines.pdf> accessed on 16 September 2017 at page 2.

⁴¹⁸ Ibid 4.

- Mandatory Minimum Sentences⁴¹⁹- These are minimum executed⁴²⁰ sentences. Their durations are specified in the statutes for offenders who have been convicted of certain felony⁴²¹ offences.

4.4 THE PRESUMPTIVE SENTENCES

4.4.1 The grid/Matrix

The Minnesota guidelines are characterized by a grid or a matrix. The ‘presumptive’ sentence is found in the appropriate grid (there are different grids for crimes) located at the intersection of the criminal history score and the severity level.⁴²² Severity of offence and criminal history score are the two dimensions that are most important for sentencing in the state of Minnesota.⁴²³

1) Severity Level

The general rule is that the applicable offence severity level is determined by the conviction offence.⁴²⁴ There exists an Offense Severity Reference Table and the severity level for each felony offence is found in section 5A.⁴²⁵ There is no severity level for first degree murder because by law the crime is punishable by a mandatory life sentence.⁴²⁶ There are some offences that are unranked when it comes to severity levels. In such a case, the court must assign a

⁴¹⁹ Ibid 4.

⁴²⁰ Executed means the person will be committed to the custody of the Commissioner of Corrections

⁴²¹ ‘Felony’ is a word used in the American context to mean serious crimes.

⁴²² “Minnesota Sentencing Guidelines and Commentary 2017” available at <http://mn.gov/msgc-stat/documents/2017Guidelines/2017Guidelines.pdf> accessed on 16 September 2017 at page 8.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Ibid.

⁴²⁶ Ibid.

severity level and specify on record why they chose that particular severity level.⁴²⁷ The factors that a court may consider in doing this are as follows (this is not an exhaustive list)⁴²⁸:

- a) Gravity of the conduct done in the unranked offence.
- b) the severity level that is assigned to any offence with similar elements to that particular unranked offence
- c) The conduct of and severity level assigned to offenders who have committed a similar offence.
- d) Severity level assigned to other offenders engaged in similar conduct.

2) Criminal History

The horizontal axis on the Sentencing Guidelines grids is the criminal history.⁴²⁹ An offender's criminal history is the total of points from the following:⁴³⁰

- a) prior felonies
- b) custody status at time of offence
- c) prior misdemeanors and gross misdemeanors
- d) prior juvenile adjudication

3) Finding the presumptive sentence

The question that now arises is how a presumptive sentence is found using the grid/matrix. The Presumptive sentence is found in the appropriate cell on the applicable grid for a particular offence.⁴³¹ It is found where the criminal history score (on the horizontal axis) meets the severity

⁴²⁷ Ibid 9.

⁴²⁸ Ibid 9.

⁴²⁹ Ibid 10.

⁴³⁰ Ibid 10.

⁴³¹ Ibid 35.

level which is on the vertical axis. The grid/matrix has shaded and unshaded areas. For the cases contained in the shaded areas it means the sentence should be stayed⁴³² unless the conviction carries a mandatory minimum sentence. In the unshaded areas it means the sentence should be executed.⁴³³

The presumptive sentence lengths are shown in months and the commission's intention was that they be calculated with reference to calendar months.⁴³⁴ In instances where the presumptive sentence length is more than the statutory maximum sentence, the statutory maximum sentence becomes the presumptive sentence.⁴³⁵

The presumptive sentences came into constitutional trouble in the case of *Apprendi v New Jersey*.⁴³⁶ It was indicated that some of the aspects involved in the presumptive guidelines infringe on the right of a defendant to a jury trial under the Sixth Amendment of the United States.⁴³⁷

4.4.2 Departure from the Guidelines

This is a very important part of the Sentencing Guidelines of the state of Minnesota (in relation to the topic). The sentences that are provided in the grids are the sentences that must be imposed for the specific crimes that are stipulated there. The courts must impose the sentence 'of the

⁴³² A stayed sentence is one where the felon is transferred to the Commissioner of Corrections to serve the prison sentence, when the sentence is executed it means that the sentence is to be served in prison.

⁴³³ "Minnesota Sentencing Guidelines and Commentary 2017" available at <http://mn.gov/msgc-stat/documents/2017Guidelines/2017Guidelines.pdf> accessed on 16 September 2017 at page 35.

⁴³⁴ Ibid 39.

⁴³⁵ Ibid 40.

⁴³⁶ 530 US 477 (2000).

⁴³⁷ SS Terblanche "Rape Sentencing with the aid of sentencing guidelines" (2006) 39 *Comparative and International Law Journal of South Africa* 3.

applicable disposition and within the applicable range’ unless there exists ‘identifiable substantial and compelling circumstances.’⁴³⁸

It is important to note that the words ‘substantial and compelling’ are also used by the Criminal Law Amendment Act of South Africa. A judge can only depart from the prescribed mandatory minimum sentences if there are substantial and compelling circumstances warranting a departure. It is also important to note that these departures are not controlled by the guidelines. The departure in itself is an exercise of judicial discretion.⁴³⁹ When departing from the presumed sentence, the court must in writing, state the particular substantial and compelling circumstances that make the departure more appropriate than the sentence in the grid.⁴⁴⁰ ‘These reasons must be stated in the sentencing order and included in the departure report and filed with the Commission’.⁴⁴¹ The Criminal Law Amendment Act in South Africa does also stipulate that the substantial and compelling circumstances must be entered on record.

This departure report has to be filed within 15 days after sentencing and it has to be filed with the Commission.⁴⁴² The defendant in question has rights to a jury trial determining whether the aggravating factors considered have been proven beyond a reasonable doubt.⁴⁴³ If the departure facts i.e. the facts that are depended upon by the judge in question to depart from the presumptive sentence, are proved beyond a reasonable doubt the court may exercise its discretion to depart.⁴⁴⁴ The reasons that support the departure including all the aggravating and mitigating

⁴³⁸ Ibid 4.

⁴³⁹ Ibid 41.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

⁴⁴² Ibid. 42

⁴⁴³ Ibid. 42

⁴⁴⁴ Ibid. 42

factors must be substantial and compelling to overcome the presumption in favor of the guidelines sentence.

It is said that the purposes of these guidelines will be undermined if the presumptive sentences are departed from on a regular basis. The aim of reducing sentencing disparity will also not be achieved.⁴⁴⁵ This was the same comment that was made in the *Malgas* case. In South African law *Malgas* guides the courts not to depart from the mandatory minimum sentences for flimsy reasons as this would undermine what the legislature intended as discussed in Chapter 2.

4.4.3 Factors that should not be used as reasons for departure

Perhaps the most interesting part about the sentencing guidelines of Minnesota is that they stipulate the factors that should not be used as reasons to depart from the presumptive sentences. This means that these factors are not regarded as substantial and compelling and if any of them are present, the sentence that is deemed by law as appropriate is the one that must be imposed in that case. The following factors are not to be regarded as reasons for departure in the state of Minnesota:

- a) A person's race
- b) Employment factors including
 - 1) Occupation or impact of sentence on profession
 - 2) Employment history
 - 3) Employment at the time of offence or sentence
- c) Social factors including
 - 1) Educational attainment
 - 2) Living arrangements at the time of offence or sentencing

⁴⁴⁵ Ibid. 42

- 3) Length of residence
- 4) Marital status
- 5) Defendant's exercise of constitutional rights during the adjudication process.

The Commission took the position that sentencing is neutral with respect to an offender's sex, race and the amount of money one earns. This is why employment factors are listed as these are related to the sex, race and income level. The Commission also took the position that employment is a factor that can be manipulated hence it is listed. There is a chance that offenders can obtain employment during the time between arrest and sentence as an attempt to reduce the severity of their sentences.⁴⁴⁶

4.4.4 Factors that may be used as reasons for departure

Factors that can be used to depart from the sentences are also given in the guidelines. This list of factors is non- exhaustive. It includes the following factors⁴⁴⁷:

4.4.4.1 Mitigating factors

- a) Where the victim was an aggressor in the incident.
- b) Where the offender played a minor or passive role in the crime or participated under the circumstances of coercion or duress
- c) Where the offender lacked the substantial capacity to completely judge the situation. The voluntary consumption of intoxicants like drugs or alcohol does not fall under this category.

⁴⁴⁶ Ibid 45.

⁴⁴⁷ Ibid 45.

d) Offender's presumptive sentence is a commitment but not a mandatory minimum sentence and there is existence of either of the following:

- Where the current conviction offence is a severity level 1 or 2 and the offender received all of his/her prior sentences during less than 3 separate appearances in court.
- Where the current conviction is at severity level 3 or severity level 4 and the offender has received all of his/her prior felony sentences during one court appearance.

e) Other grounds exist that reduce the offender's culpability even though these grounds do not amount to a defence.

f) Where the offender has a serious persistent mental illness and the court is ordering alternative placement.

g) Where the offender can be put on probation. This factor can but need not be supported by the fact that offender is open to join a certain program of individualized treatment.

h) In the case of a controlled substance, where the offender is found by the district court to be chemically dependent and if they have been accepted by or can respond to a treatment program.

4.4.4.2 Aggravating Factors⁴⁴⁸

- a) The victim was particularly vulnerable because of his/her age, reduced physical or mental capacity and offender knew or should have known.
- b) Where a victim is treated with cruelty for which the offender is responsible.

⁴⁴⁸ Ibid 46-49.

- c) Where the conviction is for a criminal sexual offence or an offence where the victim was injured and the offender has a prior conviction for criminal sexual conduct or an offence in which the victim was injured.
- d) If the offence was a major economic offence. The presence of the following factors will aggravate it:
- Where the offence involved a lot of victims or a lot of incidents per person.
 - Where the offence involved an attempted monetary loss greater than the usual offence or greater than the minimum loss specified in the statutes.
 - Where the offence was sophisticated and planning of it happened over a long period of time.
 - Where the defendant used his/her status to facilitate the commission of the offence.
 - Where defendant has been involved in other conduct similar to the offence.
- e) If the offence involved a controlled substance. The presence of these factors will aggravate

It:

- If the offence involved three or more separate transactions where the substance was sold or transferred to another person with the intention to sell.
- Where the offender or the accomplice had equipment or monies showing that the offence was committed as part of a wholesale or trafficking of a controlled substance.
- Where the offence involved the manufacture of the controlled substance.
- Where the offender or the accomplice had a firearm or any other dangerous weapon.
- Where the circumstances show that the offender had a high position in the drug distribution hierarchy.
- Where the offence involved a high degree of sophistication and execution and planning of it happened within a lengthy period of time.

- Where the offender used his position to facilitate with the commission of the crime.
- Where the offence involved separate acts of sale or possession of the controlled substance in three or more counties.
- Where the offender has a prior conviction that involves violence or the sale of a controlled substance.
- Where the defendant or the accomplice manufactured, possessed or sold the controlled substance in certain areas.

f) Where the offender committed the crime for hire, a crime against the person.

g) Where the offender is being sentenced as a dangerous offender.

h) Where offender is being sentenced as a career offender.

i) Where the offender committed the offence as part of a group of three or more offenders.

j) Where the offender selects the victim based on sex, age gender, sexual orientation, disability or national origin.

k) Where the offence was committed in the presence of a child.

l) Where the offence was committed in a location where the victim expected some privacy.

These factors are not exhaustive. In the comment section of the Minnesota guidelines they are described as ‘illustrative’.⁴⁴⁹ The factors are meant to describe specific situations that involve a small number of cases that the courts encounter.⁴⁵⁰ It is interesting to note that some of these factors may be considered when establishing conditions of stayed sentences without necessarily

⁴⁴⁹ Ibid 50.

⁴⁵⁰ Ibid 49.

being used as points of departure.⁴⁵¹ General factors such as intoxication at the time of offence are rejected by the Commission.⁴⁵²

4.5 THE MANDATORY MINIMUM SENTENCES.

In the Minnesota Guidelines, there are certain offences that are subject to mandatory minimum sentences. Even if an offender would otherwise receive a presumptive stayed sentence under the guidelines, if an offence is subject to a mandatory minimum sentence the presumptive disposition is always commitment. The duration of the commitment will be stipulated in the statutes.⁴⁵³

4.5.1 Departure from the Mandatory Minimum Sentences.

The court on its own or on the prosecutor's motion may impose a sentence other than the prescribed mandatory minimum sentence if the court finds that substantial and compelling reasons to do so exist.⁴⁵⁴ There are two types of departures⁴⁵⁵ which are

- Dispositional Departure - a stay of imposition or a stay of execution is a dispositional departure. A stay of execution is where the courts accepts and records a finding or plea of guilty and then the prison sentence is pronounced but not executed.⁴⁵⁶ A stay of imposition is where the court accepts or records a finding or a plea of guilty but does not impose a prison sentence.⁴⁵⁷

⁴⁵¹ Ibid.

⁴⁵² Ibid 50.

⁴⁵³ Ibid. 52

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid. 7

⁴⁵⁷ Ibid.

- Durational Departure - This is a sentence other than the mandatory minimum or the presumptive duration or applicable range in grid, whichever is longer.

4.6 COMPARISON BETWEEN SOUTH AFRICA'S MANDATORY MINIMUM SENTENCING SYSTEM AND MINNESOTA'S SENTENCING GUIDELINES.

4.6.1 South Africa's Mandatory Minimum sentencing legislation.

In order to successfully compare the two systems there is need to discuss the mandatory minimum sentencing legislation in South Africa as well. These mandatory minimum sentencing laws can be found in the Criminal Law Amendment Act 105 of 1997.⁴⁵⁸ This act lists certain offences that are regarded as serious and it identifies situations in which mandatory minimum sentences must be imposed. The act further states that these sentences can be departed from if 'substantial and compelling' circumstances exist in a particular case.⁴⁵⁹

4.6.2 Structure of the Criminal Law Amendment Act.

Section 51 of the Act prescribed the minimum terms of imprisonment, mainly the offences that attract public concern and are committed in circumstances where the offender is blameworthy.⁴⁶⁰ The offences are listed under Parts of Schedule 2 of the Act. In **Part 1** the following are listed:⁴⁶¹

- a) Murder
- b) Rape

⁴⁵⁸ At sections 51 to 53.

