A critical evaluation of some of the unintended consequences of the mandatory minimum sentencing legislation in South Africa.

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DECLARATION

I, Banele Prince Nkosi declare that:

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ABSTRACT

The Criminal Law Amendment Act 105 of 1997[1] (the Act) requires the imposition of mandatory minimum penalties for specific criminal offences. However, it also allows the presiding officer of the court to depart where is it determined that substantial and compelling circumstances are present.

This research seeks to evaluate the diverging interpretations of substantial and compelling circumstances by our courts as an unintended consequence of the mandatory minimum sentencing scheme. Although the legislature has not defined substantial and compelling circumstances, the case of S v Malgas[2] provided guidelines that can be used by courts whenever faced with the question of what are substantial and compelling circumstances. Despite the guidelines provided, some cases still show uncertainty regarding this phrase and some judgements tend to completely disregard the importance of the constitutional considerations of proportionality and the need to still consider the traditional sentencing principles, this is an unintended consequence of the Act owing to the lack of clarity regarding substantial and compelling circumstances.

The Minimum sentences scheme contains unexplained inconsistencies which have resulted in the diverging interpretations of compelling and substantial circumstances by our courts, this inconsistency can be seen in the lack of gradation for increasing levels of offence severity (sentencing cliffs) that are evident in the prescribed sentences for rape, some courts have required a higher showing of violence in order to not depart from the prescribed sentences. Some cases have used the prospect of rehabilitation as justification for a departure. This is problematic because the latter factor is present in most cases, as a result, this would lead to unnecessary and unexplainable departures which would then circumvent the legislatures intention in ensuring consistent sentences. This raises questions of whether courts are paying attention to some of the inconsistencies that result from their judgements.

This research also looks at prison overcrowding as an unintended consequence of the Act, this is because the Act limits the individualisation of cases thus leading to more offenders receiving lengthy sentences. Courts are expected to consider the relevant factors of each individual case however this is not properly adhered to because the act uses few sentences for different crimes without proper explanation thus affecting prison overcrowding.

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[1] Criminal Law Amendment Act 105 of 1997

[2] 2001 1 SACR 469 SCA.

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CHAPTER 1

1.1 Brief Introduction

The South African parliament enacted section 51 of the Criminal Law Amendment Act[3]. The initial idea around the enactment was to respond to the increase of violent crimes at the time, decrease sentencing disparities as well as the general public's dissatisfaction with this problem, the notion was that potential offenders would be deterred from engaging in criminal activities by the severe sentences in light of this amendment[4].

The period of this amendment has been extended various times but initially, the Act's provisions were meant to be in effect for two years thus being a temporary measure[5]. The act is now rendered permanent by the repealed section 53(1) and (2) of the Act thus eradicating the then requirement that it be reconsidered bi-annually[6].

This provision requires that minimum mandatory penalties be imposed for serious criminal offences which are specified, for instance, it prescribes mandatory sentences for rape, murder, aggravated robbery as well as for serious financial crimes however it also allows the court to depart where there is a determination that substantial and compelling circumstances exist as provided by section 51(3) where it is stated 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'[7].

The argument is that the phrase substantial and compelling circumstances was adopted from the sentencing guidelines developed by the Sentencing Commission in the American State of Minnesota in order to guide the courts in the exercise of their discretion, however, the South African legislature has not spelt out further or defined the phrase unlike the Minnesota guidelines[8]. Since the legislature has not provided a definition of substantial and compelling circumstances, this standard is seen as vague and has arguably resulted in the undermining of

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[3] Criminal Law Amendment Act 105 of 1997.

[4] Njoko, T *What constitutes ''substantial and compelling circumstances'' in the Mandatory Minimum Sentencing Context?* (Unpublished LLM Thesis, University of KwaZulu Natal, 2016) 9.

[5] Cameron, E Comment and analysis - The crisis of criminal justice in South Africa 69 (2020): *SACQ* 2020.

[6] Nzimande, ES *Minimum Sentence Legislation in South Africa* (Unpublished LLM Thesis, Nelson Mandela Metropolitan University 2012) 18.

[7] Criminal Law Amendment Act 105 of 1997 sec 51(3).

[8] South African Law Commission (Project 82) Sentencing *A New Sentencing Framework* (2000) 14.

the act's endeavour to promote uniformity[9]. It has proven to be difficult to establish the true meaning of the words as such the phrase has prompted a substantial discourse which has resulted in vast interpretations by our courts[10].

Whether the words "substantial and compelling" are to be examined separately or conjointly has been an issue of uncertainty when attempting to arrive at the intention of the parliament and in applying them to the case and its particular circumstances. The legislature's intention was that the court's response to crime be consistent however the act contains unexplained inconsistencies, particularly the sentencing cliffs that are evident in the prescribed sentences for rape[11] and if our judges are offering differing interpretations thus following different standards, this does not seem to give effect to the intention of the legislature.

One of the objectives of the Act is to promote consistency in sentences and the aim being to deter crime, nonetheless, we have discerned different explanations as far as the aims or purposes of the provision are concerned. In the case of *S v Malgas*[12] it was provided that the intention of the legislature was for courts to have a standard and consistent approach unless reasons which necessitated a lenient sentence were present.

The act has also endured some criticism from judicial officers and sentencing scholars. Terblanche and Mackenzie opine that prison overcrowding is an effect of the mandatory minimum sentence legislation thus being one of the Act's foremost shortcomings[13]. The courts are thought to show repugnance apropos this legislation, this is said to be because it seems to curtail their judicial discretion[14]. Former justice of the constitutional court Edwin Cameron speaks about the overcrowding of prisons as a consequence and arguably the most perceptible cost which has been imposed by the mandatory minimum scheme. Professor Terblanche is one of the leading experts in South African sentencing, he has also criticised the act, the criticism is based mainly on the poor language of the act and since the legislature has not provided the intention of the provision it has not been easy to determine its intention. Other issues include the notion that the sentencing scheme limits judicial discretion[15].

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[9] Roth, S "South African Mandatory Minimum Sentencing: Reform required" (2008) *Minnesota Journal of International Law* 167.

[10] S v Dodo 2001 (3) SA 382 (CC).

[11] Goliath, A 'A short critique of minimum sentences.' (2022), 43(4), *Obiter* 779-796.

[12] 2001 1 SACR 469 SCA.

[13] Terblanche SS, Mackenzie G, Mandatory *Sentences in South Africa: Lessons for Australia*? (2008) 415.

[14] Maharaj, V. *An evaluation of the effect of mandatory minimum sentencing legislation on judicial discretion in South Africa* (Unpublished LLM Thesis, University of KwaZulu Natal, 2021) 2.

[15] Terblanche, S *A Guide to Sentencing In South Africa* 3ed (2016) 51.

1.2 PROBLEM STATEMENT/PURPOSE

The purpose of this study is to critically evaluate some of the unintended consequences of the mandatory minimum sentencing in South Africa in terms of the Criminal Law Amendment Act (the Act)[16], this will cover the Act's effects on the diverging interpretations of substantial and compelling circumstances as interpreted by our courts as well as the Act's effect on prison overcrowding.

It is important to look at the fact that the legislature has not given any guideline regarding the interpretation of what 'substantial and compelling' means, this may suggest that it is left to the courts to establish its meaning and while doing so they should treat the prescribed sentences as suitable for the given crimes and not depart unless there is a weighty justification to do such[17]. It has proven to be difficult to establish the true meaning of the words. As such there has been much debate given rise to by the phrase substantial and compelling circumstances thus leading to vast interpretations which have resulted[18].

The *S v Malgas*[19] case provided guidelines that can be used for the purpose of interpreting the words compelling and substantial circumstances. Before the case of *S v Malgas*[20], the interpretations of the words substantial and compelling can be divided into three main categories namely, the strict method of interpretation, a more lenient approach of interpretation and a more balanced approach of interpretation[21]. However, in the case of *S v B*[22] the court was faced with uncertainty as it questioned what are substantial and compelling. This indicates that there is still uncertainty regarding the interpretation of the words substantial and compelling circumstances because the *S v B*[23] case was decided after the *S v Malgas*[24] guidelines were provided.

The main point is that the sentences prescribed by the Act should be the point of departure in that they should be ordinarily imposed and be given the necessary seriousness[25]. In determining whether a departure is necessary the courts are required to consider all the traditional

[16] Criminal Law Amendment Act 105 of 1997, sec 51-53.
[17] Chikoko, V. *The interpretation of substantial and compelling by South African courts and a comparison with Minnesota sentencing guidelines*. (Unpublished LLM Thesis, University of KwaZulu Natal, 2017) 4.
[18] S v Dodo 2001 (3) SA 382 (CC) para 10.
[19] 2001 1 SACR 469 SCA.
[20] Ibid.
[21] Ibid.
[22] 2013 (2) SACR 553 (SCA) at para 21.
[23] Ibid.
[24] 2001 (1) SACR 469 (SCA)
[25] Terblanche, SS 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33(1) SACJ 19.

sentencing factors However, it is equally important to note that when considering substantial and compelling circumstances some judgements tend to completely disregard the importance of the constitutional considerations of proportionality and the need to still consider the traditional sentencing principles and they only focus on the main point[26].

The existence of these three main varying interpretations suggests that the mandatory minimum provisions have not fully attained the goal of reducing sentencing disparity[27]. Based on the above discussion one can discern that the uncertainty and the diverging interpretations by our courts are an unintended consequence of the mandatory minimum sentencing scheme[28].

The purpose of this indagation is to evaluate the diverging interpretations of compelling and substantial circumstances by our courts as an unintended consequence of the mandatory minimum sentencing scheme, the uncertainty around the suitable approach to interpretation as well the usefulness of the *S v Malgas*[29] guidelines.

Professor Terblanche argues that prison overcrowding is an effect of the mandatory minimum sentence legislation thus being one of the act's foremost shortcomings[30]. Former Constitutional Court Justice Cameron[31] provides that one of the problems and arguably the most perceptible cost which has been imposed by the mandatory minimum scheme is its effect on overcrowding prisons.

Goliath provides that prison overcrowding is exacerbated by mandatory minimum sentences since the sentences lead to more offenders receiving lengthy sentences and this in turn leads to human rights violations[32]. One can discern that prison overcrowding is an unintended consequence of the mandatory minimum legislation as Terblanche provides that when the act

[26] Notably in S v PB 2011 (1) SACR 448 (SCA), S v PB 2013 (2) SACR 533 (SCA), S v Mofokeng 1999 [1] SACR 502 [W] and S v Matyityi 2011 (1) SACR 40 (SCA).

[27] Roth, S 'South African Mandatory Minimum Sentencing: Reform required' (2008*) Minnesota Journal of International Law* 168.

[28]Roth, S "South African Mandatory Minimum Sentencing: Reform required" (2008) *Minnesota Journal of International Law* 167 'Parliament expected mandatory minimums to reduce sentencing disparities, Nevertheless, the opportunity to depart from mandatory minimums where substantial and compelling circumstances exist has perhaps worsened the disparities and inconsistencies that prevail in relation to the offences targeted by act'. The vague substantial and compelling circumstances standard and the failure of Parliament to define that term have undermined the Act's endeavour to promote uniformity because some judges also interpret the phrase in ways that often circumvent the mandatory minimum sentencing thus resulting in different interpretation by courts. This is an unintended consequence of the mandatory minimum legislation as it goes against the objective of promoting consistency in sentencing.

[29] 2001 (1) SACR 469 SCA.