⁴⁵⁹ E S Nzimande *Minimum Sentencing Legislation in South Africa* (LLM thesis, Nelson Mandela Metropolitan University 2012) available at <file:///C:/Users/215005500/Downloads/ERIC++SIBUSISO++NZIMANDE.pdf> accessed on 5 August 2017 on page 1.

⁴⁶⁰ Ibid 15.

⁴⁶¹ Ibid.

- c) compelled rape
- d) any offence that is referred to in certain sections of the Protection of Constitutional Democracy against Terrorist Related Activity Act when certain circumstances in Schedule 2 exist
- e) 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 of 2007.

Part 2 includes:⁴⁶²

- a) Murder (in circumstances other than those listed in Part 1).
- b) robbery on specified circumstances
- c) Any offence relating to drugs and drug trafficking.

Part 3 includes:⁴⁶³

- a) rape or compelled rape as contemplated in Section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act in circumstances other than those mentioned in Part 1.
- b) Sexual exploitation of a child or mentally ill person
- c) Using child pornography or a child or mentally ill person for purposes of pornography.
- d) Assault with the intention of inflicting grievous bodily harm.
- e) Offence in contravention of section 36 of the Arms and Ammunition act.
- f) Any offence that is related to trafficking by a commercial carrier as contemplated in Section 71(6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

Part 4 includes:⁴⁶⁴

⁴⁶² Ibid.

⁴⁶³ Ibid. 16

- a) Where the accused person was in possession of a firearm which was intended to be used in the commission of the offence.
- b) Treason
- c) Sedition
- d) Public Violence
- e) Robbery other than the type listed in Part 1, 2
- f) Kidnapping
- g) Any offence involving assault
- h) An offence where a dangerous wound is inflicted with a firearm (other than those offences listed in Part1,2,3)
- i) An offence that involves breaking, entering a premise with the intent of committing an offence.
- j) Escaping from lawful custody

These are the crimes that fall under mandatory minimum sentencing laws. The act now goes on to the prescription of the sentences and this starts with Section 51(1). Section 51(1) applies to the offences that are listed in Part 1 of the Schedules and it imposes a duty on the courts to impose a sentence of life imprisonment on those crimes.⁴⁶⁵ Section 51(2) applies to the crimes that are listed in Part 2 to Part A and places a duty on the courts to impose minimum terms of imprisonment that prescribed. Subsection 3 contains the exception which stipulates that courts can depart from the prescribed sentences if they find that ‘substantial and compelling’ circumstances exist. This phrase made the act withstand constitutional scrutiny as it maintains the discretion of the courts in deciding which sentence to impose.

⁴⁶⁴ Ibid. 16

⁴⁶⁵ Ibid 16.

4.6.3 Procedural requirements.

There are also procedural requirements that go together with the act. If the court in question fails to inform the accused that the crime they have been charged with falls under the ambit of the act and then go on to prescribe a sentence, that sentence will be set aside. This can be seen in the case of *S v Rapoo*⁴⁶⁶ where three accused persons were convicted of armed robbery and sentenced to 15 years imprisonment. The issue in this case was whether there was a duty on the magistrate's court to inform the accused persons of the provisions of section 51. It was held that it was the magistrates' court duty to do so and failure to do so had infringed on the accused person's' right to a fair trial. The sentences were therefore set aside.

Another procedural requirement that exists is the split procedure.⁴⁶⁷ This is where if an offence falls under the ambit of Part 1 of schedule 2 and there has been a plea of guilty or not guilty by the accused. If the punishment the offence warrants is in excess of the jurisdiction of the high court, the court shall stop the proceedings and commit the accused for sentence by a High Court with jurisdiction.

4.6.4 CRITICISMS OF SOUTH AFRICA'S MANDATORY MINIMUM SENTENCES.

There has also been criticism that has been levelled against South Africa's mandatory minimum sentencing regime. According to Terblanche, criticism of the Act can be divided into disapproval of the act itself, attacks on its poor language and the difficulty that the courts have experienced in trying to determine what intention the legislature had.⁴⁶⁸ He is of the view that some of the difficulties could initially be excused since the Act was not meant to be permanent at the time

⁴⁶⁶ 1999(2) SACR 217 (T) at 219 (h)-(j).

⁴⁶⁷ Section 51 of the Criminal Law Amendment Act 105 of 1997.

⁴⁶⁸ S Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 51.

that it was enacted, but now that it has become permanent it is difficult to overlook these difficulties.⁴⁶⁹

4.6.4.1 No reduced crime and the sentencing disparities have worsened.

Critics submit that the mandatory minimum sentences have not reduced or deterred crime or the disparities that existed within the sentencing system.⁴⁷⁰ These were the problems that mandatory minimum sentences were meant to address when they were enacted. It is of great concern if these goals are not being achieved. It is also very difficult to find any evidence that the sentencing regime has had a deterrent effect or reduced crime in any way. Crime has risen since the laws were enacted and critics argue that the sentencing disparities still exist.⁴⁷¹

It has been argued that increasing sentencing severity does not have a deterrent effect when it comes to crime.⁴⁷² This argument has also been mentioned in relation to other mandatory minimum sentencing regimes outside of South Africa. Michael Tonry in the American context mentions that there is clear evidence that the enactment of mandatory minimum sentences has no deterrent effect and if any, the deterrent effect is insignificant.⁴⁷³ In his assessments of mandatory minimum sentences he makes the following comment:⁴⁷⁴

“The evidence is clear and weighty, that enactment of mandatory penalty laws has either no deterrent effect or a modest deterrent effect that soon wastes away. Equally clear and consistent

⁴⁶⁹ S Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 51.

⁴⁷⁰ South African Law Commission *Discussion Paper 91 Sentencing (A New Sentencing Framework)* 2000 available at <http://www.justice.gov.za/salrc/dpapers/dp91.pdf> accessed on 16 September 2017 page 31.

⁴⁷¹ J Sloth-Nielsen, L Ehlers “Mandatory and Minimum Sentences in South Africa: Assessing the impact” (2005) 2005 *SA Crime Quarterly* 16.

⁴⁷² A Ashworth *Sentencing and Criminal Justice* 4ed (2005) 381.

⁴⁷³ Michael Tonry *Judges and Sentencing Policy -The American Experience in Sentencing Judicial discretion and Training* 137, 152.

⁴⁷⁴ *Ibid.*

are findings that mandatory minimum laws provoke judicial and prosecutorial stratagems, usually by accepting guilty pleas to other non-mandatory penalty offences or by diverting offenders from prosecution altogether that avoid their application.”

In a more recent comment, Tonry explains that:⁴⁷⁵

“No matter which body of evidence is consulted, the general literature on the deterrent effects of criminal sanctions, work more narrowly focused on the marginal deterrence hypothesis, or the evaluation literature on mandatory penalties the conclusion is the same. There is little basis for believing that mandatory penalties have any significant effects on rates of serious crime”

The same can be said about the South African system as there has been no evidence of a consistent drop in crime levels.⁴⁷⁶ According to R Ellickson, there is a five level model of social control which is as follows:⁴⁷⁷

- a) First party control
- b) Second party control
- c) Social controls
- d) Organizational controls
- e) Government controls

This shows that government control is one of the many factors that contribute to the control of how people will behave. The argument is that severe sentences on their own cannot have a deterrent effect on individuals. Chaskalson P in *S v Makwanyane*⁴⁷⁸ expresses that the true deterrent to crime is the ‘likelihood that offenders will be apprehended, convicted and punished’

⁴⁷⁵ Ibid.

⁴⁷⁶ Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 90.

⁴⁷⁷ R Ellickson, in Tonry, *Learning from the limitations of deterrence research* 291.

⁴⁷⁸ *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 122.

The continued sentencing disparities are said to have been caused by the inclusion of the phrase ‘substantial and compelling’. The opportunity to depart from the prescribed sentences using this phrase is said to have worsened the disparities.⁴⁷⁹ This is mainly being caused by the parliament’s failure to define the phrase and also the inability by the courts to interpret it in one uniform way.⁴⁸⁰

4.6.4.2 There is still dissatisfaction with criminal sentencing.

Critics also argue that the persons in the judicial and criminal justice systems are not satisfied with the mandatory minimum sentencing regime. As a result, they try and ‘circumvent’ the system and undermine it.⁴⁸¹ It is argued that neither the South African communities nor the judges have accepted mandatory minimum sentences.⁴⁸² Those who support the mandatory minimum sentences are not satisfied with how the courts are interpreting them in practice.⁴⁸³ Sloth-Nielsen and Ehlers argue that it is difficult to determine whether the legislation has addressed the issue of how the public view sentences but survey data reveals that public fear of crime which is connected to how the public views the legislature has increased significantly over the five years.⁴⁸⁴

⁴⁷⁹ J Sloth-Nielsen, L Ehlers “Mandatory and Minimum Sentences in South Africa: Assessing the impact” (2005) 2005 *SA Crime Quarterly* 12.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid 14-17.

⁴⁸² South African Law Commission *Discussion Paper 91 Sentencing (A New Sentencing Framework)* 2000 available at <http://www.justice.gov.za/salrc/dpapers/dp91.pdf> accessed on 16 September 2017 at xviii-xx

⁴⁸³ S Roth “South African Mandatory Minimum Sentencing: Reform Required” (2008) *Minnesota Journal of International Law* available at <http://lawweb3.law.umn.edu/uploads/gV/8l/gV8lYrhMXKzaPTdE5enYZg/Roth-Final-Online-PDF-04.07.0> 171.

⁴⁸⁴ J Sloth-Nielsen, L Ehlers “Mandatory and Minimum Sentences in South Africa: Assessing the impact” (2005) 2005 *SA Crime Quarterly* 20.

4.6.4.3 Mandatory Minimum Sentences have caused prison overcrowding.

The mandatory minimum sentences are said to have increased the prison population. This has been an indirect effect that has occurred and is being caused mainly by the mandatory life sentences and the parole reform provisions that require a convict to serve at least eighty percent of their sentence.⁴⁸⁵ Terblanche remarks that the Act was enacted with no consideration whatsoever of the effect that it was going to have on the prison population.⁴⁸⁶ Judge Fagan the inspecting judge of prisons suggested that the sentencing regime contributes heavily to prison overcrowding.⁴⁸⁷ He asserts further that the numbers of prisoners continues to rise and with a growth rate of over 7000 prisoners a year the prison conditions will become inhumane and there will be need for mass releases periodically.⁴⁸⁸ The extent of this problem has not yet been fully realized however, it is argued that mandatory minimum sentences will have a huge impact on prison population in the future if the sentencing regime is not altered.⁴⁸⁹

The implementation of minimum sentences resulted in an increase in the number of prisoners that are serving life imprisonment in the prisons. In 1995 there was a number of 400 prisoners serving life imprisonment and in March 2008 that figure had climbed to over 8000.⁴⁹⁰ According to the Department of Correctional Services annual report South Africa's prison population of

⁴⁸⁵ S Roth "South African Mandatory Minimum Sentencing: Reform Required" (2008) *Minnesota Journal of International Law* available at <http://lawweb3.law.umn.edu/uploads/gV/8l/gV8lYrhMXKzaPTdE5enYZg/Roth-Final-Online-PDF-04.07.09.pdf> accessed on 16 September 2017 at page 174.

⁴⁸⁶ S Terblanche *A Guide to Sentencing in South Africa* 3ed (2026) 91.

⁴⁸⁷ "Memorandum on Mandatory Minimum Sentencing" (2005) accessed at http://www.ghjru.uct.ac.za/sites/default/files/image_tool/images/242/parliamentary/Memorandum-Mandatory-Minimum-Sentencing.pdf on the 11th of September 2017 at page 8.

⁴⁸⁸ J Sloth-Nielsen, L Ehlers "A Pyrrhic Victory Mandatory and Minimum Sentences in South Africa" (2005) 2005 *Institute for Security Studies Papers* 9.

⁴⁸⁹ S Roth "South African Mandatory Minimum Sentencing: Reform Required" (2008) *Minnesota Journal of International Law* available at <http://lawweb3.law.umn.edu/uploads/gV/8l/gV8lYrhMXKzaPTdE5enYZg/Roth-Final-Online-PDF-04.07.09.pdf> accessed on 16 September 2017 at page 174.

⁴⁹⁰ D Mujuzi "The Changing Face of Life Imprisonment in South Africa" (2008) 6 *CSPRI*

sentenced inmates stood at 116 951. This was an increase from the previous year, 2015 where the population of sentenced offenders in the prisons was 115 064.⁴⁹¹

Imprisoning offenders for a long time can be pointless as research done in the United States and the United Kingdom has shown that the persistent offenders reach their crime peak in their late teens and late twenties.⁴⁹² This means that people who are not dangerous can end up being imprisoned for a long time and offenders may end up being imprisoned at an age where their imprisonment will have no effect in reducing crime.

4.6.4.4 Mandatory Minimum Sentences are broad and poorly defined.

The way the law relating to mandatory minimum sentencing is drafted has also sparked criticism. It is argued that the act makes little distinction for example between a robber who shoots a shopkeeper and a woman who shoots her abusive partner as both of them have to be sentenced to life in this case in the event that substantial and compelling circumstances are not found.⁴⁹³ It has also been argued that there is no logic in the terms of imprisonment that have been prescribed. Life imprisonment is prescribed for some forms of aggravated murder but the two most important aggravating factors namely the brutality of the attacks and the vulnerability of the victim are left out.⁴⁹⁴ Another example given to show that the Act lacks internal logic are the various amounts of money that limit whether the Act applies or not that are listed in Part II. These amounts are described by Terblanche as ‘completely arbitrary’.⁴⁹⁵

⁴⁹¹ Department of Correctional Services Annual Report 2015/2016 available at <http://www.dcs.gov.za/docs/2016%20doc/DCS%20Annual%20Report%202015-16.pdf#page=34> accessed on November 22, 2017.

⁴⁹² L Munting “ Sentencing” *Criminal Injustice in South Africa* available at https://issafrika.s3.amazonaws.com/site/uploads/CICCh_8.pdf accessed on 5 September 2017 at page 193

⁴⁹³ Ibid 192.

⁴⁹⁴ S Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 91.

⁴⁹⁵ S Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 91.

This poor drafting has been criticized many times by judicial officers.⁴⁹⁶ The mandatory minimum sentencing laws have been described as ‘covering the field of serious crime in no more than a handful of blunt paragraphs’⁴⁹⁷. In the case of *S v RO*⁴⁹⁸ the mandatory minimum sentencing laws were said to be providing ‘draconian sanctions’ for the crimes that are listed.

The difficulties with the act have been in some instances caused by the courts. In the *Mofokeng* case, the court complains of the ‘arbitrary and severe minimum sentences’ but goes on to interpret ‘substantial and compelling’ very strictly, restricting it to mean only exceptional circumstances.⁴⁹⁹

Terblanche makes remarks that people should not view the act as anything but an expensive tool when it comes to sentencing. He mentions that the act has resulted in so many hours being used by judicial officers trying to figure out what it means and that the act has created a false sense of security and a false sense of something that will be effective against the high crime rates.⁵⁰⁰

4.6.5 ACHIEVEMENTS BY SOUTH AFRICA’S MANDATORY MINIMUM SENTENCING REGIME.

There has been a decrease in violent crime according to other researches. Although the crime levels began to get steady in 2000/2001 dipping in 2001/2002 and rising again in 2002/2003 an analysis per crime category has shown that murder has decreased as a result of the mandatory

⁴⁹⁶ *S v Jansen* 1999(2) SACR 368 (C) at 371,372 mentions the uncertainty that has been caused as a result of the bad drafting of the Act, *S v Ibrahim* 1999 (1) SACR 106 (C) at 114 mentions the bad manner in which the Act was drafted.

⁴⁹⁷ *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 11.

⁴⁹⁸ 2010 (2) SACR 248 (SCA) at para 40.

⁴⁹⁹ *S v Mofokeng* at 523.

⁵⁰⁰ SS Terblanche, “Mandatory and Minimum Sentencing: Considering s51 of the Criminal Law Amendment Act 1997” (2003) *Acta Juridica* 194.

minimum sentences.⁵⁰¹ Albeker notes that between 1996 and 1997 and 2003 and 2004 the occurrence of murder per 100 000 of the population decreased from 62.8 to 42.7. The continuation of the decline of murder from 1994 onwards shows that the abolition of the death penalty in 1995 did not in any way contribute to an increase in the offence.⁵⁰²

One of the main criticisms against the mandatory minimum sentences has been that it has led to prison overcrowding. Critics of this theory argue that it cannot be conclusively shown that the increase in the prison population has been due to the enactment of the mandatory minimum sentences. They argue that it could be due to a general increase in crime or a more strict approach being adopted by judicial officers as well as better policing of serious offences.⁵⁰³ The impact of increased jurisdiction of the lower courts could also be one of the factors that have led to prison overcrowding. The maximum sentence that a regional court could impose was increased from 10 years to 15 years for example.⁵⁰⁴ Another possible cause of prison overcrowding could be the impact of SAPS's National crime combating strategy which focused on selected crime areas with the high crime levels and directed police resources to those areas in the form of high density search and seizure operations.⁵⁰⁵ The split procedure⁵⁰⁶ also caused a delay for prisoners who were awaiting trial as their records were typed and dates sought. If this is the case it can be said that mandatory minimum sentences are not to blame for the sudden increase in prison population and could still be playing a huge role in addressing the problems that led to their enactment.

⁵⁰¹ J Nielsen, L Ehlers "A Pyrrhic victory: Mandatory and Minimum Sentences in South Africa" (2005) 2005 *Institute for Security Studies Papers* 16.

⁵⁰² Ibid 16.

⁵⁰³ Ibid 10.

⁵⁰⁴ Ibid 11.

⁵⁰⁵ Ibid 11.

⁵⁰⁶ Section 52(1) of the Criminal Law Amendment Act 105 of 1997.

4.7 The Minnesota Guidelines.

4.7.1 CRITICISMS AGAINST MINNESOTA SENTENCING GUIDELINES.

In the United States of America there has been general criticisms levelled against sentencing guidelines. Proponents of sentencing guidelines put forward the argument that sentencing guidelines are beneficial to any sentencing system. This is based on their belief that sentencing guidelines reduce disparities, they make punishments harsher and also serve as a deterrent factor when it comes to the commission of crime.⁵⁰⁷ Another argument is that sentencing guidelines help reduce the stress that judges normally had to face without them. Prior the guidelines the judges had to wrestle with their emotions before arriving at a particular sentence. Proponents of the guidelines argue that this is no longer the case.

Against this are the critics of sentencing guidelines. They have also put forward arguments suggesting that these guidelines might not be the best way to deal with problems that arise in sentencing and that they have even made the problems worse. Arguments against sentencing guidelines are along the lines of how prosecutors have been given too much power as a result of the guidelines. They argue that discretion has been stripped away from the judges because it is a criminal charge that determines what sentence an accused person is going to get. Therefore, prosecutorial discretion has replaced judicial discretion.⁵⁰⁸ Another criticism involves the mathematical formulas that are used in calculating for example the criminal history scores. It is argued that this reduces a human being to a number of points on a sentencing grid worksheet and as a result forces the judges to ignore the particular circumstances of the case.⁵⁰⁹

⁵⁰⁷ G Coppolo "Sentencing - Sentencing Guidelines: Fair or Unfair"(1994) accessed at <https://www.cga.ct.gov/PS94/rpt/olr/htm/94-R-0686.htm> accessed on 22 August 2017.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid.

4.7.2 ACHIEVEMENTS BY THE MINNESOTA GUIDELINES.

Despite the criticisms against the Minnesota sentencing guidelines, some researchers have highlighted the successes of the sentencing guidelines. Morley J argues that the sentencing guidelines have brought with them an era of fairer sentences and also manageable prison capacities.⁵¹⁰ This was the solution to their indeterminate sentencing policy that existed before the guidelines were enacted. He puts forward that the fairness has been achieved by establishing equity both within and between the groups and that allowing for judicial departure creates an even stronger uniformity in the imposition of sentences. He also puts forward that viewing the correlation between sanction severity and the seriousness of the offence has also led to fairness. Morley J also argues that through legislation mandate, there has been a success in alleviating prison capacity as well.⁵¹¹

Prior to the sentencing guidelines there had been broad penalty ranges from the legislature, there were also problems with the release policy that was being used by the parole board and decisions regarding incarceration were completely dependent on judicial decisions.⁵¹² This means there was a need for a rational framework that enabled effective and consistent decision making. Dailey argues that even though political and practical forces continue to amend these guidelines yearly, the guidelines themselves have provided a framework that was essential and is rational for efficient decision making when it comes to sentencing. He highlights this as one of the successes of the Minnesota guidelines.

⁵¹⁰ AJ Morley “Minnesota Sentencing Guidelines Commission: An analysis of sentence fairness and prison population” (2014) *Celebrating Scholarship and Creativity* accessed at http://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?article=1004&context=elce_cscday accessed on 16 September 2017 on page 3.

⁵¹¹ Ibid.

⁵¹² Ibid.

Statistics play a major role when highlighting the successes of any sentencing policy. Goodstein argues that the sentencing guidelines have led to higher equity and more predictable release date. This is done by highlighting the statistics from the era when the guidelines did not exist (up to the year 1983)⁵¹³

One of the successes that has been mentioned is that the sentencing guidelines have reduced the sentencing disparity that existed. Knapp puts forward research to support this assertion. Based on her findings, she remarks that overall, state uniformity when it comes to imprisonment practices has increased under the guidelines. Proportionality (which entails the imposition of severe sentences for severe crimes and on serious offenders) of sentences also seems to be occurring under the sentencing guidelines according to her findings.⁵¹⁴

The point on alleviation on prison capacity is expanded by Fraser. Fraser uses statistics by offering number evaluations that compare the Minnesota sentencing guidelines to other states that have a similar system. These comparisons highlight the effectiveness of the Minnesota guidelines in dealing with the issue of prison capacity.

5. The Comparison.

- a) The starting point when it comes to comparing these two systems will be to look at the intention that was had when they were enacted. With the Minnesota guidelines, it is stated at the beginning⁵¹⁵ before the system is explained that the intention was to make sentencing neutral to factors such as race e.tc. Another principle the guidelines embody is that the sentences have to be proportional to the crime that has been committed and the

⁵¹³ L Goodstein "Sentencing reform and the correctional system" (1983) 5 (4) *Law and Policy Quarterly* 478 -501

⁵¹⁴ K.A Knapp. "Impact of the Minnesota Sentencing Guidelines on sentencing practice" (1982) 237 *Hamline Law Review* 237 -256

⁵¹⁵ "Minnesota Sentencing Guidelines and Commentary 2017" available at <http://mn.gov/msgc-stat/documents/2017Guidelines/2017Guidelines.pdf> accessed on 16 September 2017 at page 1.

criminal history of the offender. Prison overcrowding was also one of the things that the guidelines aimed to address. In South Africa on the other hand, with the Criminal Amendment Act, the intention was to address the crime levels that had arisen after 1994 and also to restore the faith of the public in the justice system. *Malgas*⁵¹⁶ sums this up perfectly by saying that the intention with this Act was to standardize the response of the courts to crime, to make sentences more severe as they were perceived to be too lenient and also to achieve consistency in sentencing.

While there are some similarities with regards to what the two systems aimed to achieve at inception, there are also differences. Addressing prison overcrowding was not at the forefront of what the Criminal Law Amendment Act wanted to achieve in South Africa. At the forefront it seems was the issue to address the prevalence of crime and to ensure a standardized response by the courts. In Minnesota however, prison overcrowding was one of the factors. Despite this, the similarity is that both systems wanted to achieve a consistent response to crime.

- b) In the Minnesota sentencing guidelines there are two types of sentences that are referred to. They refer to presumptive sentences and mandatory sentences. The presumptive sentences being the ones that are found on the relevant grids and the mandatory sentences being the ones that are prescribed in the statutes. In the South African systems, the sentences are referred to as mandatory minimum sentences and no presumptive sentences exist.
- c) The presumptive sentences in the Minnesota guidelines are characterized by a grid. In the South African system, the act contains all the sentences prescribed for the various crimes. With the presumptive sentences, the criminal history score and the severity of the offence is used to calculate a sentence that will apply for a specific offence on the grid while in

⁵¹⁶ *S v Malgas* at para 8.

the South African system, the act lists the crimes in detail, including modifications and prescribes a sentence. Severity of an offence or criminal history is something that is considered by the court as the traditional factors to be taken account but this is not used entirely to determine a sentence that is applicable. The two systems become similar when it comes to the mandatory minimum sentences, these are also prescribed by statute in Minnesota like they are in South Africa.

- d) Importantly, the sentencing guidelines of Minnesota have a non-exhaustive list of what constitutes substantial and compelling and the factors that should not be taken into account. In South Africa there was no guidance from the legislature on what constitutes substantial and compelling and what doesn't. The discretion was solely left to the courts. Perhaps this had positive sides to it because it was because of this and other factors that the Criminal Law Amendment Act managed to withstand the constitutional scrutiny that it went through. Factors such as race and other employment factors are not considered as substantial and compelling in the American context. In instances where the victim was an aggressor or the offender's culpability can be reduced because of other grounds, these can be taken to be substantial and compelling circumstances warranting a departure. The only guidance that exists within the South African context is the *Malgas* case, which listed certain principles that all the courts must take into account when approached with the problem of minimum sentencing. There also exists guidance that is specific to rape cases in the form of the Criminal Law Sentencing Amendment Act.

After comparing the systems and highlighting the differences that exist between them it will be also important to look at the criticisms that have been levelled against them ever since their inception. It will also be beneficial to look at any achievements each system might have made.

6. CONCLUDING REMARKS.

In this chapter Minnesota's sentencing guidelines have been unpacked and compared to South Africa's mandatory minimum sentencing regime. The findings reflect that both systems came into existence for more or less the same reasons of wanting to address sentencing disparities and providing deterrence which is meant to reduce crime levels. Although South Africa was influenced by the Minnesota state sentencing guidelines, there is no confirmed list of what constitutes 'substantial and compelling' circumstances as was done in Minnesota. Both of the systems have faced criticism and research is showing that there have had little or insignificant impact since their enactment. There is mere certainty in Minnesota as there is a list of what should constitute as 'substantial and compelling' and what shouldn't.

CHAPTER 5

Summary of findings, Analysis of the cases, Discussion of problems, Recommendations and Conclusions to the study.

5.1 INTRODUCTION

As previously stated, the purpose of the dissertation was to look at the interpretations being given by the courts of the phrase ‘substantial and compelling’ in order to establish whether the case of *Malgas*⁵¹⁷ has led to one consistent way of interpretation. This is important as there is a necessity to establish whether the intention of the legislature is being fulfilled. Another intention of the study was to explore the Minnesota sentencing guidelines where the phrase ‘substantial and compelling’ was probably adopted from in order to make a comparison and examine if South Africa can adopt the same structure to deal with the problems of interpretation of the clause that currently exist. The study examined the interpretations of ‘substantial and compelling’ that were given before the *Malgas* case, the proposed method in *Malgas* and more importantly how cases have been interpreting the escape clause after *Malgas*. The dissertation looked to answer the following:

⁵¹⁷ As previously discussed in Chapter 2 at 2.4

- a) What were the reasons behind the imposition of Mandatory Minimum Sentencing Laws i.e.? The Criminal Law Amendment Act 105 of 1997?
- b) Since the Act does not define ‘substantial and compelling’ how have the courts been interpreting the phrase when they make a decision on whether to depart from the prescribed sentences?
- c) Has the method of interpretation that was put forward in *S v Malgas* led to one consistent way of interpretation? Have the courts been strictly applying this method?
- d) What are the differences between South Africa’s sentencing laws and the sentencing laws of Minnesota where the phrase ‘substantial and compelling’ was taken from? How has the state of Minnesota dealt with problems of interpretation?

In this Chapter there will be a summary of the findings of this study, an analysis of the cases that were examined in the study, a discussion of the problems that the courts are currently facing in interpreting ‘substantial and compelling’, recommendations and suggestions for the sentencing regime that is currently in place and finally the conclusions to the study.