[30] Terblanche SS, Mackenzie G, Mandatory *Sentences in South Africa: Lessons for Australia*? (2008) 415.

[31] Cameron, E. (2017). Imprisoning the nation: Minimum sentences in South Africa. *Dean's Distinguished Lecture, University of the Western Cape Faculty of Law.*

[32] Goliath, A 'A short critique of minimum sentences (2022), 43(4), *Obiter* 779-796.

was proclaimed, there was no consideration of whether the South African prisons would be able to cope in light of the increased terms of imprisonment[33]. The minister of Justice and Correctional Services Mr Lamola while speaking in parliament provided that in 2023 prison overcrowding still remains a challenge and continues to put a strain on the available resources[34]. He went on to provide that external factors like limiting legislation on mandatory minimum punishments has a direct impact on inmate population levels[35].

Our Bill of Rights affirms the democratic values of dignity and our constitution provides for the protection of sentenced and detained prisoners as such there is a need to evaluate the act's effects on prison overcrowding as an unintended consequence of the mandatory minimum legislation as well as establishing whether the overcrowding conditions degrade the respect that the country has for human and constitutional rights[36].

1.3 KEY RESEARCH QUESTIONS

The research goals will be achieved through answering the following questions.

What are the unintended consequences of the mandatory minimum legislation?

1. What are the factors that led to the enactment of the Criminal Law Amendment Act which provides for mandatory minimum sentences?

2. How have the courts interpreted the phrase substantial and compelling circumstances before the *S v Malgas*[37] guidelines?

3. How have the courts defined substantial and compelling circumstances after the *S v Malgas*[38] step-by-step approach on how the courts should approach the decision on whether to depart from the prescribed sentences or not?

4. What effect does the mandatory minimum legislation have on prison overcrowding?

5. How does mandatory minimum sentence legislation affect the constitutional rights of prisoners in light of the act's unintended consequence on prison overcrowding?

[33] Terblanche, SS 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33 *SACJ* 4.
[34] Sibuliso Duba 'Overcrowding in prisons continues to be a problem, says Popcru' IOL 13 January 2023, available at https://www.iol.co.za/news/south-africa/western-cape/overcrowding-in-prisons-continues-to-be-a-problem-says-popcru-6cb4b14d-fdb5-4569-bc40-6108a7eec89e, accessed on 05 June 2023.
[35] Ibid
[36] The constitution of the Republic of South Africa 1996, sec 35.
[37] 2001 (1) SACR 469 (SCA)
[38] Ibid.

6. What solutions can be offered in light of the discussed unintended consequences?

1.4 RESEARCH METHODOLOGY AND FEASIBILITY

This is a qualitative study (theoretical). Information is gathered from public textbooks, academic journals, statutes, articles, research papers and theses relevant publications as well as articles that are available on the internet. As provided, this is a qualitative study as a result it is largely based on a critical analysis of the information which has been gathered from different materials in hope of analysing and applying it in order to achieve the desired research outcome. The research aims seem to be achievable as the questions focus on case law and literature.

The data collected for the purposes of answering the research questions is of a qualitative nature, (Qualitative analysis tends to be quite flexible and relies on the researcher's judgement, so I have reflected carefully on my work). The design of the research to be utilised is Desktop.

When looking at the aims of the research, they are achievable because the topic in discussion is based on literature and case law which is readily available on the internet. With regards to feasibility, I do not see any issues that may hinder the research.

1.5 LIMITATIONS OF THE RESEARCH

This research may give rise to challenging questions since it will be looking at a vast range of literature in light of sentencing however this dissertation is specific and when looking at solutions that can be applied, I have visited relevant jurisprudence from other jurisdictions in order to provide a succinctly useful approach.

1.6 CHAPTER BREAKDOWN

Chapter One -Introduction

This chapter briefly introduces the topic of mandatory minimum sentences legislation in the South African context through a brief background and introduction of the legislation, outlining the purpose of the study, key questions, research methodology and feasibility as well as the limitations of the research.

Chapter Two- Mandatory Minimum Legislation

Chapter two will give particular focus on the background of the Criminal Law and Amendment Act as the context upon which the unintended consequences arose. This chapter also examines

the intention of the legislature behind the enactment of the mandatory minimum scheme, amendments to the act while also looking at various criticisms positioned against the legislation. This chapter will be rounded off by discussing the modus operandi used by courts when interpreting the phrase "substantial and compelling circumstances" as a clause allowing an escape from prescribing the minimum sentences. The focus will be directed on the different approaches adopted by courts when interpreting the phrase substantial and compelling circumstances.

Chapter Three – The Interpretation of substantial and compelling circumstances

Chapter three will give particular focus to the *S v Malgas*[39] case and its guidelines as well as the cases that were decided after its judgement in hope of establishing whether the guidelines have proven to be useful for cases decided after its judgement in clarifying the uncertainty when interpreting words substantial and compelling circumstances.

Chapter Four - The effects of the Act on prison overcrowding as an unintended consequence of the mandatory minimum legislation.

Chapter Four will look at the act's effect on prison overcrowding as an unintended consequence of the mandatory minimum legislation and will be rounded off by a discussion on whether prison overcrowding has any effects on the respect that the country has for constitutional and human rights as affirmed by our bill of rights.

Chapter Five- Conclusion and Recommendations

Chapter five will see the rounding off of this dissertation with possible solutions or recommendations thus forming a conclusion.

[39] 2001 (2) SA 1222 (SCA).

CHAPTER 2

MANDATORY MINIMUM SENTENCING LEGISLATION

This chapter will give particular focus on the background of the Criminal Law and Amendment Act[40] as the context upon which the unintended consequences arose. This chapter also examines the intention of the legislature behind the enactment of the mandatory minimum scheme, amendments to the act while also looking at various criticisms positioned against the legislation. This chapter will also look at the cases decided prior to the *S v Malgas* guidelines, The writer engages in such indigation in order to discern how the courts interpreted the phrase substantial and compelling circumstances before the *Malgas* step by step approach or guidelines were provided.

2.1. Introduction and background of the Act

Terblanche and Mackenzie have defined mandatory sentencing as the legislature's establishment of a set penalty for a particular criminal offence[41]. In broad terms, it refers to an event where the legislature has set a minimum and maximum sentence for a particular offence, hence there is a common use of the term mandatory minimum sentencing[42]. A minimum sentence can also be considered as a sentence that has a lower limit thus giving discretion to the court for the imposition of a higher sentence[43]. When looking at the history of South Africa, one can discern that there have been various attempts made for mandatory minimum sentences although some fell out of favour due to disapproval and strong criticism[44].

When looking at the history of mandatory minimum sentences in South Africa particularly the Criminal Law Amendment, one can discern that it was passed two years after the decision of the *S v Makwanyane*[45] case which had decided against the death penalty and provided that it should be substituted by punishment which is lawful and appropriate[46]. To some extent, one can argue that the Act satisfied the constitutional court order from the *Makwanyane* case as the

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[40] Act 105 of 1997.
[41] Terblanche, S Mackenzie, G 'Mandatory Sentences in South Africa: Lessons for Australia?' (2008) 41(3) *Australian and New Zealand Journal of Criminology* 402-420.
[42] Ibid at 402.
[43] Terblanche, S 'A Guide to Sentencing in South Africa' 2nd ed (2007) 42.
[44] Nzimande, ES *Minimum Sentence Legislation in South Africa* (Unpublished LLM Thesis, Nelson Mandela Metropolitan University, 2012) 3.
[45] S v Makwanyane 1995 (6) BCLR 665 (CC).
[46] Ibid para 150.

legislation also provided for the substitution of the death penalty by appropriate and lawful punishments[47]. In light of the above constitutional court decision, the death penalty was seen as resulting in the violation of the right to life and the right not to be subjected to inhuman and degrading punishment[48] thus being inconsistent with the constitutional provisions of the 1993 Constitution of the Republic of South Africa[49] which was in force at that time and was later followed by the 1996 Constitution of the Republic of South Africa ("the Constitution")[50].

It is equally important to note that the South African legal system already had mandatory minimum sentences before the death penalty was abolished[51], there were prescribed various mandatory sentences regarding offences which were drug-related, involving in possession or use of potentially dangerous dependence-producing drugs which were prohibited.

One can discern that in certain circumstances mandatory corporal punishment was imposed[52], it was also compulsory to impose imprisonment for the prevention of crime and also imprisonment for corrective training however certain requirements had to be met to allow such[53]. For instance, for corrective training, a minimum of 2 years and a maximum of 4 years imprisonment was applicable and for the prevention of crime, a minimum of 5 years and a maximum of 8 years imprisonment was applicable[54].

Although South Africa did experience the imposition of mandatory minimum sentences before the Act, this came to an abandonment which can be argued to have been influenced by the 1971 finding by the Viljoen Commission[55]. The findings of the commission indicated that the nature of minimum sentences which was mandatory led to the prevention of individual circumstances from being taken into account when looking at the different cases brought before courts as such

[47] Deziel, J *The effectiveness of mandatory minimum sentences: a comparative study of Canada and South Africa* (unpublished LLM thesis, University of Cape Town, 2013) 44.
[48] *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 344.
[49] Constitution of the Republic of South Africa, Act 200 of 1993.
[50] Constitution of the Republic of South Africa, 1996.
[51] Donovan, MO & Redpath, J 'The Impact of Minimum Sentencing in South Africa' (Report 2), 2006 *Open Society Foundation for South Africa* 11.
[52] This was through the Criminal Sentences Amendment Act 32 of 1952, Section 338(2) of this Act required courts to impose mandatory whipping in addition to sentences of imprisonment. Corporal punishment was carried out specifically through "cuts, whipping, flogging, caning or lashes and strokes applied in accordance with this Act.
[53] South African Law Commission Discussion Paper 11 (Project 82) 'Sentencing: Mandatory Minimum Sentences'.
[54] Neser, JJ 'Mandatory Minimum Sentences in the South African context' (2001) 3 *Crime Research in South Africa (CRSA)* 1.
[55] Viljoen, G Report of the Commission of Enquiry into the Penal System of the Republic of South Africa. Pretoria: Government Printer (1976).

this had a result of the imposition of unfair sentences and the discretion on judicial sentencing was interfered with[56].

Before the 1997 Act was introduced, a project committee of the South African Law Commission (“the SALC”) chaired by the High Court judge was appointed by the Minister of Justice and Constitutional Development at the time[57]. The purpose of the committee was to investigate elements and issues which were concomitant to sentencing, this *inter alia* included the desire to introduce a statute governing the imposition of mandatory minimum sentences in the country. The work of the committee led to the production of an issue paper No. 11 titled *(Project 82) Sentencing: Mandatory minimum sentences*[58]. This paper made a recommendation that issues which emerged from the sentencing aspect’s investigation needed to be debated before the proposition of any legislation[59]. However, the Act was in parliament already before public comments could be made regarding the issue paper and the Act already had an inclusion of provisions which created a minimum sentences scheme which ranged from five (5) year sentences to life imprisonment. Initially, the act was passed without proper regard of the SALC’s process because the inclusion of the scheme was made regardless of the recommendations which were made by the SALC[60].