5.2 SUMMARY OF THE FINDINGS

5.2.1 The Criminal Law Amendment Act

The Criminal Law Amendment Act⁵¹⁸ was a legislative response to persistent serious and violent crime.⁵¹⁹ One of its aims was to restore the public’s faith in the criminal justice system. Its deterrent function is ‘attested’ to in *Malgas*⁵²⁰ when the Supreme Court of Appeal made a declaration that:

⁵¹⁸ As previously discussed in Chapter 4 at 4.6.2.

⁵¹⁹ As discussed in Chapter 1.

⁵²⁰ *S v Malgas* at para 25.

“In short the legislature aimed at ensuring a severe, standardized and consistent response to the commission of such serious crimes”

The Act lists certain serious crimes such as rape, robbery and murder and prescribes the duration of sentence that a court must impose except where ‘substantial and compelling’ circumstances are found. The Act also does not apply to child offenders. It was received with mixed feelings and criticisms against the Act can be divided into disapproval of the scheme itself, attacks on its use of poor language and the difficulty that has been had in trying to ascertain the legislature’s intention.⁵²¹ Du Toit⁵²² supports the criticism that has been levelled against mandatory minimum sentences and remarks that by imposing ‘arbitrary’ and ‘severe’ minimum sentences from which the courts can’t depart unless ‘substantial and compelling’ circumstances have been shown to exist, the legislature has ‘driven a coach and four’ through these civilized principles. He goes on to add that the fact that the legislature has seen fit to use the courts as rubber stamps that must apply the legislature’s arbitrary sentences without regard to just punishment is unreasonable. He describes the mandatory minimum sentences as a breach of separation of powers that undermines the independence of the court making them mere ‘cat’s paws’ for implementation of the legislature's own inflexible penal policy.⁵²³

Judicial officers have also continued to criticize the Act arguing that it limits their discretion. Despite the criticisms the Act continues to be in effect and was declared constitutional in the case of *Dodo* where it was held that the Criminal Law Amendment Act is not in violation of any relevant constitutional principle.

⁵²¹ SS Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 51.

⁵²² E Du Toit *Commentary on the Criminal Procedure Act* (1999).

⁵²³ *Ibid.*

The impact that the Act has had to sentencing is difficult to measure and according to Sloth-Nielsen and Ehlers⁵²⁴:

“The information presented in this article suggests that there has been little or no significant impact with regard to any of the above goals (i.e. the problems the Act was supposed to address). It is unclear that the legislation has served a deterrent function, and the criminal justice system seems no closer to achieving consistency in sentencing than in 1997”

It has also been difficult to make a determination on whether the Act has addressed the public perception that sentences are not severe. Survey data has shown that public fear of crime has increased over the past 5 years. The 2003 Institute for Security Studies’ victim survey has found that more people felt unsafe in 2003 than they did in 1998. One clear consequence of enacting mandatory minimum sentencing has been that there has been a great increase in the prison population causing prison overcrowding.⁵²⁵

5.2.2. The ‘escape clause’ in the Criminal Law Amendment Act.⁵²⁶

The Act allows departure from the prescribed sentences if ‘substantial and compelling’ circumstances are found. The requirement is that these circumstances must be entered on record. By saying that a court is supposed to enter the circumstances on record it means that “a court is required to spell out and enter on record the circumstances which it considered justified a refusal to impose the specified sentence”.⁵²⁷ In *Flannery*⁵²⁸ it was held that a requirement for the courts to give reasons concentrates the judicial officer’s mind and if the judicial officers follow this

⁵²⁴ J Sloth-Nielsen and Ehlers “Mandatory Minimum Sentences in South Africa: Assessing the Impact” (2005) 2005 *SA Crime Quarterly* 20.

⁵²⁵ *Ibid.*

⁵²⁶ Discussed in detail in Chapter 2

⁵²⁷ *S v Malgas* at para 9.

⁵²⁸ *Flannery v Halifax Estate Agencies Ltd* (2000) 1 WLR at 381.

rule, the reasons that they will give will more likely be sound. The inclusion of the phrase ‘substantial and compelling’ is probably one of the reasons why the Act survived constitutional scrutiny as this phrase leaves a bit of discretion with the courts.

The legislature did not give any guidance on how the escape clause should be interpreted and it left it entirely to the courts. Establishing the true meaning of the escape clause has been extremely difficult for the courts. Keeping in mind that the Act lists serious crimes, it is important that this phrase is interpreted to reflect the intention of the legislature. The answer to the question of how the courts have been interpreting ‘substantial and compelling’ is twofold. There are interpretations that were given before the seminal judgement in *Malgas* and interpretations that were given afterwards.

Before *Malgas*, other cases followed a more lenient approach to interpretation. The lenient approach does not view the Act as a piece of legislation that introduced entirely new principles to sentencing. According to this approach the normal aggravating and mitigating factors that are taken into account in the traditional process of sentencing are useful when it comes to the process of determining whether ‘substantial and compelling’ circumstances exist. These traditional factors are weighed in order for a court to decide whether to depart from the prescribed sentence or not. With this approach factors such as the absence of physical injury, youthfulness, lack of previous convictions, remorse and the prospects of rehabilitation can amount to ‘substantial and compelling’ circumstances. There is no requirement that circumstances need to be exceptional or ones that the legislature could not have had in mind when they put forward the Act.

The more balanced approach requires a rather lengthy process from the courts. With this approach the court has to weigh the cumulative impact of the traditional aggravating and mitigating factors and measure it against the yardstick of ‘substantial and compelling’ Its

application is seen in the cases of *S v Van Wyk*,⁵²⁹ *S v Blaauw*,⁵³⁰ *S v Homoreda*,⁵³¹ *S v Shongwe*,⁵³² *S v Dithoze*,⁵³³ *S v Jansen*.⁵³⁴

Malgas proposes a set of guidelines that all the courts must follow when it comes to interpreting what ‘substantial and compelling’ means. This case is of extreme importance as it was endorsed by the Constitutional Court in *Dodo*. It puts forward that the phrase is to be viewed conjointly and not as two separate words. What one can say to be the essence of the *Malgas* judgement is that: These sentences have been imposed in order to severely punish offenders and ensure that the courts respond consistently and strictly when it comes to sentencing offenders of this crime. In the event that a court finds that there are ‘substantial and compelling circumstances’ in a particular case, it must feel free to depart from the prescribed sentences. While the emphasis has now shifted to the severity of the crime, the traditional factors of sentencing must still be taken into account. The cumulative impact of mitigating and aggravating factors must be measured against the phrase ‘substantial and compelling’ to determine whether a departure is warranted in a particular case. The cumulative impact of an accused’s youth, vulnerability to influence, fact that she had shown remorse and that she was young enough for rehabilitation was held to be substantial and compelling in *Malgas* and a departure from life imprisonment to 25 years was made. The Constitutional Court in *Dodo* adds a different dimension to the principles that were put forward in *Malgas*. It puts forward or rather emphasizes the proportional requirement which applies regardless of whether sentencing is being done under the Act or not. The proportionality principle demands that whichever sentence that a court imposes must be proportional to the

⁵²⁹ 2000 (1) SACR 380 (C), as previously discussed in Chapter 2.

⁵³⁰ 1999 (2) SACR 295 (W)

⁵³¹ 1999 (2) SACR 319 (W), as previously discussed in Chapter 2.

⁵³² 1999 (2) SACR 220 (O), as previously discussed in Chapter 2.

⁵³³ 1999 (2) SACR 314 (W), as previously discussed in Chapter 2.

⁵³⁴ 1999 (2) SACR 368 (CC), as previously discussed in Chapter 2.

crime that has been committed. This is something that the courts must bear in mind when making a decision on whether to depart from the prescribed sentences or not.

Malgas held that the strict interpretations that were being given to the escape clause are erroneous and that is not what the legislature intended. This means that the approach in cases such as *Mofokeng* has no place in the sentencing laws of South Africa. Although the interpretation that it put forward has received criticisms⁵³⁵ it remains the authoritative precedent for the courts up to now.

With regards to interpretations of ‘substantial and compelling’ after the guidelines that were given in *Malgas*, the dissertation specifically looked at interpretations that were given in rape, murder and robbery cases. Other relevant cases were also discussed.

5.2.2.1 AN ANALYSIS OF THE INTERPRETATION OF ‘SUBSTANTIAL AND COMPELLING’ IN THE DISCUSSED RAPE CASES.⁵³⁶

One of the things that can be criticized about *S v Abrahams*⁵³⁷ judgement is that the judge although remarking that rape within a family was in no way less reprehensible the sentence that ended up being imposed is only 5 years more than the one that had been initially imposed by the High Court. This shows a hesitancy to impose life imprisonment. Van Der Merwe⁵³⁸ applauds the way the judicial officer arrived at the decision in this case. She is of the opinion that the

⁵³⁵ The judgement was criticized in V Bafobekhaya “Application of prescribed minimum sentencing legislation on juvenile offenders in South Africa” (2005) accessed at http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/2671/Momoti_LLM_2005.pdf?sequence=1 accessed on 6 March 2017 at page 34 and N Kubista ‘Substantial and compelling circumstances: Sentencing of rapists under the Mandatory Minimum Sentencing Scheme’ (2005) 18 *South African Journal of Criminal Justice* 81.

⁵³⁶ The cases that were previously discussed in Chapter 3. The cases are discussed in the same order as they appear in Chapter 3.

⁵³⁷ *S v Abrahams* 2001 (2) SACR 116 (CC)

⁵³⁸ A Van der Merwe “Guidelines on sentencing in child sexual abuse cases” (2002) 3 *Child Abuse Research in South Africa* 20.

general manner that was used was correct as all the traditional aggravating and mitigating factors were considered. The important points are the role of a judicial officer during sentencing, acceptance of evidence having the potential to provide information on the effect of crime and lastly, understanding the interpretation of harm suffered by a child as a result of the rape.⁵³⁹

*Mahomotsa*⁵⁴⁰ does not mention all the practical guidelines that were put forward in the *Malgas* case. It does however emphasize on the fact that in *Malgas*, it was held that the prescribed sentences should not be departed from for ‘flimsy’ reasons. The sentence that had been imposed by the court a quo is described as ‘woefully inadequate’ by the appeal court but no sufficient basis is given. The prescribed sentence of life imprisonment is also held to be too ‘severe’ but there is no outline of factors that were taken into account for the appeal court to arrive at this decision. It is however important to note these points from the case:

- a) a man’s virility was held not to play a part in the sentencing process
- b) The fact that a complainant had had sexual intercourse days before the rape cannot be used against them.
- c) The fact that the accused had lied about his age cannot be taken as an aggravating factor especially in this case as the accused had later disclosed his age.
- d) It was also highlighted that there is difference in seriousness when it comes to rape cases with this particular case being described as a ‘borderline’ one.

⁵³⁹ Ibid.

⁵⁴⁰ 2002 (2) SACR 198 (SCA)

Mahomotsa does however establish a very ‘dangerous precedent’⁵⁴¹ by mentioning that a survivor has to prove that they suffered psychological or mental damage after a rape. This creates a few problems. One of the problems is that the enquiry will now be focused on the victim and will shift from the offender making it seem like it is the victim that is on trial. Another of the problems is that a burden is now imposed on the prosecution to prove mental or psychological injury where it is not apparent.⁵⁴² One of the principles that we can draw from this case is that it puts forward that not all rapes are the same and life imprisonment should only be imposed for the ‘worst cases of rape’.⁵⁴³

There is a clear principle that *Mahomotsa* establishes when it comes to sentencing. This is the principle that when a court is interpreting Section 51(1) of the Act when it comes to rape, it must exercise its discretion before imposing a sentence of life imprisonment.⁵⁴⁴ It emphasizes that this is a principle that emerges from the *Dodo* and *Malgas* judgement. What it is stressing is that just because a rape falls within the listed aggravating circumstances that are listed by the Act. It mentions that even if a rape falls within this category there are different degrees of seriousness.⁵⁴⁵

In *Njikelana*⁵⁴⁶ we see the fact that the complainant had not suffered any serious physical injury was a huge mitigating factor. Although the psychological damage and trauma that the complainant had suffered as a result of the crime was acknowledged, Thring J emphasizes the fact that there were no significant injuries on the complainant’s body.

⁵⁴¹ K.S Baehr “Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa” (2008) 1 *Yale Journal of Law and Feminism*
<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1283&context=yjlf> (Accessed on 16 October 2017).

⁵⁴² Ibid.

⁵⁴³ S Terblanche “Sentencing” (2009) 22 *SACJ* 136.

⁵⁴⁴ S Terblanche “Sentencing” (2008) 21 *SACJ* 129.

⁵⁴⁵ *Mahomotsa* at para 29.

⁵⁴⁶ 2003 (2) *SACR* 166 (C)

In *S v M*, Judge Satchwell seems to follow the legislation very strictly. This judgement has been described by Terblanche as ‘substantial but controversial in many respects’⁵⁴⁷ Judge Satchwell does not seem to exercise the discretion that has been given to the courts and seems to conclude that just because the rape fell within the listed aggravating circumstances, life imprisonment was the just sentence to impose. In other words, Satchwell just acted as a rubber stamp of the legislation.⁵⁴⁸ She did not grade the rape like the other cases have done and there was a disregard of circumstances that have been considered as substantial and compelling in other cases.⁵⁴⁹

One of the important things to note about the *Nkomo*⁵⁵⁰ judgement is that the prospect of rehabilitation of an offender was identified as a substantial and compelling circumstance. Judge Theron AJA put forward a dissenting judgement in which she stated that there is no evidence to suggest that the fact that an offender has a prospect of rehabilitation should be taken into account as a substantial and compelling circumstance.⁵⁵¹ Theron AJA was also of the view that if we look at the bigger picture, every offender has prospects of rehabilitation. However, the majority seemed to agree that a prospect of rehabilitation was substantial and compelling.⁵⁵² Mujuzi is of the opinion that in order to make a determination whether the prospect of rehabilitation falls under substantial and compelling it has to be asked whether it doesn’t fall under what the SCA in *Malgas* termed as ‘speculative hypotheses favorable to the offender and undue sympathy’⁵⁵³. Mujuzi describes rehabilitation as ‘initiatives taken by prison authorities to model the offender’s

⁵⁴⁷ S Terblanche “Sentencing” (2008) 21 *SACJ* 128.

⁵⁴⁸ *Ibid* at 130.

⁵⁴⁹ Satchwell disregarded the fact that the offender was a first offender and had spent nearly a year in custody. These are factors other judgements have been taking seriously.

⁵⁵⁰ 2007 (2) SACR 198 (SCA)

⁵⁵¹ *S v Nkomo* at para 31.

⁵⁵² *Ibid*.

⁵⁵³ J D Mujuzi “Prospect of rehabilitation as a substantial and compelling circumstance to avoid imposing life imprisonment in SA: A comment on *S v Nkomo*” (2008) (21) (1) *South African Journal of Criminal Justice* at page 6.

life during his time in prison in a way that when he is released from prison he has been reformed to such an extent that he is not likely to reoffend'.⁵⁵⁴ Mujuzi is of the opinion that for the SCA to say that rehabilitation is a substantial and compelling circumstance, it is saying that the offender will be rehabilitated by staying for a short time in prison compared to life imprisonment. This according to him is an indication of undue sympathy.⁵⁵⁵ The funding for rehabilitation has declined and the Department of Correctional Services has been unable to meet its rehabilitation targets. This is also proof that the prospect of rehabilitation remains a speculative hypothesis.⁵⁵⁶

The court in *Vilakazi*⁵⁵⁷ focused so much on the fact that sentences should not be disproportionate and substantial and compelling circumstances need not be exceptional to qualify as such. It also highlighted a bit on the gravity of the offence that was in question and how that was relevant when it came to determining sentences. It quoted excessively from *Malgas* and found everything that was inconsistent with the *Malgas* judgement in the court a quo's judgement to be erroneous. When it comes to the step by step practical interpretation put forward in *Malgas*, *Vilakazi* seems to focus more on how courts should not be vehicles of injustice instead of emphasizing that the prescribed sentences are a point of departure for the courts when it comes to sentencing. Terblanche is of the view that the essence of *Malgas* and *Dodo* would have been correctly reflected by saying that the prescribed sentences are a point of departure than saying how disproportionate sentences shouldn't be imposed and how courts should not be 'vehicles of injustice'.⁵⁵⁸ There wasn't much emphasis on measuring all the factors traditionally

⁵⁵⁴ Ibid 12.

⁵⁵⁵ *S v Vilakazi* at para 7.

⁵⁵⁶ Ibid.

⁵⁵⁷ 2009 (1) SACR 552 (SCA)

⁵⁵⁸ S Terblanche *A Guide to Sentencing in South Africa* 3ed 2016 at page 80.

relevant to sentencing against the yardstick of substantial and compelling to determine whether to depart or not from the prescribed sentence although it was mentioned.⁵⁵⁹

It is important to note that factors such as whether an accused is married or not, whether he/she is employed or unemployed or how many children the accused has were classified under the ‘flimsy’ grounds that shouldn’t be considered when departing from the prescribed sentences. The judge was however quick to say that these factors can be useful in other situations.

It is also important to note that in *Vilakazi*, we can get that it is not enough for one aggravating factor to be used as justification for the imposition of the prescribed sentence. The Appeal court noted that the court a quo had overemphasized on the fact that the complainant was 16 years old and neglected other factors that were present.

With this said, I’m of the opinion that one can’t fault the decision that the Appeal Court eventually arrived at. A sentence of fifteen years seems more appropriate based on the circumstances that were presented before the court. With regards to its application of *Malgas*, we can see that the judge was in agreement with the principles mentioned in the case though he overemphasized some principles and neglected the other in a way.

The court in *S v PB* referred to none of the other considerations that were mentioned in the *Malgas* case. The case also did not make reference to the proportionality requirement neither did they apply it to their judgments.⁵⁶⁰ Terblanche is of the view that in these cases there was too much stress on the principle that departure reasons need not be flimsy that the judicial officers ended up interpreting ‘substantial and compelling’ strictly.⁵⁶¹ The refusal to interfere with the sentence of life imprisonment that had been imposed shows the court wanted to emphasize the

⁵⁵⁹ *S v Vilakazi* at para 11.

⁵⁶⁰ A sentence of life imprisonment is imposed and there is a disregard of helpful mitigating factors.

⁵⁶¹ S Terblanche “Sentencing: Recent cases” (2011) 24 *SACJ* 230.

importance of imposing heavy sentences in these cases to prevent young girls from getting abused.⁵⁶²

In *S v MS*⁵⁶³ there is no reference to the *Malgas* case but the principle that it put forward that the prescribed sentences should be departed from for reasons that are not flimsy. Victor J mentioned how the traditional factors that are relevant in sentencing should be considered and he goes on to do that. What is most important in this case is the mention of the Criminal Law Sentencing Amendment Act and the factors that it says must not be regarded as substantial and compelling when it comes to rape cases. The seriousness of the crime and the impact it had had on the victim made it hard for Victor J to set aside the six terms of life imprisonment that had been imposed by the court a quo.

Perhaps the only notable thing about the *S v Uithaler*⁵⁶⁴ judgment is the fact that the court was of the view that when it comes to rape, the fact that an accused did not use excessive force during the commission cannot be taken as a substantial and compelling factor. There was no mention of other practical considerations that were put forward in *Malgas*. The court did however stress the point that courts should view the prescribed sentences as ones that must be ordinarily imposed and in the event that they find substantial and compelling circumstances, they are free to depart from the prescribed sentences⁵⁶⁵. This is a principle that the *Malgas* case mentioned.

In rape cases, it is trite law that a complainant's sexual history, the lack of physical injuries after the rape, any religious or cultural beliefs that the accused has about rape and any relationship

⁵⁶² A Van der Merwe "Sentencing: Recent cases" (2014) *SACJ* 465.

⁵⁶³ 2014 (1) SACR 59 (GNP).

⁵⁶⁴ 2015 (1) SACR 174 (WCC)

⁵⁶⁵ *S v Uithaler* at para 22.

existing between the complainant and the offender prior to the rape cannot be considered as ‘substantial and compelling’ circumstances justifying the imposition of a lesser sentence.⁵⁶⁶ The rape cases that were analyzed in this dissertation spanned from 2002 to 2015. The principle of considering and weighing the traditional mitigating and aggravating factors seems to have been grasped firmly by the courts as this exercise was done by all the rape cases considered in this study. There was not any disagreement or criticisms of the *Malgas* judgement either. The principle in *Malgas* that is quoted excessively is the one where *Malgas* stipulates that courts must not depart from the prescribed sentences for ‘flimsy reasons’.⁵⁶⁷

Not all of the cases made reference to the Criminal Law Sentencing Amendment Act which is of importance because it stipulates the factors that must not be regarded as ‘substantial and compelling’ in rape cases. Although in most of the cases considered in the study, none of the factors listed in the Act were taken into account there is a problem with *S v Njikelana* where the lack of physical injury was listed under the factors that had a cumulative impact on departing from the prescribed sentence. The proportionality requirement is also not mentioned in most of the cases except the emphasis *Vilakazi* put on it. One would assume that the proportionality requirement forms part and parcel of the guidelines that were given in *Malgas* as a result of the *Dodo* case. There is also a contradiction in the *Vilakazi* case. *Vilakazi* although stating that these factors can be useful in another regard, had declared marriage, children and employment as falling under the ‘flimsy’ grounds that were mentioned in *Malgas*. The contradiction is when the case considers the cumulative impact of the offender having a stable family and stable employment enough to warrant a departure from life imprisonment.

⁵⁶⁶ This is according to Section 3 of the Criminal Law Sentencing Amendment Act 38 Of 2007

⁵⁶⁷ Quoted in *S v Mahomotsa*, *S v Vilakazi*, *S v MS*, *S v Njikelana*.

In light of the cases considered, there has not been a consistent list of factors that one can surely state will be ‘substantial and compelling’ in a rape case. Youth seems to play such a very important role in mitigation of sentence.⁵⁶⁸ Personal circumstances such as lack of education, absence of previous convictions also play a role in the cumulative impact of justifying departure but some judicial officers disregard these.⁵⁶⁹ Another interesting factor is the prospect of rehabilitation which played a role in departure in the *Nkomo* case.

5.2.2.2 ANALYSIS OF THE INTERPRETATION OF ‘SUBSTANTIAL AND COMPELLING’ IN THE DISCUSSED ROBBERY and MURDER CASES.⁵⁷⁰

In *Khathi* the fact that the deceased was a law enforcement officer was regarded as a major aggravating factor. It is unclear if it is because of this that Moshidi J viewed the personal circumstances of the accused as not extraordinary enough. However, it is without a doubt that it played a huge role in the decision that was made. There is express mention of *Malgas* in this case and the fact that one of the principles in *Malgas* is that the courts must not depart for ‘flimsy’ reasons is emphasized.

The case of *S v Mbatha* puts forward an approach for courts who want to impose a greater sentence than the one prescribed in minimum sentencing legislation. Aspects of this are in disagreement with what was held in the judgment of the Supreme Court of Appeal in *Mthembu v S*. It will be discussed below how the omission to give guidance on upward departure by the judgment of the Supreme Court of Appeal in *Malgas* has led to confusion.

⁵⁶⁸ *S v Njikelana S v Mahomotsa, S v Nkomo* all used youthfulness as one of the factors that justified a departure from the prescribed sentence.

⁵⁶⁹ For example, in *S v Nkomo* the fact that the offender had emotional scars from a young age and that he had relatively low education was not enough to persuade the judicial officer to depart while *Mahomotsa* and *Vilakazi* emphasized personal circumstances and they played a role in the judge’s decision to depart

⁵⁷⁰ As previously discussed in Chapter 3. The cases will be discussed in the same order as they appear in Chapter 3.

The case of *Chowe* speaks of the prospect of rehabilitation as a factor to be considered and deems a 26-year-old a good prospect of rehabilitation. The case also looks at the combination of factors, i.e. their cumulative impact in determining whether they can qualify as substantial and compelling circumstances.

Matyityi can be criticized for an incomplete reflection of the judgement in the *Malgas* case.⁵⁷¹ There was no emphasis on the fact that *Malgas* mentioned that all the factors that are to be traditionally taken into account when it comes to sentencing should be factored in. The cumulative impact of these circumstances will then have to be mentioned against the yardstick of ‘substantial and compelling’ to see if a departure is warranted. This was not noted in *Matyityi*, the judge focused on the prescribed sentences being the point of departure and avoiding departing from the prescribe sentences for ‘flimsy’ reasons. Even though the judgment can be criticized for this, it is hard to fault the conclusion that the judge arrived at as the offenders had murdered and gang raped.⁵⁷²

Matyityi also emphasized the importance of accommodating a victim during the sentencing process. This was said to be important and that it enables a court to measure the impact that the crime had on the victim and also makes the court better informed.⁵⁷³ Another point that was emphasized was that whenever confronted with this problem, a sentencing court must independently apply its mind to the question of whether the prescribed sentence is proportionate to the crime.

In *Mahlangu* we see the brutality of a crime being overemphasized and the fact that the accused persons had spent a lot of time in custody being disregarded.

⁵⁷¹ SS Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 80.

⁵⁷² *Ibid.*

⁵⁷³ N Whitear-Nel “S v *Matyityi* 2011 1 SACR 40 (SCA): compliance with mandatory sentencing, and placing the victim at the center of the criminal justice system: recent case law” (2012) 45 *De Jure* 587.

Mthembu v S disagrees with *S v Mbatha*'s proposed approach for when a court wants to make an upward departure.⁵⁷⁴

In the *Buys* case, we see a case where the personal circumstances of an accused person are held to not be enough to warrant a departure from the prescribed sentence. Factors such as remorse, the accused financial responsibilities, the fact that he had used a toy gun instead of a real weapon, the fact that no harm had been done to the victims were all held not to be substantial and compelling enough as the crime had had serious consequences and the accused had not been a first offender.

Mogaramedi is a perfect example of a murder case where the judge strongly highlighted the aggravating factors to show that no amount of mitigating factors would be enough to depart from the sentence that was prescribed by the legislature.

In the *Montsho* case, we see all of the personal circumstances that the appellant had being struck down and held not to be enough to amount to substantial and compelling circumstances. An important thing to note about this case is that it refuses to accept that the cumulative impact of circumstances should be considered but rather the circumstances themselves need not be neutral of all under flimsy reasons. A plea of guilty was also said not to automatically constitute remorse on the side of the accused and that in order to see whether an accused is remorseful one has to look at the accused's actions and not merely what they say in court.

In *Ngwenya*, the fact that the appellant was a member of the SAPS played a major role in determining the sentence. Even though there were personal mitigating factors, it seems these were overlooked because of the position of trust that the appellant held. There is no express mention of the guidelines that were put forward in *Malgas* in this case.

⁵⁷⁴ This will be discussed in detail below.

In *Matjeke* it is important to note that the proportionality element was regarded among the circumstances that were held to be substantial and compelling. This is something that hasn't been considered in other cases. *Matjeke* even cites the *Vilakazi* case as basis for this. The consumption of alcohol was also held to have influenced the accused in some way and Judge Ratshibvumo went on to hold this as a substantial and compelling circumstance as well.

With the robbery cases, there seems to be a very strict approach from the courts when it comes to what constitutes 'substantial and compelling'. Age was disregarded as a substantial and compelling factor in all the cases⁵⁷⁵ examined by this study except the *Chowe*⁵⁷⁶ case. All the robbery cases considered endorsed the practical guidelines that were put forward in the *Malgas* case. Robbery being a different crime from rape, we see factors such as the value of goods stolen, the manner in which the robbery was committed and whether there was physical injury playing a crucial role in the decision of whether there must be departure from the prescribed sentences.⁵⁷⁷ Remorse and personal circumstances such as having little or no income, poor background, low levels of education and having been incarcerated for a long time awaiting sentence are disregarded by most of the cases considered in the study as well. One can say that with robbery cases, the manner in which the robbery was committed is emphasized when it comes to sentencing and it tends to overshadow any personal circumstances that the offender

⁵⁷⁵ *S v Mahlangu, Buys v S, S v Matyityi, S v Ngwenya* all disregard age. In *Mahlangu* the judge remarks that youthfulness is not an automatic substantial and compelling circumstance and that in this case the gravity of the offence outweighed the youthfulness of the offender. In the same case, the youngest offender had exerted the most influence in the commission of the crime.