After the Act was introduced, the Van Zyl Smit Committee (South African Law Commission) led by Professor Dirk Van Zyl Smit was appointed by the then Minister of Justice to undertake empirical studies and investigate the sentencing patterns before and after the introduction of the 1997 amendment act and the attitudes of key role players (the judges)[61]. A report titled ‘Sentencing: A New Sentencing Framework’, came as a result of the committee’s work in the year 2000[62]. This report included a proposed sentencing bill. With regards to sentencing patterns, it was revealed that for serious offences there were weighty sentencing disparities which prevailed even after the amendment of 1997 was introduced[63]. It was also found that new sentencing patterns could have a significant effect on the problem of overpopulation in

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[56] Njoko, T. *What constitutes ‘’substantial and compelling circumstances’’ in the Mandatory Minimum Sentencing Context*? (Unpublished LLM Thesis, University of KwaZulu Natal, 2016) 8.
[57] O' Donovan M & Redpath J ‘The Impact of Minimum Sentencing in South Africa’ (Report 2), 2006 Open Society Foundation for South Africa 10.
[58] South African Law Commission Discussion Paper 11 (Project 82) ‘Sentencing*: Mandatory Minimum Sentences’* (1997).
[59] Ibid 11.
[60] Ibid 10.
[61] Neser, JJ “Mandatory minimum sentences in the South African context” (2001) 3(3) *Crime Research in South Africa*.
[62] South Africa Law Commission Discussion Paper 91 (Project 82): ‘*Sentencing (A New Sentencing Framework*)’ (2000).
[63] Neser, J ‘Reformation of Sentencing In South Africa’ (2001) 14(2) *Acta Criminologica* 84-89.

prisons since the patterns now had longer terms of imprisonment, however it is equally important to note that the proposed bill has never been brought before parliament[64].

2.2. The adoption of the Act

In South Africa, minimum legislation was reintroduced by the Criminal Law Amendment Act[65], particularly sections 51 to 53. This act came into effect on 1 May 1998. It is equally important to note that the act was meant to be a temporary measure as its provisions were initially meant to be in effect for two years however it was extended various times[66]. The act is now permanent by the repealing of section 53(1) and (2) of the Act as such eradicating the then requirement that it be reconsidered bi-annually[67]. The permanency of the act was through the Criminal Law (Sentencing) Amendment Act 38 of 2007[68], it is equally important to note that prior to this amendment, section 51 of the act was titled Mandatory Minimum Sentences but after the amendment the word mandatory was replaced with discretionary[69].

The re-introduction of minimum sentencing was passed for various reasons including being a response to the *Makwanyane* judgement as noted above. One of the objectives of the Act was to promote consistency in sentences and the aim being to deter crime through the imposition of grave sentences, nonetheless we have discerned different explanations as far as the intention or purposes of the provision are concerned. In the case of *S v Malgas*[70] it was provided that the intention of the legislature was for courts to have a standard and consistent approach unless reasons which necessitated a lenient sentence were present[71]. Having a consistent approach is of paramount importance because in the past, judges having almost unlimited discretion resulted in discrimination due to some offenders being treated differently because of racial grounds and like cases not being treated alike[72].

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[64] Njoko, T. *What constitutes ''substantial and compelling circumstances'' in the Mandatory Minimum Sentencing Context*? (Unpublished LLM Thesis, University of KwaZulu Natal, 2016) 8.
[65] Act 105 of 1997
[66] Nzimande, ES *Minimum Sentence Legislation in South Africa* (Unpublished LLM Thesis, Nelson Mandela Metropolitan University, 2012) 3.
[67] Nzimande ES *Minimum Sentence Legislation in South Africa* (Unpublished LLM Thesis, Nelson Mandela Metropolitan University, 2012) 18.
[68] Act 38 of 2007.
[69] Nzimande, ES *Minimum Sentence Legislation in South Africa* (Unpublished LLM Thesis, Nelson Mandela Metropolitan University, 2012) 4.
[70] 2001 1 SACR 469 SCA.
[71] Ibid para 25.
[72] South Africa Law Commission Discussion Paper 91 (Project 82): 'Sentencing (*A New Sentencing Framework*)' (2000).

Sloth-Nielsen and Ehlers are of the view that with the introduction of mandatory minimum scheme, the legislature had the intention of achieving consistency in sentencing as well as reducing violent and serious crime[73]. Some have argued that having consistency in sentencing as an objective seems to be not necessarily accurate[74], and this is because the act was meant to be a temporary measure as it was to be in operation for a period of two years.

According to Roth, the implementation of mandatory minimum sentences was based on the parliament's belief that it would lead to the deterrence of crime and to also reduce sentencing disparities[75]. In the case of *S v Homareda*[76] the court provided that deterrence and retribution are the intended purposes of the act in discussion, however, the court was doubtful as to whether the said purposes were only to be achieved through the minimum sentences which in the past have proven to result in failure in light of drugs and drug trafficking[77].

2.3 Pitfalls/ Criticism of the Act

The Act has also endured some criticism from judicial officers and sentencing scholars. Terblanche criticises the act on its lack of sophistication, this lack is prevalent in the legislation's whole scheme as there is no central philosophy aside from the prescription of severe sentences for an unmethodical selection of offences[78]. Terblanche's criticism is based on the legislation's poor language and the difficulty in ascertaining the intention of the legislature[79]. Additionally, the drafting of the act has been criticised repeatedly by the courts for being poor[80].

Terblanche opines that when the act was proclaimed, there was no consideration of whether the South African prisons would be able to cope in light of the increased terms of imprisonment[81]. Goliath provides that prison overcrowding is exacerbated by mandatory

[73] Sloth-Nielsen and Ehlers "A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa" 2005 Paper 111 *Institute of Security Studies Papers*.

[74] Goliath, A 'A short critique of minimum sentences' (2022), 43(4), *Obiter* 779-796.

[75] Roth, S 'South African Mandatory Minimum Sentencing: Reform Required' (2008). *Minnesota Journal of International Law.* 111.

[76] 1999 (1) SACR 502 (W).

[77] Ibid para 526 A.

[78] Terblanche, SS 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33 *SACJ* 4.

[79] Chikoko, V *The Interpretation of "Substantial and Compelling" By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (Unpublished LLM Thesis, University of KwaZulu Natal, 2021) 3.

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

[81] Terblanche, S 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33 *SACJ* 4.

minimum sentences since the sentences lead to more offenders receiving lengthy sentences and this in turn leads to human rights violations[82].

Metz opines that mandatory minimum sentences are not compatible with the notion of reconciliation because they impede on judges' ability to address the victim's and perpetrator's circumstances as well as the wider community environment[83]. He advances an African approach to sentencing which is based on the concept of Ubuntu[84] and reconciliation. Mandatory minimum sentences have disempowered judicial officers of power and have not played a positive role in safeguarding a fair system but have instead done the opposite[85].

Roth suggests that the act has not achieved its intended purposes, he attributes this failure to the parliament as it did not take proper consideration of the proposals which were set forth by the South African Reform Commission's Issue Paper[86]. He provides that the parliament's failure to address these proposals led to a creation of a sentencing regime which does not address the sentencing disparities initially prompted by the act nor does it promote the expressed aims of punishment in South Africa[87].

Terblanche[88] criticises the substantial and compelling clause and provides that the act had minimal chances of achieving consistency in sentencing. He opines that the exemption clause which gives judges the ability to depart should have provided more guidance so that the idea of avoiding disparities in sentencing can be achieved. He argues that the substantial and compelling circumstances are ill-defined as a result they leave enormous leeway for interpretation. A lot of unintended consequences have risen when making an application of the substantial and compelling circumstances, for instance courts misuse the subjectivity severity of the crime as a mitigating factor thus creating case law which is based on subverting

[82] Goliath, A 'A short critique of minimum sentences' (2022), 43(4), *Obiter* 779-796.
[83] Metz T 'Reconciliation as the Aim of a Criminal Trial: Ubuntu's Implications for Sentencing' (2019) 9 (1) *Constitutional Court Review* 114.
[84] Ubuntu is an African concept which can be translated to mean umuntu ngumuntu ngabantu/motho ke motho ka batho ba bangwe (a person is a person through other persons).
[85] Maharaj, V. *An evaluation of the effect of mandatory minimum sentencing legislation on judicial discretion in South Africa* (Unpublished LLM Thesis, University of KwaZulu Natal, 2021) 18.
[86] Roth, SM 'South African Mandatory Minimum Sentencing: Reform Required' (2008) *Minnesota Journal of International Law* 165.
[87] Ibid.
[88] Terblanche, S 'Research on the Sentencing Framework Bill – Report 4' *Open Society Foundation for South Africa* (2008) 7-8.

legislation[89]. The exemption clause does not offer a valuable remedy to disparities regardless of the parameters which were elaborated in *S v Malgas* by the Supreme Court of Appeal[90].

Terblanche[91] also criticises the circumstances upon which life imprisonment is prescribed. Here the concern is around the idea that the brutality under which rape is committed does not feature in a sense that various factors which are singled out in light of life imprisonment are not factors which are normally sufficient to aggravate the justification of life imprisonment.

Prescribing life imprisonment for instances of rape which are less serious means that it becomes difficult to apply differentiation and it becomes possible through one means only and essentially that is if the court departs from the prescribed life imprisonment[92]. Under the current framework, proportionate sentencing is almost impossible[93]. The framework of the legislation makes it difficult for courts to ensure that in each individual case they consider all relevant factors which includes the gravity of the crime, the offender and the interests of the society[94]. This is a crucial problem because there is a lack of gradation for increasing degrees of offence severity[95]. The legislation makes provision for just four sentences for various offences with only little changes for previous convictions.

Delomoney provides that the mandatory minimum sentence's vision is to make contribution towards developing consistent sentencing procedures however its application has not achieved its envisioned goals but has rather caused further difficulties by intensifying the problem of prison overcrowding and thus potentially invading on constitutional rights[96].

The court in *Dodo*[97] provided that the length of punishment must be proportionate to the offence that has been committed and that a mere disproportionate sentence is not an infringement on the right not to be subjected to punishment that is degrading, inhuman and cruel[98]. This right can only be said to be violated when there is gross disproportionality between

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[89] Deziel, J *The effectiveness of mandatory minimum sentences: a comparative study of Canada and South Africa* (unpublished LLM thesis, University of Cape Town, 2013) 59.
[90] Ibid.
[91] Terblanche, SS Sentencing in South Africa: Dominated by minimum sentences' (2020) 33 *SACJ* 4.
[92] Terblanche, SS 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33 *SACJ* 4.
[93] Baehr KS 'Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa' (2008–2009) 20 *Yale J L & Feminism* 213 at 240–241.
[94] Terblanche, SS Sentencing in South Africa: Dominated by minimum sentences' (2020) 33 *SACJ* 4.
[95] Ibid 21
[96] Delomoney D *Will A Restorative Justice Approach To Sentencing Improve the Efficacy and Functioning of the Criminal Justice System?* (Unpublished LLM Thesis, University of KwaZulu Natal, 2015) 53.
[97] S v Dodo 2001 (1) SACR 594 (CC).
[98] Terblanche SS 'Twenty Years of Constitutional Court Judgments: What Lessons are there about Sentencing?' *PER / PELJ* 2017(20).

the punishment given and the offence. It is equally important to note that under the South African legal system it remains unclear as to what standard to apply when making a determination as to when a sentence can be classified as gross[99]. The constitutional court in *Dodo* found valuable guidance from the United States and Canada, in this regard the application of the gross disproportionality standard is significantly different from each other. The United States sets a threshold that is higher before a sentence can be classified as gross while on the other hand in Canada the threshold applied is much lower[100]. Goliath criticises the act due to this lack of clarity and provides that the gross disproportionality standard needs more explanation from the South African perspective[101].