⁵⁷⁶ *Chowe* seems to have been the more lenient case (probably because of the manner in which the robbery was committed). It considered age and prospect of rehabilitation as substantial and compelling while these factors were disregarded by the other cases.

⁵⁷⁷ In *S v Chowe*, it was remarked that these are the factors that should be considered in robbery cases

might have. It should also be noted that being a member of the South African is a major aggravating factor.⁵⁷⁸

The murder cases that were considered for the purpose of the study all seem to do things the *Malgas* way i.e. assessing the traditional mitigating and aggravating factors in order to determine whether a departure is warranted. Age⁵⁷⁹ was disregarded as mitigating factor in two cases that were examined in the study. The gravity of the crime is emphasized in brutal murders. This can be seen in *Montsho*, *Mogaramedi* and *Khathi*. In *Khathi* we see the judicial officer remarking that there was nothing extraordinary about the offender being 27 years old, having low levels of education and having a minor child. Life imprisonment was imposed despite this because the crime that had been committed was brutal and involved the murder of a law enforcement officer.

In general, there has not been any disagreement with the practical guidelines that were put forward in *Malgas*. What can be seen is inconsistent application (factors that are considered as ‘substantial and compelling’ in some cases are disregarded in other cases)⁵⁸⁰ and omission of some of the principles mentioned.⁵⁸¹ This may be attributed to the fact that each case possesses its own set of unique facts.

The method in *Malgas* has not necessarily led to one consistent way of interpretation. The study found that with some crimes judicial officers are more lenient.⁵⁸² The two decisions namely *Malgas* and *Dodo* have led to what can be described as a ‘hybrid sentencing scheme’ which uses

⁵⁷⁸ As can be seen in *S v Ngwenya*.

⁵⁷⁹ In *Montsho* where the accused was 25 years old the judicial officer dismisses this on the basis that there was no indication that the offender was immature. In *Mogaramedi* the fact that the accused was 49 years old was disregarded and the offender was sentenced to life imprisonment.

⁵⁸⁰ An example can be *S v Montsho*, where antisocial personality disorder and narcissism are disregarded in sentencing.

⁵⁸¹ The proportionality principle is not mentioned in some cases.

⁵⁸² For example, judges overemphasize personal circumstances in rape cases but these are over emphasized when it comes to crimes like robbery.

factors that were used pre the minimum sentences to depart from the prescribed sentences. The long term result of this is that factors will be abused or misused to depart from these mandatory minimum sentences.⁵⁸³

5.2.3 The discussion of the Minnesota Sentencing Guidelines and a comparison with South Africa's mandatory minimum sentencing regime.⁵⁸⁴

The Minnesota sentencing guidelines were put in place for more or less the same reasons as South Africa's mandatory minimum sentencing regime. They were put in place to address the sentencing disparities and to make sentences more 'uniform and predictable'. The severity of an offence and the offender's criminal history were identified as the two factors that are most important when it comes to sentencing. The Minnesota guidelines consist of a grid system and the sentence is located where an offender's criminal history and the severity of the crime they committed intersect. The sentences are known as presumptive sentences.

Departure from these presumptive can only be done when 'substantial and compelling' circumstances exist. These must be stated in writing and included in a departure report which is filed with the Commission. The sentencing guidelines of Minnesota have a comprehensive list of factors that can be used as reasons for departure and those that should not be considered by the courts when making a decision of whether to depart or not. Factors such as race, various employment and social factors may not be used as reasons for departure. Factors that may be used as reasons for departure are grouped into mitigating and aggravating factors. A mitigating factor can be that the victim was the aggressor in the commission of the crime while an

⁵⁸³ N Kubista 'Substantial and compelling circumstances: Sentencing of rapists under the mandatory minimum sentencing scheme' (2005) 18 *South African Journal of Criminal Justice* 81.

⁵⁸⁴ As previously discussed in Chapter 5.

aggravating factor can be when a victim was treated with utmost cruelty during the commission of the offence.

The guidelines also have certain offences that are subject to mandatory minimum sentences. These mandatory minimum sentences are to be departed from if there is an existence of ‘substantial and compelling’ circumstances as well. The same comprehensive list of what constitutes ‘substantial and compelling’ and what does not is still applicable here.⁵⁸⁵ Departures may either be dispositional or durational.

Upon comparing the two systems the study found that the systems were put in place for more or less the same reasons. Dealing with prison overcrowding was however not at the forefront of what South Africa wanted to address. The proportionality principle is a key feature of both systems as well. Minnesota has presumptive and mandatory sentences and South Africa’s system only has the mandatory minimum sentences without the presumptive sentences. In both systems, these sentences can be departed from when ‘substantial and compelling’ are found to exist. There is no grid system in South Africa like the one that exists in Minnesota, all the sentences are listed in the Criminal Law Amendment Act. Most importantly unlike South Africa, the Minnesota sentencing guidelines have a non-exhaustive list of what judges can take into account as ‘substantial and compelling’ circumstances and what they should not take into account.

Both systems have been criticized. Critics of the Minnesota sentencing guidelines say the guidelines have given the prosecutors so much power and stripped judicial officers of the discretionary powers they had. The mandatory minimum sentences were also criticized for this with the basis that the act was violating the principle of separation of powers. This argument was however struck down in the *Dodo* case. The mathematical formulas that are used in Minnesota

⁵⁸⁵ There is no indication that the list does not apply.

have also been criticized with the view that they reduce human beings to a number of points on a sentencing grid. The critics of South Africa's mandatory minimum sentencing system argue that the sentences have not in any way reduced crime, they have led to prison overcrowding and the act in itself is broadly and poorly defined.

Despite the criticisms, both systems have had their achievements. The study found that sentences have become fairer in the state of Minnesota. The release dates have become more predictable and sentencing disparities have reduced. In South Africa some reports suggest that there has been a decrease in violent crime and sentences have become stricter. Prior to the imposition of mandatory minimum sentences, for the crimes that are listed in Part 1, offenders were getting an average of 10 years in prison.⁵⁸⁶

It is important to note that Minnesota dealt with problems of interpretation by including a list of what the judges can take into account as 'substantial and compelling' circumstances and what they should not take into account.

5.3 Discussion of Problems

5.3.1 The flaws of the practical interpretation that was given in *S v Malgas*.

Perhaps the most interesting question is whether *Malgas* clearly explained how the courts are supposed to deal with interpreting 'substantial and compelling'. To a large extent, one can conclude that this case provided as much guidance as was possible. This is so because it sums up the intention of the legislature perfectly,⁵⁸⁷ states that 'substantial and compelling' does not mean exceptional, mentions that the factors traditionally considered in sentencing are useful in the enquiry and most importantly puts forward that the prescribed sentences should not be departed

⁵⁸⁶ S Terblanche "Sentencing: Recent cases" (2011) 24 *SACJ* 230

⁵⁸⁷ On para 8, mentions that one of the aims was to achieve consistency when it comes to sentencing.

from for ‘flimsy reasons’. The ‘flimsy reasons’ requirement has been emphasized by a lot of judicial officers and one can say that it has since become trite law.⁵⁸⁸

Despite summing up the legislator’s intention perfectly and giving the judicial officers guidance on how to interpret ‘substantial and compelling’ one cannot run away from the fact that the absence of a ‘textual interpretation’⁵⁸⁹ of ‘substantial and compelling’ by *Malgas* is one of the reasons why a lot of inconsistencies still exist up to this date. A textual interpretation would have been really helpful, for example if there had been examples of what might constitute ‘substantial and compelling’ and what might not in a particular case. Perhaps the reason why the *Malgas* case did not provide a textual interpretation was for the purposes of maintaining the discretion of the courts. This, however has done harm as there are still inconsistencies which means the intention of the legislature is not being achieved.

The guidelines themselves do nothing but advocate for the use of the traditional factors that are used when a court is sentencing an offender. If one looks at it strictly, ‘substantial and compelling’ could simply mean the traditional factors that our courts have long considered as mitigating circumstances. That is basically how the courts have been interpreting it as this is the guideline that is given in *Malgas*. There would be nothing wrong if the legislature had intended it to be so but enactment of mandatory minimum sentences show that there were problems with the system that existed then. It would be a bit puzzling if the intention was for the courts to take into account the ordinary mitigating factors. What this would mean is that nothing has changed but for the fact that the courts now have to measure the factors against the yardstick of ‘substantial and compelling’ which is not being interpreted consistently therefore creating further problems.

⁵⁸⁸ K Phelps “Sentencing: Recent cases” (2014) 27 *South African Journal of Criminal Justice* 244

⁵⁸⁹ In *S v Kgafela* it is remarked that ‘substantial and compelling’ is not interpreted at all in *Malgas* and that it was only reduced to the effect of an instinctive reaction or response.

The word ‘flimsy’ means insubstantial which is the opposite of substantial, one cannot say that ‘flimsy’ can be a guideline for the courts. What is flimsy for another judicial officer might well be very important for another judicial officer. Terblanche submits that there is nothing of value in the statement that judicial officers should not consider ‘flimsy reasons’.⁵⁹⁰ He states that no judicial officer would ever base a decision on reasons that he/she thinks are ‘flimsy’.⁵⁹¹ The problem he identifies is that large gap that is between circumstances that could be considered ‘substantial and compelling’ and those that are no longer to be ‘characterized’ as flimsy.⁵⁹²

‘Hypotheses favorable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts about the legislation and marginal differences in personal circumstances’⁵⁹³ are listed as some of the factors that must be excluded but looking at the cases that have been considered in the study, some of these factors have been taken into account by judicial officers.⁵⁹⁴ There is definitely an aversion to imprisoning first offenders and some judicial officers go as far as disregarding a previous conviction if it is in no way related to the crime that they are sentencing at that particular moment as justification for departing from the prescribed sentences.⁵⁹⁵

While it can be difficult to determine whether the courts understood the last guideline that was given in *Malgas* which states that they must keep in mind that the crimes that are listed in the

⁵⁹⁰ S Terblanche “Sentencing” (2011) 21 *SACJ* 228.k

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*

⁵⁹³ *S v Malgas* at para 25.

⁵⁹⁴ Personal circumstances are playing a huge role in mitigating sentences especially when it comes to rape cases, Judicial officers have also been listing the fact that an offender is a first offender as part of the mitigating factors that they consider. See *S v Njikelana*, in *S v Mahomotsa* the judicial officer even held that the fact that an offender's previous conviction did not involve non-consensual sex favored a departure from the prescribed sentences. Elements of undue sympathy can also be seen in other cases.

⁵⁹⁵ See *S v Chowe* where the court a quo considered the fact that the previous conviction did not in any way relate to robbery as a mitigating factor.

Act have been singled out for severe punishment.⁵⁹⁶ Judicial officers are departing from life imprisonment to imposing sentences as little as 14 years.⁵⁹⁷ This means *Malgas* can also be criticized for not giving a margin for which the courts may depart. This makes the task of sentencing even difficult for judicial officers and creates the potential for huge sentencing disparities.

Another question that can be raised is why the *Malgas* decision does not mention anything that relates to an upward departure. This led to the confusion that is evident from the *Mbatha* and *Mthembu* case. Mthembu completely disagrees with the method that was put forward in *Mbatha*. Departure is addressed but one has to wonder how a judicial officer who makes an upward departure can be checked to ensure that they have followed all the principles especially in matters where that upward departure is appealed.

5.3.2 The inconsistencies/sentencing disparities and confusion that still exists in the system.

a) Confusion

One of the principles that is emphasized by *Malgas* is that when a court is satisfied that substantial and compelling circumstances exist, it can then depart from the prescribed sentence and go on to impose a sentence that it deems proportional to the offence that has been committed.⁵⁹⁸ In 2017, one would expect that this principle would be clear for judicial officers but unfortunately this is not the case.⁵⁹⁹ This confusion can be seen in the case of *S v Seedat*⁶⁰⁰ where it was held that once a magistrate is satisfied about the existence of substantial and compelling circumstances, he/she is to suspend the imposition of sentence for five years and

⁵⁹⁶ *S v Malgas* at para 25.

⁵⁹⁷ see *S v Njikelana*,

⁵⁹⁸ This was emphasized in *Malgas* at para 9.

⁵⁹⁹ S Terblanche

⁶⁰⁰ 2017 (1) SACR 141 (SCA).

make a restorative justice award.⁶⁰¹ Although the Supreme Court of Appeal later held that this was wrong and incompetent, the Appeal court was not clear on the matter either.⁶⁰² There have also been cases that have suspended sentences prior to that, an example is *S v Alam*.⁶⁰³ It has been declared by the Supreme Court⁶⁰⁴ that suspension is prohibited even when the judicial officer decides to depart from the prescribed sentences.

b) Inconsistent interpretation of substantial and compelling.

The ‘substantial and compelling’ standard for departing from the prescribed sentences is one of the ‘troubling’ aspects of South Africa’s sentencing regime. Over the years they have been more or less consistent results when this standard is applied by the courts.⁶⁰⁵

An example showing there exists a huge inconsistency involves the *Mahomotsa, Abrahams* and *S v M* judgements. These cases all involved rape. *Mahomotsa* emphasized the need for courts to keep their discretion and that just because a rape falls within the aggravating factors it does not mean substantial and compelling circumstances cannot be found. This is a principle that is heavily entrenched in the *Malgas* and *Dodo* cases. It also forms part of the guidelines for interpretation that were given in *Malgas*. Instead of following this principle that seems to be set in law, Judge Satchwell does the opposite in *S v M* where she fails to grade a rape and imposes life imprisonment. Grading the seriousness of the offence is the foundation of any sentencing process. It has long been emphasized that the punishment must fit the crime and that there must be proportionality between the sentence and the crime that has been committed.⁶⁰⁶

⁶⁰¹ *S v Seedat* at para 36.

⁶⁰² S Terblanche “Sentencing” (2017) 30 *South African Journal of Criminal Justice* 102.

⁶⁰³ 2006 (2) SACR 613 (Ck) this was done in clear contravention of Section 51(5) of Act 105 of 1997.

⁶⁰⁴ *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) at para 23.

⁶⁰⁵ S Terblanche “Sentencing” (2015) 28 *SACJ* 120.

⁶⁰⁶ S Terblanche “Sentencing” (2008) 21 *SACJ* 130.

The inconsistencies are further exacerbated when the *S v M* judgement is compared with the *Abrahams* case. These cases have facts that are somehow similar. The aggravating factors in *S v M* were the age of the victim, the relationship that existed between the victim and the offender, the position of power that the offender had and the victim's vulnerability to the offender.⁶⁰⁷ These factors are the same factors that existed in *Abrahams* as well. However, we see that in *S v M* a sentence of life imprisonment is imposed while in *Abrahams* the offender was sentenced to 12 years imprisonment. The difference in the way these two cases were dealt with is shocking to say the least. It goes against the very same thing that the legislature wanted to address and it is an indication that the inconsistencies are still very common. There is no answer from the *S v M* judgement why there is such a huge gap. One would expect an explanation since the *Abrahams* judgement is quoted in the *S v M* case.

Also, one would expect that the rape of a child is a major aggravating factor but in some instances, the rape of an adult and that of a child sees the same sentence being imposed. An example of this can be taken from *Mahomotsa* and *Abrahams* in comparison to *S v Swart*.⁶⁰⁸ In *Swart*, the offender had broken into the complainant's house and raped her repeatedly. Twelve years was imposed, the same as was done in *Abrahams* and *Mahomotsa* where child complainants were involved. Terblanche remarks that it is unexplainable how these judgements can have the same sentence.⁶⁰⁹

A strict approach when interpreting 'substantial and compelling' has been warned against in various Supreme Court of Appeal judgements. It is surprising that a few judgements still choose to interpret substantial and compelling strictly even after these warnings. The cases of *S v PB* and

⁶⁰⁷ Ibid 129.

⁶⁰⁸ 2004 (2) SACR 370 (SCA).

⁶⁰⁹ S Terblanche "Rape Sentencing with the aid of sentencing guidelines" (2006) 39 *Comparative and International Law Journal of SA* 5.

Matyityi have gone against this. This again is pointing to the fact that inconsistencies still exist when it comes to interpretation. Partly, the blame can be put on *Malgas* for that ‘flimsy reasons’ principle as this is what the two judgements emphasized and focused solely on. Both these courts criticized other judgements for frequently departing from the prescribed sentences for ‘flimsy reasons’.⁶¹⁰

The difference that is notable between the two cases is that *PB* was a first offender.⁶¹¹ What can be seen is too much stress on the requirement that the prescribed sentence should be imposed and a disregard of factors that would have had a cumulative impact in minimizing the sentence as is in the other cases that have been considered by the study.⁶¹² As a result, we see in *S v PB* the offender, who a first offender was getting the same sentence (life imprisonment) that a serial rapist would have got.⁶¹³ This raises questions of whether the courts are having regard to the proportionality principle or whether they are paying attention to the inconsistencies their judgements are resulting in. What this is showing is that despite *Malgas*, some cases are still interpreting ‘substantial and compelling’ strictly.

5.3.3 The failure of the courts to properly inquire into the existence of substantial and compelling circumstances.

The application of ‘substantial and compelling’ as a standard for deviating from the prescribed sentences in the Act remains the most troubling aspect of the mandatory minimum sentencing regime.⁶¹⁴ The *Malgas* judgement suggests using the ‘past sentencing patterns’ as a starting point

⁶¹⁰ *S v Matyityi* at para 23, *S v PB* at para 10.

⁶¹¹ Although *Matyityi* involved a higher amount of brutality.

⁶¹² In *S v PB* the fact that the offender was a first offender, that he had shown remorse, In *Matyityi* the offender had plead guilty.

⁶¹³ S Terblanche “Sentencing” (2011) 24 *SACJ* 231.

⁶¹⁴ S Terblanche “Sentencing: Recent cases” (2015) 28 *South African Journal of Criminal Justice* 120.

for the courts when they are determining sentences for the crimes that are listed in the act.⁶¹⁵ In other words, what this is saying is that the traditional factors that are taken into account in sentencing i.e. the mitigating and aggravating factors play an important role in determining whether ‘substantial and compelling’ circumstances exist. What this entails is that a court has to make an inquiry into the existence of ‘substantial and compelling’ circumstances (by looking at the mitigating and aggravating circumstances) in order to arrive at a decision that truly reflects the intention of the legislature. This creates a duty on the part of the courts.

This was directly emphasized in the *Calvin*⁶¹⁶ case. This case involved the rape of a 6-year-old victim and the court a quo had sentenced the offender to life imprisonment as per the prescribed sentences. The Supreme Court of Appeal however held that the trial court had misdirected itself by failing to consider all the factors that were present in this case. It held that there also had not been any steps taken to obtain evidence in order to make a proper assessment of whether ‘substantial and compelling’ circumstances existed. This led to the life imprisonment sentence being reduced to twenty years. This judgement makes it clear that in order for a judicial officer to depart from the prescribed sentences, he/she must make a proper inquiry into the existence of ‘substantial and compelling’ circumstances. In order for the inquiry to take place, a court must have all the necessary information and most importantly it has to show in the judgement that the court has taken into account all the circumstances that are available for consideration.⁶¹⁷

⁶¹⁵ *S v Malgas* at para 21.

⁶¹⁶ (962/2013) [2014] ZASCA 145 (26 September 2014).

⁶¹⁷ B Tshehla “Remitting of a case to the trial court and the duty to take steps to obtain evidence to determine the existence of substantial and compelling circumstances” (2015) 36 (3) *Obiter* 820-821.

It is also a general principle that any conclusion that a court arrives at should be properly motivated.⁶¹⁸

Although in some cases it is apparent which factors have been taken into account and what their cumulative impact is, that is not the case in all cases. This shows that there are some inconsistencies. An example of this can be seen in the *Matyityi* case and to some extent the *Vilakazi* case. *Matyityi* does not seem to emphasize on the fact that the traditional aggravating and mitigating factors must be taken into account. It also doesn't reflect in this judgement that all the circumstances have been taken into account. The judicial officer simply strikes down the accused's age and remorse⁶¹⁹ and mentions that the sentence that had been imposed by the court a quo was disproportionate to the crime and the interests of the society.

Terblanche is also of the view that judicial officers in South Africa have become used to imposing the sentences that are prescribed in the Act that many are losing the required consideration that must be had to proportionality.⁶²⁰ This is true, not many cases make mention of the proportionality requirement.

If a court does not make a proper inquiry and it's not reflective in the judgement which factors were considered to arrive at a decision, there is a problem. Either the sentence that is arrived at will not reflect the intention of the legislature or there runs a risk of courts departing from the prescribed sentences for reasons that are not justifiable. This creates inconsistencies. The fact that even after *Malgas*, courts are failing to make a proper assessment in determining what constitutes 'substantial and compelling' indicates that there has not been much guidance or the

⁶¹⁸ *S v Mbatha* [2009 \(2\) SACR 623 \(KZP\)](#) at para 2 this was also emphasized in *S v Maake* 2011 (1) SACR 263 (SCA).

⁶¹⁹ *S v Matyityi* at para 24.

⁶²⁰ S Terblanche "Annual Survey of South African Law: Sentencing" (2009) *2009 Annual Survey of South African Law* 1166.

guidance that is in place is misunderstood or that there is a mere disregard of the steps that should be followed by the courts.

5.3.4 Substantial and compelling circumstances in rape cases.

Rape is one of the most violent and serious crimes. It is one of the crimes that led to the imposition of mandatory minimum sentences. Kubista⁶²¹ is of the opinion that discretion has been left to the courts to decide whether to depart from the prescribed sentences and with rape, section 51 lists certain thresholds for sentencing and when those thresholds are crossed, the court must automatically impose a certain sentencing. This means that if a crime meets any of the requirements that are mentioned in Schedule 2 of Part 1, life imprisonment must be imposed. This might mean that the courts have been interpreting the Act wrongly and possibly considering ‘substantial and compelling’ circumstances for departure where they should not. This was not clarified in the *Malgas* judgement or any of its confirmation judgements. Kubista goes on to say that the factors that are being used to justify departure from a minimum sentence should therefore not relate to the severity of a crime in these cases as the legislature has already dealt with that and predetermined which types of crime are to be punished and at what level that is to be done.

She states that if the crime fits in Schedule 2 of Part 1 its ‘severity in relation to other conceivable variations of the crime or any subjective circumstances must be read to exclude circumstances relating to the severity of the crime’.⁶²² In a nutshell, her point is that, for example if the rape falls within the ambit of the scenarios mentioned in Schedule 2 of Part 1, ‘substantial and compelling’ circumstances must be read to not include circumstances that relate to the

⁶²¹ N Kubista “Substantial and compelling circumstances: Sentencing of rapists under the mandatory minimum sentencing scheme” 2005 18 *South African Journal of Criminal Justice* 82.

⁶²² *Ibid* 83.

severity of the crime. The severity of a crime is a recurring theme in cases that were considered in the study. You find that judicial officers often highlight the way a crime was committed when deciding whether or not to depart from the prescribed sentence.

Another worrying thing when it comes to considering ‘substantial and compelling’ circumstances in rape cases is that courts wrongfully require a higher showing of violence for them not to depart from the prescribed sentences.⁶²³ In *S v Dzukudu* it was held that rape in itself should be seen as a crime that is inherently violent.⁶²⁴ It is then surprising that judicial officers choose to use the absence of extreme violence in a rape as a mitigating factor or substantial and compelling circumstance when the crime in itself is of a violent nature. This is a disregard of the Criminal Law Sentencing Amendment Act⁶²⁵ which clearly states that ‘apparent lack of physical injury to the complainant’ should not be taken as a substantial and compelling circumstance.

It is also confusing that in some cases it has even been said that not all rapes are the same and that life imprisonment should only be imposed in the ‘worst cases of rape’.⁶²⁶ Rape has been ‘conceptualized on a continuum from bad to worse’ and it has been said that life imprisonment is only justified in the worst cases of rape.⁶²⁷ This can be problematic because rape violates a person’s bodily integrity and has been shown to have major psychological effects on the victims whether there were serious injuries or not. It has been described as an ‘invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity’.⁶²⁸ In *S v Uithaler* the judge, correctly so, stated that the absence of physical injury in a rape should

⁶²³ An example of this is *S v Njikelana*, see also *S v Gqamana* 2001 (2) SACR 28 (C).

⁶²⁴ *S v Dzukudu* 2001 (2) SACR 244 (W) at 215 c-d.

⁶²⁵ 38 of 2007 at Section 3.

⁶²⁶ *S v Mahomotsa* 2002 (2) SACR 435 (SCA).

⁶²⁷ N Whitear-Nel “*S v Matyityi* 2011 1 SACR 40 (SCA): compliance with mandatory sentencing, and placing the victim at the center of the criminal justice system: recent case law” (2012) 45 *De Jure* 588 this has happened in the cases of *S v Abrahams*, *S v Mahomotsa*.

⁶²⁸ *S v Chapman* 1997 (3) SA 341 (A).

not be taken as a mitigating factor as it does not in any way make the crime ‘less reprehensible’⁶²⁹ Terblanche is also of the view that the fact that the victim has not sustained any physical injuries cannot mitigate the seriousness of rape and goes on to say that this does not mean that this cannot be considered as an aggravating factor and make the crime worse than it already is.⁶³⁰

*S v Nkawu*⁶³¹ remarked that the absence of physical injuries cannot be taken solely as a substantial and compelling circumstances and that it would make no sense for it not to be taken into account when looking at the bigger picture. This makes sense, the problem is when there is an overemphasis that the rape lacked physical injuries and reliance on this fact to mitigate a sentence.

Kubista is of the view that the starting point in these cases should be where life imprisonment is recognized as the sentence that has been ordained by the legislature before the lack of physical violence.⁶³² The overemphasis of lack of physical violence in an inherently violent crime indicates that there is problems with the sentencing system and a possibility that the courts might be implementing their own mandatory minimum sentences⁶³³ whose effect will start to show in years to come. How a court can consider a factor that is prohibited by legislature in the inquiry is worrying to say the least.

What can be seen from the rape judgements is that they believe that for a rape to warrant a sentence of life imprisonment it must fall under the worst cases of rape. What this has resulted in

⁶²⁹ *S v Uithaler* 2015 (1) SACR 174 (WCC) at para 12.

⁶³⁰ S Terblanche “Sentencing” (2015) 28 SACJ 121.

⁶³¹ 2009 (2) SACR 402 (E) at paras [14] - [17].

⁶³² N Kubista “Substantial and compelling circumstances: Sentencing of rapists under the mandatory minimum sentencing scheme” (2005) 18 *South African Journal of Criminal Justice* 86.

⁶³³ *Ibid.*

is that the judicial officers have put themselves in a place where they constantly have to justify sentences that are lesser than life in most serious cases. These justifications are coming in the form of emphasizing factors such as the absence of bodily injury and in some cases, the absence of mental or psychological injury.⁶³⁴ What this has done is the judicial officers are focusing on the elements that justify the imposition of a lesser sentence instead of those elements that make the rapist more culpable. This ‘lenient language of downward departures’ being seen in rape sentencing judgements excuses rapists.⁶³⁵ It is necessary to emphasize that the study has found that the intention of the legislature in enacting mandatory minimum sentences was to respond to serious crimes in a way that makes sentencing more consistent and severe. By overemphasizing factors that should not be emphasized or that take away from the severity of the crime as ‘substantial and compelling’, the intention of the legislature is being undermined.

5.3.5 Substantial and compelling circumstances in murder and robbery cases.

With the robbery cases, the courts seem to be following a strict approach where we see factors such as the age of accused persons being disregarded in some cases. Personal circumstances also tend to get sidelined in robbery cases.