2.4 The diverging approaches adopted by the Courts in interpreting the phrase substantial and compelling circumstances

It is important to note that there has been a substantial discourse prompted by the phrase substantial and compelling circumstances as such there are vast interpretations which have resulted. Prior to the case of *S v Malgas*, three main approaches developed from the conflicting interpretations of the phrase namely, the strict method of interpretation, a more balanced approach in interpretation and a lenient approach in interpretation.

2.4.1 The strict approach

Judge Stegmann provided an interpretation which seems to be extreme when he stated in the case of *S v Mofokeng*[102]

> 'The absence of previous convictions, the comparative youthfulness of the offenders, the unfortunate factors in their backgrounds, the probable effect upon them of the liquor which they had taken, the absence of dangerous weapons, and the fact that the complainant had not suffered serious injury are all factors that a court sentencing a convicted rapist in the ordinary course, would weigh up as substantial factors relevant to the assessment of a just sentence, and as tending to mitigate the severity of the punishment to be imposed. However, in my judgment, these factors, 'substantial' though they are, are matters that Parliament must have had in mind as everyday circumstances that would be found present in many or most of the crimes referred to in Part I of Schedule 2 of

[99] Goliath, A'A short critique of minimum sentences' (2022), 43(4), *Obiter* 779-796.
[100] Terblanche SS 'Twenty Years of Constitutional Court Judgments: What Lessons are there about Sentencing?' *PER / PELJ* 2017(20).
[101] Goliath, A 'A short critique of minimum sentences' (2022), 43(4), *Obiter* 779-796.
[102] 1999 [1] SACR 502 [W].

Act 105 of 1997. Without emasculating the legislation, they cannot be thought of as 'compelling' the conclusion that a sentence lesser than that prescribed by Parliament should be substituted for the prescribed sentence. This is owing to the absence of any exceptional factor to explain the prisoners' conduct and the absence of any mitigating factors other than the usual factors already enumerated. As I understand this legislation, substantial and compelling circumstances must be factors of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2'[103]

According to Stegmann J, these words leave the trial court compelled to impose the minimum sentence as they are afforded almost no discretion. According to the view of Stegmann J, factors which are generally deemed as mitigating or aggravating circumstances cannot be simply weighed up for sentencing purposes in order to establish whether they are grounds that are compelling and substantial for a departure unless such factors are unusual and exceptional that the parliament did not contemplate when it prescribed standard penalties for certain scheduled crimes. He then provided that to regard general factors which do not fall under the exceptional and unusual scope would mean that the presiding court prefers its own judgement rather than that of parliament thus compromising the court's integrity.

The case of *S v Madondo*[104] adopted the above strict approach, it was emphasised that the courts should not easily intervene to impose lesser sentences. This case dealt with a rape matter and Judge Squires highlighted that the parliament's intention was focused on ensuring that offenders sentenced for raping young girls receive severe sentences and that courts do not effortlessly interfere with such sentences by imposing lesser sentences as compelling reasons because doing such would not be lightly found. It was further stated that it would equate to the undermining of the legislature's intention to consider such a difference alone as constituting compelling reasons[105]. One can discern that the standard set by Squires is high as he commented that a court should depart only if in that case the prescribed sentence is highly inappropriate and that no reasonable court would impose that sentence[106].

In the case of *S v Segole and Another*[107], the accused had been convicted on counts of rape, kidnapping and robbery. As per the provisions of the act the court had to impose 15 years on

[103] Ibid 523i-524d. The case of *S v Zitha and others* 1999 (2) SACR 404 (W) followed the approach adopted by Stegmann J.
[104] Unreported judgement of (N) case CC/99 delivered on 30 March 1999.
[105] Njoko, T. *What constitutes ''substantial and compelling circumstances'' in the Mandatory Minimum Sentencing Context*? (Unpublished LLM Thesis, University of KwaZulu Natal, 2016) 27.
[106] Chikoko, V *The Interpretation of "Substantial and Compelling" By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (Unpublished LLM Thesis, University of KwaZulu Natal, 2021) 14.
[107] 1999(2) SACR 115 (W) at 123(j).

the charge of robbery and life imprisonment for the charge of rape if substantial and compelling circumstances were not found present. In determining what substantial and compelling means Jordan J provided that he is bound by the provisions of the act and as such obligated to give effect to it. He made the following expression:

"I therefore have no discretion left but to sentence each of you to life imprisonment''[108].

The court agreed with sentiments expressed by Stegman J and took a similar view that the circumstances in the present case did not create compelling circumstances as envisaged by parliament.

In the case of *S v Kgafela*[109], the accused was sentenced to life imprisonment for the murder of her husband. The accused had hired an assassin to shoot her husband and as per the provisions of the act life imprisonment was prescribed as it falls under part 1 of Schedule 2. Friedman JP provided that there were no substantial and compelling circumstances present as such there was no reason to depart from the prescribed sentence and that he was obliged to impose a life sentence.

In the case of *S v Majola*[110] the accused had stabbed his pregnant girlfriend to death, this was a crime falling under part 2 of schedule with 15 years prescribed minimum sentence. The accused was member of the community who was deemed responsible in nature, a first offender and the crime was not premeditated. The court did not find these factors to present substantial and compelling circumstances as such it imposed the prescribed sentence and stated that the attack was brutal in nature and against a defenceless pregnant woman.

2.4.2 The lenient approach

In the case of S v Majalefa[111], Leveson J laid down an approach which seems to be wider. The judge highlighted that regardless of the act's provisions, at the outset when making an enquiry into whether a departure is suitable or not, there should be a consideration of all aggravating and mitigating factors in the traditional sense. It was provided that the words substantial and compelling are actually just a confirmation of the traditional principles of sentencing, and factors of material significance should be distinguished from all the other factors which still had to be taken into account during the process of sentencing. In another case of *S v Mthembu*

[108] Ibid at 126(e).
[109] 2001 (2) SACR 207 (B)
[110] 2001 (1) SACR 337 (W).
[111] S v Majalefa and Another (unreported decision in the Rand supreme court of 22 October 1998).

and others[112], the same judge Leveson provided that the intention of the legislature was not for the phrase to signifier a criterion that is stricter than these previously regarded as mitigating factors.

In the case of *S v Cimani*[113], Jones J indicated support of the *Majalefa* approach and provided that 'In every case, however, the nature of the circumstances must convince a reasonable mind that a lesser sentence is a proper sentence and that it is justified when regard is had to

(a) the aggravating and mitigating features attendant upon the commission of what is already classified by the lawgiver as among the most serious of offences, and

(b) the interests of society weighed against the interests of the offence'[114].

In the *Cimani* case, certain factors were regarded as substantial and compelling to allow departure from the prescribed sentence. These factors include the youthfulness of the accused, absence of physical injury, lack of previous convictions and the fact that there were prospects of rehabilitation and the accused showed remorse. However, these same circumstances were not regarded as substantial and compelling circumstances in the *Mofokeng* case as discussed under the strict approach above[115].

2.4.3 The balanced approach

In the case of *S v Blaauw*[116] the perpetrator was an 18-year-old male who was found guilty of premeditatedly raping a 5-year-old girl, the perpetrator was under the influence of alcohol at the time of the incident, the child suffered severe genital harm as a consequence of his actions. The social worker also presented evidence which indicated that the child was likely to suffer additional harm in future. Previously the accused had been committed to a reformatory which he later escaped from, his committal was a consequence of his prior conviction of two offences. The court provided that committal to such a reformatory might have affected him negatively particularly due to his unfavourable background. The court was of the notion that the interest of the society demanded a severe sentence as the offence was repulsive, however, the court was compelled to consider imposing a lesser sentence after looking at the cumulative effect of factors. These factors included the fact that the accused had consumed alcohol at the time of

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[112] Unreported case, Case No 365/98.
[113] Unreported judgment of the ECPD, case CC11/99, delivered on 28 April 1999.
[114] Ibid.
[115] 1999 [1] SACR 502 [W].
[116] (2) SACR 295 (W).

the incident, his unfavourable background, his young age both at sentencing and at the commission of the offence and his unfavourable background.

The court considered that imposing the prescribed mandatory sentence would be harsh, the court held that the cumulative effect of the mitigating factors warranted for a lesser sentence to be imposed, as a result a sentence of 25 years imprisonment was imposed. Furthermore, the court made a recommendation for the accused's committal to a rehabilitation programme.

In this case, Borchers J developed the balanced approach as it was provided that judicial discretion in sentencing was purposefully narrowed by parliament in the sense that courts cannot deviate on the grounds of circumstances alone from the prescribed sentence. So essentially if one wanted to determine whether a departure is suitable then they would have to look at the cumulative effect of the aggravating and mitigating factors of a case. If such assessment has been done and the sentence seems to be grossly inappropriate, then there is a need to impose a lighter sentence otherwise the judge would have to impose the prescribed sentence[117].

In the case of *S v Dithotze*[118] it was provided that the court can still have regard to all factors which traditionally would have been relevant in imposing a sentence if the court after having considered all factors concludes that a life imprisonment sentence would be disproportionately gross to the committed crime or offensive to its sense of justice then it should find that substantial and compelling circumstances exist which allow departure from a life imprisonment prescribed sentence. The cases of *S v Shongwe*[119] *S v Homoreda*[120] also agreed with the balanced approach from *Blaauw*[121].

In *S v Jansen*[122], the court provided that the substantial and compelling words required the court to consider all mitigating factors available to discern whether they have sufficient weight to enable the court to exercise discretion in order to provide a reduced sentence. In *S v Van Wyk*[123], the court provided that substantial and compelling circumstances include circumstances that were previously referred to as mitigating factors as well as circumstances that might indicate a diminished moral blameworthiness of the accused.

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[117] Ibid.
[118] 1999(2) SACR 314 (W) at 315 b-d.
[119] 1999 (2) SACR 220 (O) at 221 i-j.
[120] 1999 (2) SACR 319 (W) at 320 a-c
[121] (2) SACR 295 (W).
[122] 1999(2) SACR 368 (C) at 377 (h)-(i).
[123] 2000 (1) SACR 45 (C) at (g)-(h).

Based on the discussion above one can discern that there are a number of decisions in which High Courts have considered the import of the injunction to impose imprisonment for life on persons convicted of an offence as was referred to in part 1 of schedule 2 unless substantial and compelling circumstances were present to justify the imposition of a lesser sentence. These interpretations which have placed and developed upon the provisions have been discordant[124].

An important factor about the *Mofokeng*[125] case is the suggestion it seems to make in that the sentences proposed by parliament are the most appropriate and that there should not be a departure simply because such sentences are more severe when compared to those that can be imposed by the courts ordinarily[126]. The way in which the judge dismissed the factors present in that case suggests that substantial and compelling circumstances are not easily found or they are perhaps found in unique cases[127].

The case of *Malgas*[128] did not agree with the strict approach from *Mofokeng*[129] in that the requirement in 'substantial and compelling' means circumstances that are exceptional in nature. Van Zyl also criticised this approach in that Judge Stegmann confused circumstances that are exceptional with those that are compelling and substantial, this is apparent from Stegmann's pronouncement that such circumstances must be factors that are unusual in nature and of an exceptional kind that the parliament did not contemplate when prescribing the standard penalties [130].