In murder cases there has been inconsistent interpretation. Factors that are regarded as ‘substantial and compelling’ in other cases are disregarded in other cases.

⁶³⁴ An example of a case where the lack of psychological injury was taken as a substantial and compelling circumstance is *S v Rammoko* 2003 (1) SACR 200 (SCA) at 205. In this case a life sentence of a rape of a thirteen-year-old was overturned because they had been failure to prove that the victim had suffered psychological harm.

⁶³⁵ KS Baehr “Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa” (2008) *Yale Journal of Law and Feminism* accessed at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1283&context=yjlf> (Accessed on 16 October 2017).

5.3.6 The problem with considering rehabilitation as a substantial and compelling circumstance.

The prospect of rehabilitation has been used as justification to depart from the prescribed minimum sentences.⁶³⁶ Consideration of the prospect of rehabilitation as substantial and compelling has caused a bit of controversy. This is not so for discretionary sentencing as the prospect of rehabilitation is a factor that is normally considered.⁶³⁷ In the *S v S*⁶³⁸ case the court a quo had used the prospect of rehabilitation to depart from a prescribed sentence. This prompted the appeal court to ask the following question, ‘Does the fact that the appellant is a first offender who is likely to be rehabilitated constitute substantial and compelling circumstances that would justify a deviation from the minimum sentence of life imprisonment?’⁶³⁹ Following this the appeal court reached the conclusion that the court a quo had misdirected itself and the other factors significantly outweighed the prospects of rehabilitation that the offender had. One can conclude that the appeal court did not view the prospect of rehabilitation as a worthy substantial and compelling circumstance, thereby answering the question that it had posed. This was not the case however in *S v Nkomo*. As previously stated in Chapter 3 in a dissenting judgement to this case, Theron AJA stated that there is no evidence that the prospect of rehabilitation should be taken as a substantial and compelling circumstance.⁶⁴⁰

⁶³⁶ In *S v Nkomo*.

⁶³⁷ K Phelps “Sentencing: Recent cases” (2014) 27 *South African Journal of Criminal Justice* 245

⁶³⁸ (A71/2013) [2014] ZAGPPHC 450 (20 June 2014).

⁶³⁹ *S v S* at para 43.

⁶⁴⁰ *S v Nkomo* at para 31, see also K Phelps “Sentencing: Recent cases” (2014) 27 *South African Journal of Criminal Justice* 244 where Kelly Phelps also agrees with the same sentiments shared by Theron AJA. She mentions that everyone can be rehabilitated i.e. every offender has prospects of rehabilitation unless they suffer from a mental illness. See also J D Mujuzi “Prospect of rehabilitation as a substantial and compelling circumstance to avoid imposing life imprisonment in SA: A comment on *S v Nkomo*” (2008) 21 (1) *SAJCJ* 6 where he concludes that the prospect of rehabilitation remains a speculative hypotheses and is an indication of undue sympathy.

The huge problem with using the prospect of rehabilitation as a substantial and compelling circumstance is that this is a factor that will be present in all cases except the few that will be exceptional or have a set of unique facts.⁶⁴¹ This means that considering this factor as such will lead to a lot of unnecessary departures thereby circumventing the intention that the legislature had when they enacted mandatory minimum sentencing laws. The fact that the prospect was used for departure in *Nkomo*, leaves room for other judgements to erroneously do so as well.

6. Recommendations

The study has established that *Malgas* guidance has not proved to be helpful when it comes to achieving consistency in the sentencing system of South Africa. In the year 2000, the SA Law Commission after having researched and identified the problems in the sentencing system, recommended that a sentencing council be established with the task of creating guidelines for courts when it comes to sentencing.⁶⁴² The Law Commission had found that like cases were not being treated the same, sufficient weight was not being given to serious offences, prisoners were being released too early because of overcrowding, there was no restorative approach to less serious offenders and sufficient attention was not being given to victims of crime.⁶⁴³ The study has found that some of these problems still persist 17 years later.

Prior to that the Van Der Heever Committee had also identified that the wide discretion given to the courts is causing inconsistencies within sentencing and that there was an urgent need for sentencing guidelines to guide the courts.⁶⁴⁴ Sentencing guidelines refer to any general standards

⁶⁴¹ K Phelps "Sentencing: Recent cases" (2014) 27 *South African Journal of Criminal Justice* 245.

⁶⁴² SS Terblanche "Rape Sentencing with the aid of sentencing guidelines" (2006) 39 *Comparative and International Law Journal of South Africa* 5.

⁶⁴³ South African Law Reform Commission *Sentencing: A New Sentencing Framework* available at <http://www.justice.gov.za/salrc/dpapers/dp91.pdf> accessed on 30 October 2017 at page 3.

⁶⁴⁴ J Nesor "Reformation of Sentencing in South Africa" (2001) 14 *Acta Criminologica: Southern African Journal of Criminology* 84.

that guide the courts in determining the sentence that should be imposed in a specific case as was done in the state of Minnesota.⁶⁴⁵ The concept of sentencing guidelines has been frowned upon in South Africa because of the need to maintain the sentencing discretion of the courts.⁶⁴⁶ It is also notable that the courts⁶⁴⁷ have not considered any jurisprudence, cases or guidance from Minnesota but at the same time have not been particular about how to interpret ‘substantial and compelling’.⁶⁴⁸

It is high time that South Africa admits that a sentencing scheme that includes normative sentencing guidelines is the only way that consistency can be achieved in a sentencing system. It is also the only way that the diverse opinions of the public can be met.⁶⁴⁹ Phelps is of the opinion that the government would do well if they ‘resurrect’ the recommendations that were given by the Law Commission in 2000.⁶⁵⁰ Minnesota's system of guidelines is and remains one of the most highly rated systems. It has achieved most of the objectives it had set out at the beginning and it is balanced and flexible to have adapted to the changing circumstances while retaining its ‘simplicity and ease of use’.⁶⁵¹

A system that includes sentencing guidelines gives potential offenders a sense of what punishment they may expect if they go on to commit a particular crime. It is not enough to

⁶⁴⁵ Ibid. 2

⁶⁴⁶ Ibid. 1

⁶⁴⁷ See *S v Malgas* at para 18 where it states that the phrase has been specifically left to the courts to interpret. also *S v Jansen*.

⁶⁴⁸ SS Terblanche “Rape Sentencing with the aid of sentencing guidelines” (2006) 39 *Comparative and International Law Journal of South Africa* 5.

⁶⁴⁹ Van Zyl Smit and D Van Zyl Smit “Human Rights and Sentencing Guidelines” (2001) 5 *Law, Democracy and Development* 50.

⁶⁵⁰ K Phelps “Sentencing: Recent cases” (2013) 26 *South African Journal of Criminal Justice* 228.

⁶⁵¹ SS Terblanche “Rape Sentencing with the aid of sentencing guidelines” (2006) 39 *Comparative and International Law Journal of South Africa* 5.

merely state what the prescribed punishments are.⁶⁵² Lack of sentencing guidelines however, allows the sentencing discretion of the courts to be exercised in an inconsistent way making it impossible to make a determination on whether like cases are being treated alike.⁶⁵³ What is needed in the South African system is consistent weighing of factors that constitute ‘substantial and compelling’ and the total disregard of factors that should not constitute ‘substantial and compelling’ by all judicial officers to achieve fairness. It has been submitted by various experts that the current system is lacking in ‘meaningful principle’.⁶⁵⁴ There is no guidance whatsoever for the courts and this has constantly led to inconsistent outcomes.

In 2006, using the crime of rape as an example, Terblanche conducted a research on how different models of sentencing work. He used a factual scenario with two slight variations and went on to impose a sentence in terms of four jurisdictions. Two of these jurisdictions were South Africa and Minnesota. The purpose of the research was not to determine the severity of sentences in the jurisdictions that were used but to highlight the contrast that is there when it comes to determining sentences in a structured system like that of Minnesota and an unstructured system like South Africa’s.⁶⁵⁵ The factual scenario was as follows⁶⁵⁶:

“The accused and victim, both in their early thirties, have dinner together on a first date. Afterwards he drives her to a dark spot, and forces her to have sexual intercourse with him. He threatens her with physical violence, without being specific about this violence, which is sufficient to overcome her resistance. No physical injuries are caused, but the victim is traumatized, as can be expected. At trial the

⁶⁵² D Van Zyl Smit and D Van Zyl Smit “Human Rights and Sentencing Guidelines” (2001) 5 *Law, Democracy and Development* 46.

⁶⁵³ Ibid.

⁶⁵⁴ SS Terblanche and JV Roberts “Sentencing in South Africa lacking in principle but delivering justice” (2005) 18 *SACJ* 200.

⁶⁵⁵ SS Terblanche “Rape Sentencing with the aid of sentencing guidelines” (2006) 39 *Comparative and International Law Journal of South Africa* 38.

⁶⁵⁶ SS Terblanche “Rape Sentencing with the aid of sentencing guidelines” (2006) 39 *Comparative and International Law Journal of South Africa* 3.

accused pleads not guilty, offering consent as defense, but is convicted nevertheless. He is a first offender.”

The factual scenario had the following variations:⁶⁵⁷

“In terms of the first variation the accused uses a knife to threaten the victim, pins her down and manhandles her to the extent that she sustains a few bruises. In terms of the second variation, the accused is not a first offender, but has a previous conviction for rape, committed nine years before the current offence, involving a set of circumstances similar to the main scenario.”

“In terms of the second variation, the accused is not a first offender, but has a previous conviction for rape, committed nine years before the current offence, involving a set of circumstances similar to the main scenario.”

In terms of the main scenario, when the sentencing laws of Minnesota were applied, Terblanche came to the conclusion that a sentence of 4 years was most likely to be imposed. With regards to the first variation where the accused uses a knife to threaten the victim, it was found that life imprisonment was most likely to be imposed. With the second variation it was found that almost 5 years would be imposed.⁶⁵⁸

After applying South African law to the scenario and its variation, Terblanche found that in the main scenario, a sentence of 5 years would most likely be imposed. In the first variation where the knife is used 10 years would most likely be imposed. The second variation would most likely attract a sentence of 8 years.⁶⁵⁹

⁶⁵⁷ Ibid 3.

⁶⁵⁸ Ibid.

⁶⁵⁹ Ibid 37.

As previously stated, the purpose of this research was to compare the determination of sentences in structured and unstructured systems. When one talks of structure, what is meant is the existence of certain guidelines that assist the court in determining sentences. Terblanche finds that once one ‘gets a grip’ of how sentencing guidelines work, the task of sentencing is made easier.⁶⁶⁰ One gets into a position where they are able to predict with a certain degree of accuracy, the sentence that will be imposed in a particular situation.⁶⁶¹ This is with reference to the Minnesota guidelines. It is notable that Terblanche found it much easier working with a system that included guidelines. He mentions that the use of guidelines make sentences more predictable which is a very important aspect as this can contribute to the consistency of sentences.⁶⁶² He found that the same was not true for South Africa’s system. Even with knowledge of how the system works, one cannot predict a final sentence and it remains ‘guesswork’.⁶⁶³ He goes on to add that many important aspects of the justice system of South Africa have not been addressed thoroughly or systematically.⁶⁶⁴ This is especially true for the interpretation of ‘substantial and compelling’. The guidance that was given is not making the sentencing task easier but creating further inconsistencies.

The following is therefore recommended to assist the courts in interpreting ‘substantial and compelling’ more consistently:

1. The establishment of an Independent Sentencing Council. The Sentencing Council should comprise of 2 Constitutional Court judges, 2 Supreme Court of Appeal judges, 2 trial court judges, 1 prosecutor, 1 defense attorney, a member of the Correctional Services, 2

⁶⁶⁰ Ibid 38.

⁶⁶¹ Ibid.

⁶⁶² Ibid.

⁶⁶³ Ibid.

⁶⁶⁴ Ibid.

sentencing experts and 2 citizens who have been victims of the crimes that are listed in the Act. This Council's objective will be to create sentencing guidelines for interpreting 'substantial and compelling' for South Africa's sentencing system. Terblanche rates the success of the commission that was established in Minnesota as one of the reasons why the Minnesota Guidelines are highly regarded to this date.⁶⁶⁵

2. The Sentencing Council's first task will be draft a list of the principles that the South African sentencing system seeks to embody or in other words emphasize the intention that the legislature had when it promulgated the Act. Sentencing guidelines that are drawn up in light of clear principles ensure that like cases are treated the same.⁶⁶⁶ These principles should also be flexible to ensure that the courts retain their discretion and to also make room for the unusual cases.⁶⁶⁷
3. More importantly, after extensive research the Sentencing Council will be tasked to create a comprehensive but not exhaustive list of what factors the courts can take into account when making a determination whether 'substantial and compelling' circumstances exist. This list will include mitigating factors and aggravating factors and another list of factors that should not play a part in the decision to depart or impose the prescribed sentence.
4. A direction to the courts from the council that in the event that it sees reason to depart from the prescribed sentences, it files the factors that it has found to warrant a departure with the Sentencing Council.
5. The Sentencing Council will also conduct an annual research and analysis of cases that fell within the ambit of the Act to ensure that the courts are following the guidelines.

⁶⁶⁵ Ibid 14.

⁶⁶⁶ D Van Zyl Smit and D Van Zyl Smit "Human Rights and Sentencing Guidelines" (2001) 5 *Law, Democracy and Development* 50.

⁶⁶⁷ Ibid.

8. Conclusions

The aim of this dissertation was to determine how ‘substantial and compelling’ is being interpreted by the South African courts and whether it is being interpreted consistently. The study has established that the phrase ‘substantial and compelling’ is not being interpreted consistently by the South African courts. Certain factors that are taken into account by other courts are disregarded by others.

Another important discovery made by the study was that South Africa can learn a thing or two from the Minnesota sentencing guidelines. The state of Minnesota has made it easier for the courts to interpret ‘substantial and compelling’ by providing a list of the mitigating and aggravating factors that a court may take into account in making a determination on whether to depart from the prescribed sentence or not. There is also a list of factors that should not be taken into account.

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