The *S v Mofokeng* [131]case was the first judgement to directly deal with the words substantial and compelling circumstances. Judge Stegmann complained that his sense of justice and conscience were challenged by the act. As inspired by the Truth and Reconciliation Commission report that encouraged judges to speak out against unjust laws, Stegmann showed

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[124] S v Malgas 2001 (1) SACR 469 (SCA) para 6.
[125] 1999 [1] SACR 502 [W].
[126] Ibid at 523b.
[127] Chikoko, V *The Interpretation of "Substantial and Compelling" By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (Unpublished LLM Thesis, University of KwaZulu Natal, 2021) 10.
[128] 2001 (1) SACR 469 (SCA).
[129] 1999 [1] SACR 502 [W].
[130] Van Zyl Smit, D 'Mandatory Sentences: A Conundrum for the new South Africa?' (2000) 2(2*) Punishment and Society* 197-212.
[131] 1999 [1] SACR 502 [W].

his sense of affront on the inappropriate procedure introduced by parliament to inflict offenders through the instrumentality of the courts[132].

One can argue that in certain instances the difficulties regarding suitable interpretation are caused by courts because in the *Mokokeng case*[133], the court complains about the arbitrary and severe nature of minimum sentences but still goes ahead to interpret the phrase substantial and compelling in a very strict manner thus restricting it to only mean exceptional circumstances[134]. Terblanche opines that the act is an expensive tool to sentencing and it has resulted on judicial officers spending many hours trying to figure out what it means and that it has created a false sense of security[135].

The lenient approach is broad as it allows a court to consider factors it would normally regard as relevant to a sentence and as a result impose a sentence of its choice[136]. This view suggests that the amendment act is only a measure for establishing greater uniformity in sentencing as such it should not be regarded as introducing a major change in the approach to sentencing[137].

The approach adopted in *Blaauw*[138] (balanced approach) does not undermine the intention of the legislature and it also allows courts some discretion[139]. However, it remains a difficult to apply such approach as it requires courts to consider all the mitigating and aggravating factors that it has considered traditionally albeit within a different framework[140]. Precisely it is spelling out all manner of circumstances that allow a departure from the prescribed sentence, this has led to the severe criticism of some judgements for having taken inappropriate factors into account. This can be illustrated by the case of *S v Abrahams*[141] where Foxcroft J held that an offender who had raped his own daughter was not a threat to society as a whole, this was considered as a mitigating factor along with others in deciding not to impose the prescribed life sentence. Although public criticism may be understandable and justified for the way the judge articulated a mitigating factor of this nature, it may be argued that the relatively inflexible

[132] Van Zyl Smit, D 'Mandatory Sentences: A Conundrum for the new South Africa?' (2000) 2(2*) Punishment and Society* 197-212.
[133] 1999 [1] SACR 502 [W].
[134] Chikoko, V *The Interpretation of "Substantial and Compelling" By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (Unpublished LLM Thesis, University of KwaZulu Natal, 2021) 101.
[135] Terblanche, SS "Mandatory and Minimum Sentencing: Considering s51 of the Criminal Law Amendment Act 1997" (2003) *Acta Juridica* 194.
[136] Van Zyl Smit, D 'Mandatory Sentences: A Conundrum for the new South Africa?' (2000) 2(2*) Punishment and Society* 197-212.
[137] South African Law Commission (Project 82) Sentencing *A New Sentencing Framework* (2000) 12.
[138] (2) SACR 295 (W).
[139] South African Law Commission (Project 82) Sentencing *A New Sentencing Framework* (2000) 14.
[140] Ibid 14.
[141] Unreported judgment of the CPD, case SS 99, delivered 20 September 1999.

structure of the legislation has resulted in courts putting forward mitigating factors of this nature if they believe that the prescribed sentence would be inappropriate[142].

The burden imposed by the act on judges to justify substantial and compelling circumstances for departure has negatively influenced public opinion and is also a reflection of how the judiciary has been placed at a disadvantage by the legislation[143]. This can be illustrated by the *S v Jansen*[144] case (discussed above under the balanced approach) and the public criticism it suffered[145]. In this case, a 26-year-old accused was convicted for raping a 9-year-old girl as the state accepted his plea of guilty. Judge Davis found substantial and compelling circumstances to allow departure from the prescribed mandatory life sentence and instead imposed a sentence of eighteen years imprisonment. When looking at the standards that applied before the enactment of the act, this sentence represented a heavy sentence however it was subject to severe public criticism. Van Zyl[146] argues that before the enactment of the act, eighteen years of imprisonment in a case of this nature would have gained widespread public approval however the imposition of this sentence under the new legislation requires judges to explain why the crime is regarded less serious in relative terms.

The *S v Jansen*[147] case was rendered not that long after the Act's adoption. Since then, we have discerned that departures from the prescribed sentence have become a common practice in light of rape cases[148]. However, the same issue is encountered when judges consider a departure in the circumstances, they have to justify why the crime concerned is relatively less serious[149]. In doing so, the risk is that the general public will perceive them as being soft on crime which is a perception that the political proponents of mandatory sentences can use to further their argument that such prescribed sentences are a necessity because judges are out of touch and too lenient[150].

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[142] South African Law Commission (Project 82) Sentencing *A New Sentencing Framework* (2000) 14.
[143] Deziel, J *The effectiveness of mandatory minimum sentences: a comparative study of Canada and South Africa* (unpublished LLM thesis, University of Cape Town, 2013) 60.
[144] 1999(2) SACR 368 (C).
[145] Van Zyl Smit, D 'Mandatory Sentences: A Conundrum for the new South Africa?' (2000) 2(2*) Punishment and Society* 197-212.
[146] Ibid 207.
[147] 1999(2) SACR 368 (C).
[148] Deziel, J *The effectiveness of mandatory minimum sentences: a comparative study of Canada and South Africa* (unpublished LLM thesis, University of Cape Town, 2013) 60.
[149] Van Zyl Smit, D 'Mandatory Sentences: A Conundrum for the new South Africa?' (2000) 2(2*) Punishment and Society* 197-212.
[150] Deziel, J *The effectiveness of mandatory minimum sentences: a comparative study of Canada and South Africa* (unpublished LLM thesis, University of Cape Town, 2013) 60.

Some judges interpret the phrase in ways that often circumvent the mandatory minimum sentencing. For instance, judges who view the act as merely a nominal attempt to increase uniformity in sentencing can justify departure by engaging in the traditional pre-act weighing of factors[151]. The judges who attempt to balance the lenient and strict approach also run the risk of circumventing the act's intention by weighing all the aggravating and mitigating factors in a given case[152].

2.5 Conclusion

This chapter has given focus on the background of the act, introduced the topic in discussion as well as delineating the unintended consequence of the act encompassing this research. The purpose of the act has been established through the cases and other material, in a nutshell the legislature's intention in adopting the act was to achieve consistency in sentencing as well as reducing violent and serious crime. The act has been criticised for its lack of sophistication and sentencing cliffs evident in light of rape sentences. Disproportionality has also been advanced as an issue between the different offences and the prescribed sentences. The chapter has also explored the different approaches adopted by courts when interpreting the phrase substantial and compelling circumstances. These approaches are the strict, lenient and a balanced approach.

[151] Roth, S 'South African Mandatory Minimum Sentencing: Reform Required' (2008). *Minnesota Journal of International Law.* 111

[152] Ibid 169.

CHAPTER 3

3. The Interpretation of substantial and compelling circumstances

This chapter gives particular focus on the *S v Malgas*[153] case and its guidelines as well as the cases that were decided after its judgement in hope of establishing whether the guidelines have proven to be useful for cases decided after its judgement in clarifying the uncertainty when interpreting words substantial and compelling circumstances. The writer has provided that the diverging interpretations of substantial and compelling circumstances are an unintended consequence of the act, as such, this chapter will give particular focus on how the courts have interpreted these words by looking at different cases that have dealt with substantial and compelling circumstances. This discussion will focus on rape, murder and robbery cases as they demonstrate the issue of interpretation much clearer.

3.1 S v Malgas

In *S v Malgas,* a 22-year-old woman was convicted of murder and sentenced to life imprisonment by the trial court as she had shot the deceased at the instigation of the deceased's wife (Carol)[154]. The court a quo granted leave to appeal against this sentence to the Supreme Court of Appeal. The appellant had been residing with the deceased and his family, however, the precise nature of the deceased's relationship with the appellant was unclear[155]. The appellant testified that the night before the incident the deceased struck her as he believed that the appellant had been sexually involved with another man, on the same night Carol told the appellant that she intended to shoot the deceased. The deceased's relationship with his wife had many quarrels as the wife was allegedly unfaithful to him with different other men[156].

On the day of the shooting a quarrel took place between the deceased's wife and the deceased, later the deceased told the appellant that he loved her however the appellant replied that she wished nothing to do with him[157]. He then produced a firearm and decided to lock himself in the bathroom and then fired a shot which led to the appellant and Carol thinking that he had committed suicide. Carol and the appellant told him that they were going to drink pills, he then emerged from the bathroom unscathed. His friends arrived and they consumed whisky until 01:30 am, after the friends had left, the deceased and Carol laid upon the same bed. After the

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153 2001 (1) SACR 469 (SCA).
154 Ibid at para 26.
155 Ibid.
156 Ibid.
157 Ibid at para 27.

deceased had fallen asleep Carol roused him and gave the deceased two pills to drink. After he fell asleep again, Carol woke up and lay in another room[158].

Shortly after at around 03:00 am, the deceased's wife woke the appellant up and told her to shoot the deceased[159]. Carol handed the appellant a loaded and cocked firearm as well as equipment to be used in order to avoid discharging evidence. The appellant pointed the firearm at the deceased's head as she knelt alongside him, during this time Carol also reminded the appellant that the deceased had struck her the evening before and that this should serve as an incentive for the appellant to shoot him[160]. The appellant then shot the deceased to death after she was persuaded by the deceased's wife. At first, the appellant and the deceased's wife tried to pass off this incident as an act of suicide however sometime after, the appellant first confessed to her friend and to a member of the South African Police Service who was also her friend that she indeed had shot the deceased, this led to her arrest and trial[161].

3.1.1 Decision of the Supreme Court of Appeal

The court noted that the legislature refrained from using the word ''or'' in favour of the word ''and'' as a result it provided a composite description of the circumstances that can justify departing from the prescribed sentences[162]. Parliament requires the circumstances to meet the test of the composite description, so the circumstances in consideration must be both compelling and substantial because the words are to be examined conjointly[163]. Courts are not prohibited from using past sentencing patterns in order to decide whether or not a prescribed sentence should be regarded as unjust in the particular circumstances of the case, however, the courts need to appreciate that the existence of a mere discrepancy between the compared cases cannot be the sole criterion that justifies departing because something more than that is required[164].

Although the court did not express in precise and accurate language what that something more is, what is clear is that if the circumstances of a specific case render the imposition of the prescribed sentence to be disproportionate to the crime, the legitimate needs of the society and

158 Ibid.
159 Ibid at para 28.
160 Ibid.
161 Ibid at para 29.
162 Ibid at para 19.
163 Ibid.
164 Ibid at para 21.

the criminal, then the circumstances of that case will be characterised as substantial and compelling to the extent that they justify departure and the imposition of a lesser sentence[165].

The appeal court considered the purpose of the legislature when it enacted the Act, in interpreting the words substantial and compelling circumstances, the court provided a step-by-step approach that can be followed in the application of section 51 (3) (a) of the 1997 Act. The practical interpretation can be used by courts when they are faced with the question of what constitutes substantial and compelling circumstances. The court stated in paragraph 25 that:

A. Section 51 has not eliminated but rather has limited the discretion of the courts from imposing a sentence in light of offences referred to in part 1 of schedule 2[166].

B. When courts approach the imposition of a sentence, they are required to be conscious of the fact that the legislature has ordained life imprisonment (or another prescribed imprisonment period) as a suitable sentence to be ordinarily imposed in the absence of a weighty reason justifying for the crimes listed in the specified circumstances[167].

C. The courts are required to provide a consistent, standardised and severe response to the crimes in question unless there are truly convincing reasons that can be seen which support a different response[168].

D. The sentences specified are not to be departed from easily and for insubstantial reasons. Undue sympathy and the degrees of participation between co-offenders are inter alia to be excluded[169].

E. Whether a departure is called for by the circumstances of a particular case, is something that the legislature has deliberately left to the courts to decide. Although the emphasis has shifted to the gravity of the crime involved and the need to effectively sanction against it, this does not mean the ignorance of all other considerations[170].

F. All factors that are traditionally taken into account continue to play a role in a sentencing process and none is excluded from being considered at the outset other than the factors set out in D above[171].

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[165] Ibid at para 22.
[166] Ibid at para 25.
[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid.

G. In order to justify a departure from the standard response ordained by the legislature, the impact of all relevant circumstances must be measured against the substantial and compelling yardstick during sentencing[172].

H. In the application of the statutory provisions, it is not appropriate to constrict to use the concepts developed in dealing with appeals against sentence as the sole criterion[173].

I. The sentencing court is entitled to impose a lesser sentence if after considering the circumstances of the particular case is satisfied that imposing the prescribed sentence would be disproportionate to the crime and the needs of the society thus being unjust[174].

J. In so doing, it must be taken into account that the crime of that particular nature has been singled out for a grave punishment and that the sentence meant to be imposed in lieu of the sentence prescribed should be evaluated paying regard to the legislature's provided bench mark[175].

Marais JA provided that he finds it erroneous that in order for circumstances to qualify as substantial and compelling they need to be exceptional in the sense that they are rarely encountered and that the infrequency or frequency of the existence of circumstances is not logically relevant to the question of whether or not they are substantial and compelling[176]. He further provided that he found erroneous the decisions that seem to suggest that traditional factors such as age, lack of previous convictions or presence thereof are eliminated entirely from the outset or at the subsequent stage of the enquiry[177].

The court provided that there was a need to reconsider the matter afresh as the trial court had misdirected itself in holding that for circumstances to be considered substantial and compelling, they need to be classified as exceptional although it was not clear as to the extent the trial judge was influenced by this proposition[178].

The court provided that although there was planning, premeditation as well as common purpose in the commission of the crime, the personal circumstances of the accused which include her clean record, youth, vulnerability to Carol's influence and that she was dragooned into

[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid at para 10.
[177] Ibid.
[178] Ibid para 33.

committing the offence are strong mitigating factors[179]. Marais J also noted that the appellant had shown remorse which is a factor that cannot be doubted and that her confession is deserving of recognition as it brought light to the crime that had been committed[180]. He further provided that her youthfulness is enough to make rehabilitation a real prospect even after a long period of imprisonment. Marais J further held cumulatively regarded, these circumstances satisfy that a sentence of life imprisonment would be unjust[181]. The court held that these circumstances qualify as substantial and compelling circumstances within the meaning of the provision[182]. The sentence life imprisonment was therefore set aside and substituted with a sentence of imprisonment for twenty-five (25) years[183].

3.2 Rape Cases

In the case of *S v Abrahams*[184], the state made an appeal to the Supreme Court of Appeal (SCA) for a rape sentence where the victim was a 14-year-old girl. The High Court (Court a quo) had sentenced the accused to seven years in prison thus departing from the imposition of a mandatory life sentence as prescribed by the Act. The High Court found that the actions of the accused did not fall within the ambit of worst cases of rape. The High Court was convinced that there were substantial and compelling circumstances that justified the departure from the presumptive life sentence. These circumstances inter alia included that the accused was not a threat to society. Although the SCA agreed that there were substantial and compelling circumstances which allowed the departure from the life sentence, the SCA however provided that the High Court had erred in failing to take into consideration the damage suffered by the victim, possessiveness and that the rape was motivated by sexual jealousy. The SCA accordingly substituted the 7-year sentence to a 12-year sentence.

In *S v Mahomotsa*[185], the High Court found the accused guilty of two counts of rape. The first count was in light of holding hostage a 15-year-old girl, the accused further went on to physically assaulting and rapping the complainant multiple times. For the second count, the accused had drawn a knife to force another 15-year-old girl to his home where he then raped

[179] Ibid para 34.
[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] Ibid para 35.
[184] 2002 (1) SACR 116 (SCA).
[185] 2002 (2) SACR 435 (SCA).

her. The court found sufficient reasons to depart from the prescribed life imprisonment[186]. The mitigating factors considered were that the accused was young and had spent eight months in prison at the time of sentencing. Other factors include that the complainant had sustained no psychological or physical damage from the rape. The High Court used the test established in the Mofokeng case which provides that for factors to qualify as compelling and substantial they must be of an exceptional nature[187]. For count one, the accused was sentenced to six years in prison and for count two, the High court sentenced the accused to ten years in prison.

The SCA reviewed the sentence and again made emphasis with regards to the concept of worst category of rape. The SCA stated that

> 'The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. Although what appeared to be a firearm was used to threaten the complainant in the first count and a knife in the second, no serious violence was perpetrated against them. Except for a bruise to the second complainant's genitalia, no subsequently visible injuries were inflicted on them. According to the probation officer … they do not suffer from any after-effects following their ordeals. I am sceptical of that but the fact remains that there is no positive evidence to the contrary. These factors need to be taken into account in the process of considering whether substantial and compelling circumstances are present justifying a departure from the prescribed sentence.'[188]

The SCA mentioned that the Mofokeng test used by the Court a quo was rejected in the Malgas case in that, factors do not need to be exceptional in nature in order to qualify as substantial and compelling[189]. The SCA provided that the court a quo erred in finding that the rape did not result in the complainants suffering psychological or physical damage[190]. The SCA mentioned that although it is theoretically possible that a rape victim may not suffer any other psychological damage besides those experienced during the rape, this is highly unlikely. The young age of the complainant girls makes it likely that they would have suffered some psychological damage as a result of rape[191]. The SCA further provided that it is not easily possible to quantify psychological damage and that the question of sentencing should not be approached with the assumption that no psychological harm was suffered[192].

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[186] Ibid at para 2.
[187] Ibid at para 9.
[188] Kubista, N 'Substantial and compelling circumstances: Sentencing of rapists under the mandatory minimum sentencing scheme' (2005) 18(1) *SACJ* at 82.
[189] S v Mahomotsa 2002 (2) SACR 435 (SCA) at para 10.
[190] Ibid at para 11.
[191] Ibid.
[192] Ibid.

The Appeal court looked at the aggravating and mitigating factors that were considered by the court a quo in order to decide whether the court a quo had not misdirected itself in concluding that there were substantial and compelling circumstances. The SCA provided that a man's virility should not play any role in the sentencing process as this would have the effect of taking away the accused's moral blameworthiness in most rape cases[193]. The SCA provided that the court a quo had misdirected itself and that the prescribed sentences should not be departed from for flimsy reasons as provided in the Malgas case[194].

The court also looked at the *S v Abrahams* case to emphasise that there are differences in the seriousness of rape cases and that these differences play a vital role in the sentencing process[195]. The *Abrahams* case[196] provided that life imprisonment should only be reserved for cases that do not have substantial and compelling circumstances that can justify the imposition of a lesser sentence.

After looking at the sentences imposed by the court a quo, the SCA provided that in light of count one, the accused's youthfulness and other personal circumstances which *inter ilia* include that his previous conviction although it was sexual in nature it however did not involve non-consensual sex favoured departure from the prescribed sentence. The same could not be said with respect to the second charge because within a period of two months after the release of the accused into the custody of his grandmother he again committed a similar offence[197]. After consideration of all aspects of the case, the SCA described this case as a borderline one[198]. The judge provided that the life imprisonment prescribed sentence was too severe and would result in an unjust sentence[199], however, the sentences provided by the court a quo did not reflect the seriousness of the offence and were inadequate[200]. The SCA re-sentenced the accused, for count one the sentence was substituted to 8 years in prison and for count two, the sentence was substituted to 12 years in prison[201].

In *S v Njikelana*[202], the accused was charged and convicted of raping a 16-year-old girl. The court listed the factors which had the cumulative effect to be regarded as substantial and

[193] Ibid at para 13.
[194] Ibid at para 14.
[195] Ibid at para 18.
[196] 2002 (1) SACR 116 (SCA).
[197] S v Mahomotsa 2002 (2) SACR 435 (SCA) at para 20.
[198] Ibid at para 22.
[199] Ibid.
[200] Ibid at para 26.
[201] Ibid at para 27.
[202] S v Njikelana 2003 (2) SACR 166 (C).

compelling circumstances. These factors included that the complainant had no permanent physical injuries and only had one small scar on her forehead which was hardly visible, the doctor described the lacerations as superficial. Although the complainant did not sustain serious physical injuries, she did suffer mental trauma and distress. The accused had also been in custody for 35 months as he was awaiting trial, Thring J provided that this was a long time and to subject the accused to a sentence of life imprisonment would be unreasonable. The accused had no degree of sophistication and was uneducated. He had consumed alcohol the day the crime was committed and the judge remarked that alcohol reduces inhibitions and a person's ability to resist temptation. The accused also had no previous convictions and was a fairly young man.

The court also provided that the presence of aggravating factors had to be weighed against the present mitigating factors. These aggravating factors include that in the commission of this offence, the accused pushed the complainant off a bridge and she sustained an injury albeit not serious. The accused used a considerable amount of force in raping the complainant and the accused abused the friendly relationship that he had with the complainant as she viewed him as a friend and they had been drinking together. Despite all of these aggravating factors, the court departed from the sentence of life punishment and held that this sentence would be unjust, this resulted in the accused receiving a 14 years imprisonment sentence.

In *S v M*[203], the accused had raped his minor stepdaughter when she was 14 and 15 years old. The mitigating factors which were present in this case were that before the commission of the offence, the accused had a clean record, he was also a first-time offender and no harm was inflicted on the victim. The accused had spent nearly 12 months in custody and also tendered a plea of guilty. The court emphasised the position which was provided in the Malgas case which is that judicial officers should treat the prescribed sentences as the suitable punishment that has been ordained for the specific crimes by the legislature[204].

Satchwell J provided that in this particular case, a plea of guilty does not amount to a substantial and compelling circumstance[205]. The judge went on to provide that there is no authority to support that because the accused has a previous clean record that in itself should be taken as a factor that can act as a justification to depart from the prescribed sentences[206]. Satchwell J also

[203] 2007 (2) SACR 60 (W).
[204] Ibid at para 10.
[205] Ibid at para 80.
[206] Ibid at para 69.

provided that the absence of bodily injury in a case of rape where the victim is under the age of 16 should not constitute a substantial and compelling circumstance[207].

Satchwell J then concluded that none of the mitigating factors can individually nor in combination constitute circumstances that can give grounds for departing from the prescribed sentence. Judge Satchwell went on to impose a life imprisonment sentence[208]. Chikoko argues that Satchwell J failed to properly grade this rape like how other cases have done as she followed the legislation very strictly hence a life imprisonment sentence was imposed[209]. The judge did not exercise the discretion afforded to courts and also disregarded some factors that that have been considered as substantial and compelling in other cases[210]. Terblanche has described this judgement as substantial but controversial in many respects[211].

In the case of *S v G*[212], a 32-year-old male was found guilty of raping his girlfriend's daughter who was 10 years at the time. Although he was not the biological father of the girl, they regarded him as such because they all resided as a family in one household. The High Court considered the impact of the crime on the victim and found several mitigating factors which include that the accused had no previous convictions, the rape did not lead to serious bodily harm and he had also served two years in prison while awaiting sentencing. The court also found aggravating factors which include that the accused abused his position of trust and also displayed no remorse, the victim and her immediate family suffered from severe emotional trauma and the fact that the victim was relatively young at the time of the incident and was also not sexually mature as a result the crime was categorised as a heinous one[213].

The court compared the circumstances of this case with those from *S v Mahomotsa*[214] and *S v Abrahams*[215] to ensure that it reached a suitable decision. The court noted that although this was a serious case it however did not fall within the category of worst cases of rape. The imposition of the prescribed life sentence was held to be disproportionate to the seriousness of the crime, as such the accused was sentenced to 18 years imprisonment.

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[207] Ibid at para 89.
[208] Ibid at para 117.
[209] Chikoko, V *The Interpretation of "Substantial and Compelling" By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (Unpublished LLM Thesis, University of KwaZulu Natal, 2021) 118.
[210] Ibid.
[211] Terblanche, S "Sentencing" (2008) 21 SACJ 128.
[212] 2004 (2) SACR 296 (W).
[213] Njoko, T *What constitutes ''substantial and compelling circumstances'' in the Mandatory Minimum Sentencing Context?* (Unpublished LLM Thesis, University of KwaZulu Natal, 2016) 51.
[214] 2002 (2) SACR 435 (SCA).
[215] 2002 (1) SACR 116 (SCA).

Kubista argues that the courts made a distinction between rape and rape that caused physical injury[216]. The premise of this distinction is that as much as rape is physical intrusion, if there is not enough showing of violation or injury then it does not constitute rape as prescribed by the Act. If the courts are requiring a higher showing of violence, then they directly contradict the legislature's determination that in and of itself rape is inherently violent. The courts used this distinction as a mitigating factor, and an example of how powerful the violent rape distinction is can be found in *S v Njikelana*[217], here the court noted the presence of aggravating factors including that the accused used a certain amount of violence as he had pushed the complainant off a bridge and she was injured, he also used a considerable degree of force when raping her however the court concluded that these injuries are not permanent and also not serious in nature.

S v Gqamana[218] is another case where the court emphasised the need for physical injury beyond the rape. Despite the list of aggravating factors, the court provided that one of the major mitigating factors was that the complainant did not suffer real physical injury and that the mental sequelae of her experience were not that serious and also not of a lasting nature.

In *Njikelana*[219] and *Gqamana*[220], the undisputed facts indicated the presence of egregious behaviour which was squarely within the Act, however, the Court’s emphasis on additional violence beyond rape allowed departure from the prescribed punishment. The lack of physical violence was over-emphasised because the courts should have started their analysis from the point that a life sentence is an ordinary sentence suitable for the crimes before it. The factor acted as an onus which the state has to prove in order to remain within the boundaries of the Act because if they do not prove the factor, the court will have a reason to depart. This paradigm shifts the burden onto the state to prove additional factors which were not enumerated in the Act.

If the courts continue to create law that is based on subverting legislation, a lot of unintended consequences arise when making an application of substantial and compelling circumstances. Efforts to avoid what is unjust in one case may result in case law which has the effect of producing unjust results in other cases. The use of the presence of physical violence and non-

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[216] Kubista, NJ. “Substantial and compelling circumstances: Sentencing of rapists under the mandatory minimum sentencing scheme.” (2005) 1 *SACJ* 77-86.

[217] 2003 (2) SACR 166 (C).
[218] 2001 (2) SACR 28 (C).
[219] 2003 (2) SACR 166 (C).
[220] 2001 (2) SACR 28 (C).

physically violent rape perpetuates a mythical rape paradigm that rape in itself is not violent, this is problematic because rape is violent and necessarily results in physical harm.

3.2.1. Rape cases decided after the Criminal Law(sentencing) Amendment Act.

The Criminal Law (Sentencing) Amendment Act[221] prescribes for specific circumstances that do not qualify or constitute substantial and compelling circumstances that justify the imposition of a lesser sentence on a charge of rape. These factors include

(i) The complainant's previous sexual history

(ii) an apparent lack of physical injury to the complainant

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed[222]

In *S v SN*[223], the accused had intentionally and unlawfully committed acts of sexual penetration with a 10-year-old girl. The Eastern Cape Division Director of Public Prosecutions (DPP) who was prosecuting for and in the name of the state preferred a charge of rape against the accused. The complainant was under the age of 16 and was raped more than once, the DPP sought the imposition of the prescribed minimum sentence of life imprisonment as per the Criminal Law (Sexual Offences and Related Matters) Amendment Act[224]. The accused had pleaded guilty to the charge and signed a statement admitting the facts in light of the complainant's rape in terms of s 112(2) of the Criminal Procedure Act[225]

The court convicted the accused as charged after it was satisfied that he understood the importance of his statement. In light of the sentence, the accused testified in mitigation and requested a lower sentence of 20 years imprisonment rather than life imprisonment. The accused expressed remorse and apologised for the way he acted. On the other hand, the state provided aggravating factors which include that the accused breached the trust placed on him

[221] The Criminal Law (Sentencing) Amendment Act 38 of 2007.
[222] Ibid Sec 51(3) (aA).
[223] [2022] 3 All SA 497 (ECG).
[224] Act 32 of 2007.
[225] Act 51 of 1977.

and that he was of mature age. The court also mentioned the constitutional protection offered to children which is supported by the Children's Act[226].

As the court found that the accused had displayed remorse, the court mentioned the existence of substantial and compelling circumstances which justified deviation from the imposition of life imprisonment[227]. One of the factors in support of this deviation was that the accused had been assaulted by the community and stabbed by his brother after they discovered the crime committed[228]. The accused also had a clean record for the previous 15 years thus being a candidate for rehabilitation. The court sentenced the accused to 25 years imprisonment[229] and ordered that the complainant should receive therapy for her trauma[230].

In *S v Nkomo*[231], the appellant was convicted for kidnapping and rape. The appellant had laced the complainant's cold drink with alcohol while they were at a bar and then forced her into a hotel room which he had hired. He then forced her to undress and raped her[232]. The appellant locked her in the room and went to have more drinks in the bar. The complainant tried to escape from the room but the appellant forced her back into the room and raped her again four times during the course of the night[233]. He also kicked, slapped and also forced the complainant to perform oral sex on him. The complainant escaped the following morning and went to the police station[234]. The appellant was then arrested and charged, the regional court sentenced him to a 3-year sentence regarding the kidnapping charge and then referred him to the High Court in order to be sentenced on the rape charge. The High Court concluded that it did not find any circumstances that were compelling and substantial to justify a departure as a result the appellant was sentenced to life imprisonment.

The appellant appealed against the life imprisonment sentence to the Supreme Court of Appeal, the appeal was allowed and the court replaced the life imprisonment sentence with 16 years' imprisonment. This is because the court noticed that there were chances of rehabilitation, the appellant was employed and at the commission of the rape, the appellant was young (29 years)[235]. It is equally important to note that the minority judgement disagreed with the notion

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[226] Act 38 of 2005.
[227] S v SN [2022] 3 All SA 497 (ECG) at Para 43.
[228] Ibid 38.
[229] Ibid 54.
[230] Ibid 52.
[231] 2007 (2) SACR 198 (SCA).
[232] Ibid para 5.
[233] Ibid para 6.
[234] Ibid para 8.
[235] Ibid para 13.

that rehabilitation amounted to a substantial and compelling circumstance because there was no evidence to support this conclusion and it was not a convincing reason for departing from the minimum sentence ordained by the legislature[236].

In the case of *S v PB*[237] the court accepted that a father who had raped his 13-year-old biological daughter had left her with a distorted understanding of love and that the impact of the incident was far-reaching and devastating thus making this incident a heinous one. The judgement of the trial court provided that compelling and substantial circumstances were not present. The court also provided that to depart from the prescribed sentence would be to do what the Malgas case warned against which is to depart for flimsy reasons and speculative hypotheses favourable to the offender.

Bosielo JA was of the view that when approaching an appeal on a sentence imposed in terms of the Act, such approach should not be similar to other sentences imposed under the ordinary sentencing regime because the prescribed minimum sentences are ordained by the Act and cannot be substituted for insubstantial reasons. The court provided that the most difficult question to answer is always the question of what are substantial and compelling circumstances, the court was of the view that this term is so elastic that it can accommodate even mitigating factors that are normally considered during sentencing[238]. The court further provided that the determination of substantial and compelling circumstances involves making a value judgment on the part of the sentencing court.[239] Although various judgements of the Supreme Court of Appeal have warned against a strict approach to interpreting the phrase substantial and compelling circumstances, in this case the judge went against this as they disregarded the importance of the constitutional considerations of proportionality and the need to still consider the traditional sentencing principles.

Mujuzi argues that the Supreme Court of Appeal needs to set the record straight by providing explanation as to what it meant for the prospect of rehabilitation to be one of the substantial and compelling circumstances in the *Nkomo*[240] case or the Court can visit the *Malgas* ruling and explain what it meant by speculative hypotheses and undue sympathy to the offender as factors that should not be included from the composite yardstick of what amounts to substantial

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[236] Mujuzi, JD "The 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) *SACJ* 4.
[237] 2013 (2) SACR 533 (SCA).
[238] Ibid at para 21.
[239] Ibid.
[240] 2007 (2) SACR 198 (SCA).

and compelling circumstances[241]. Mujuzi also argues that the court needs to develop a criterion that should be used to measure whether a particular offender is capable of rehabilitation or not, this will allow the lower courts to follow the Court's reasoning without any confusion[242]. If the Court does not assist in this regard, then one is left with no option but to conclude that the majority ruling in S v Nkomo[243] paved the way for future interpretations that are confusing in light of what amounts to substantial and compelling circumstances as we had hoped that the *Malgas* case had finally settled this confusion[244].

3.3 Murder cases

In *S v Pillay*[245], the accused was convicted of murdering Annelene Pillay (the deceased), this murder is one committed under circumstances which are contemplated in section 51, part I of schedule 2 of the Act, in that the state alleged the offence was planned or premeditated (count 1), and, possession of a firearm in contravention of section 3 of the Firearms Control Act[246] read with s 51, part II of schedule 2 of the Act (count 2).

The 32-year-old accused used a vehicle tracking company to obtain the whereabouts of the deceased, he then went to her workplace and waited for her to emerge from the building. When she emerged from the building he then went to the outside staircase of the building and called her up. The deceased started running back upstairs, the accused then shot at her from below. She then fell from the building and incurred severe injuries. The deceased died approximately 10 minutes later and then the accused dropped the gun and handed himself to the police station. It appeared that the firearm used had been obtained by the accused after he was attacked and robbed whilst he was on duty repairing a taxi.

The issue which was of concern to the court was whether to impose the life imprisonment prescribed minimum sentence in light of count 1- and the ordained 15-years imprisonment in respect of count 2, or whether to deviate from such sentences.[247]

[241] Mujuzi, JD "The 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) *SACJ* 21.
[242] Ibid.
[243] S v Nkomo 2007 (2) SACR 198 (SCA).
[244] Mujuzi, JD "The 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) *SACJ* 21.
[245] 2018 (2) SACR 192 (KZD).
[246] Act 60 of 2000.
[247] 2018 (2) SACR 192 (KZD) at para 6.

The court referred to the case of *S v Vilakazi*[248] where it was explained that whether mitigating or aggravating, particular factors should not be taken individually and in isolation as circumstances that are substantial or compelling. When deciding whether there is any existence of circumstances that are substantial or compelling, ultimately one must look at traditional mitigating and aggravating factors and consider the cumulative effect thereof. The personal circumstances of the accused must be taken into account by a court when sentencing. It is important to note that only some of the personal circumstances carry a weight that is sufficient to work in favour of the accused. For instance, if the accused is a first offender of a young age, this can play a role in reducing the sentence because there is a potential that the offender will not repeat the crime and will be rehabilitated[249].

Henriques J stated that if the court after the consideration of all factors is convinced that the imposition of the minimum sentence would result in an injustice it can then qualify such factors as those amounting to substantial and compelling circumstances and thus be able to deviate from imposing the minimum sentence prescribed. The court provided that:

> 'for circumstances to qualify as substantial and compelling, they need not be 'exceptional' in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender'[250].

In light of the sentence the court held that in the time preceding the shooting, there was nothing on the facts which indicated that the accused formed a plan or an intention to kill her and nothing indicated that he had deliberately armed himself with the firearm and went to the deceased's workplace with the sole intention to kill her. Rather, his actions were a spur-of-the-moment act of a man who was in an emotional rage although they are tragic and deadly.

The court acknowledged the circumstances under which the deceased died, however on the facts of the matter substantial and compelling circumstances did exist that justified a deviation from the prescribed minimum sentence, these factors included that the accused had displayed genuine remorse and also had intended to plead guilty from the time of his arrest and had also acted with diminished responsibility at the time. After considering the circumstances of the case, the court sentenced the accused to 20 years imprisonment for count 1- and 5 years imprisonment for count 2. The accused was also declared unfit to be licensed for a firearm in terms of the Firearms Control Act[251].

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[248] 2009 (1) SACR 552 (SCA).
[249] 2018 (2) SACR 192 (KZD) at para 12.
[250] Ibid at para 10.
[251] Act 60 of 2000.

3.4 Robbery Cases

In *S v Matewane*[252], the victim was walking one night along a street illuminated by streetlights. A group of five men then attacked the victim threatening to stab him with a knife. As they assaulted him, they took his cell phone, his running shoes as well as his wallet. The victim managed to get away while the attackers started squabbling amongst themselves. Only the appellant appears to have been convicted of robbery with aggravating circumstances and his 3-year imprisonment sentence was confirmed by the appeal court. Terblanche argues that this is the least severe sentence and it appears to be completely inconsistent with other sentences that have been imposed for aggravated robbery[253].

In the case of *S v Davids*[254], the appellant and his friend came across the victim and had a brief conversation with him. The appellant then produced a knife and grabbed the cell phone of the victim and told him to go so that he does not get hurt. The appellant pleaded guilty to the crime of robbery and admitted the aggravating circumstances which include threatening the victim with a knife. The appellant was a breadwinner of his family and was 27 years old at the time. The trial court found not substantial and compelling circumstances as result the prescribed sentence of 15 years imprisonment was imposed. The appeal court refused to interfere with this judgement.

In *S v Mxolisi*[255] the prescribed sentence of 15 years imprisonment was imposed as the two appellants and their co-accused had violently taken R332 000 from a bank while carrying firearms. The sentence imposed in *S v Davids* seems much longer when looking at the facts of the case in consideration of *S v Mxolisi*[256].

Robbery is regarded as one of the serious crimes and such seriousness is reflected in the severity of the imposed sentence, however Terblanche[257] argues that not all robberies are equally serious, this is because it is not clear from the South African perspective as to what factors determine whether one robbery is more or less serious than another even though robbery is prevalent in this country. The answer to this question is unclear thus being left to the court's

[252] 2013 JDR 2755 (GNP).
[253] Terblanche, SS 'Comparing sentencing for robbery with Strafzumessung für Raub' (2022) 35(2) *SACJ* 156-174.
[254] 2016 JDR 1864 (ECM).
[255] 2018 JDR 0586 (GJ).
[256] Terblanche, SS 'Comparing sentencing for robbery with Strafzumessung für Raub' (2022) 35(2) *SACJ* at 163.
[257] Ibid at 156.

discretion. This results in sentencing disparity as it is not assisted by legislation as it sets a single term of imprisonment for robbery with aggravating circumstances when in fact some of these circumstances are much more severe compared to others[258].

The South African legal system does not distinguish between the different grades of robbery even though it can range from a gravely serious crime (an armed and organised gang takes millions of rands while using violence, military weapons and explosives) to a petty offence (a property that has little value is taken with a minimal threat of violence).

The Act prescribes a minimum sentence of 15 years imprisonment for the crime of robbery when there are aggravating circumstances or involving the taking of a motor vehicle[259]. For the most part, our courts have generally without much clarity assumed that this reference to aggravating circumstances is the same as that defined in the Criminal Procedure Act[260], in a nutshell that it refers to robbery when it is committed with a dangerous weapon (including a firearm) or when serious bodily injury is threatened or inflicted.

Terblanche argues that it is problematic that the Act does not make a distinction whether the robbery is committed with an AK-47 assault rifle or a pocketknife, or whether the motor vehicle taken is a piece of scrap worth around R20 000 or it was a supercar valued at R5 million, or whether or not it was the victim's only means of transport[261]. It is equally important to note that the Act is not affected by robberies not involving these aggravating circumstances or the taking of a motor vehicle[262].

3.5 Conclusion

One can discern from the above discussion that rape cases decided after the *Malgas*[263] decision but before the Criminal Law (Sentencing) Amendment Act attached great weight on the presence of physical injuries in consideration of whether to depart from the prescribed sentence. The distinction between the presence of physical injury and the absence thereof is problematic because it fosters the idea that as much as rape is a physical intrusion, if there is no sufficient showing of violation or injury then it does not constitute rape as prescribed by the

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[258] Ibid at 173.
[259] Criminal law amendment Act 105 of 1997, Item 2 in Part II of Schedule 2.
[260] Act 51 of 1977.
[261] Terblanche, SS 'Comparing sentencing for robbery with Strafzumessung für Raub' (2022) 35(2) *SACJ* at 160.
[262] Ibid.
[263] 2001 (2) SA 1222 (SCA).

legislation. The approach provided by the *Malgas*[264] case is quoted by different judicial officers as it is used as a point of departure. After the enactment of the Criminal Law (Sentencing) Amendment Act, the consideration of physical injuries or absence thereof is contrary to section 51 (3) (aA) (ii) of this Act. The introduction of the Criminal Law (Sentencing) Amendment Act[265] limited the deviation from the prescribed sentences in rape cases[266]. The traditional factors continue to play an important role in the sentencing process, these factors include the accused's age, criminal history as well as the age of the victim. Some judicial officers consider the accused's prospects of rehabilitation as a factor that can mitigate the imposition of a prescribed sentence as seen in *S v Nkomo*[267]. Some courts have considered the time served by the accused while in custody awaiting trial and have viewed this as a mitigating factor and not necessarily as a sole criterion for deciding whether substantial and compelling circumstances exist. the answer is unclear and largely left within the discretion of the sentencer. This chapter has also revealed that it is unclear as to what factors determine whether one robbery is more or less serious than another.

[264] Ibid.
[265] The Criminal Law (Sentencing) Amendment Act 38 of 2007.
[266] Nzimande, ES *Minimum Sentence Legislation in South Africa* (Unpublished LLM Thesis, Nelson Mandela Metropolitan University 2012) 19.
[267] 2007 (2) SACR 198 (SCA).

CHAPTER 4

The effects of the Act on prison overcrowding as an unintended consequence of the mandatory minimum legislation.

This chapter gives particular focus on prison overcrowding as an unintended consequence of the Act. The discussion will also look at the reality of prison overcrowding in order to establish whether the situation degrades the respect that the country has for constitutional and human rights as affirmed by our Bill of rights.

4.1 Prison overcrowding as an unintended consequence of the Act

Goliath provides that the Act is the main important factor which contributes to the increased prison population[268]. This is because the Act restrict the judge's discretion to deviate from the minimum sentences ranging from 15 years to life imprisonment for certain serious offences. The same was echoed by Ronald Lamola (Minister of Justice and Correctional Services) who admitted at a media briefing, before his budget speech on correctional services that the introduction of minimum sentencing contributed to prison overcrowding as it withdrew judges and magistrates sentencing discretion for certain crimes[269]. The Minister also pointed out during the parliamentary session that the overcrowding level in South African prisons is disturbing and if not properly managed, it will become the norm[270].

The regime of minimum sentencing fuels overcrowding by keeping offenders imprisoned long after the rehabilitation stage thus resulting in South Africa having one of the highest imprisonment rates worldwide which is 286 prisoners per 100 000 of the population[271]. During the above- mentioned parliamentary session, it was reported that some prisons are 200 percent overcrowded with Johannesburg prison overcrowded by 233 percent[272]. While speaking in parliament Mr Lamola again provided that in 2023 prison overcrowding still remains a challenge and continues to put a strain on the available resources[273]. He went on to provide that

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[268] Goliath, A *Rethinking minimum sentence legislation* (Unpublished LLM Thesis, Nelson Mandela University, 2020) 25.
[269] Ensor "Prison overcrowding a 'disturbing' problem for government" (17 July 2019) https://www.bu sinesslive.co.za/bd/national/2019-07-17-prison-overcrowding-a-disturbing-problem-for-government/ (accessed 01-03-2024)
[270] Hansard: NA: Unrevised Hansard (EPC) "Debates on the National Assembly- Vote No 18 Correctional Services" 17 July 2019 https://pmg.org.za/hansard/28891/ (accessed 05-03-2024).
[271] Ibid.
[272] Ibid.
[273] Sibuliso Duba 'Overcrowding in prisons continues to be a problem, says Popcru' IOL 13 January 2023, available at https://www.iol.co.za/news/south-africa/western-cape/overcrowding-in-prisons-continues-to-be-a-problem-says-popcru-6cb4b14d-fdb5-4569-bc40-6108a7eec89e, accessed on 05 June 2023.

external factors like limiting legislation on mandatory minimum punishments has a direct impact on inmate population levels[274].

Information gathered by the parliamentary monitoring group through interactions with stakeholders, justice and crime prevention and security (JCPS) cluster and during oversight visits reveals that the minimum sentencing provisions of the Act are one of the main contributors to overcrowding[275] because they limit the individualisation of cases thus leading to more offenders receiving lengthy sentences and this in turn leads to human rights violations[276]. The Act brought an increase in sentencing tariffs, this places an escalating burden on the prison system because prisoners serving life sentences fill bed spaces for lengthy periods thereby decreasing the space available to inmates who are sentenced for shorter periods and those waiting to be sentenced[277].

The rise of the South African prison population is a matter of grave concern, however, this phenomenon is not a South African problem alone because it also affects other countries globally[278]. The legislative change brought by the Criminal Law Amendment Act led to a major impact on South African sentencing, the common perception is that the minimum sentences legislation is chifley responsible for the prison population increase[279], These findings support those of Giffard and Muntingh[280] who reported that for the most part, the blame regarding prisoner population is to be placed on the enactment of the minimum sentences act in 1997. This legislation led to a visible impact for sentences on sexual offences because it resulted in courts being compelled to impose sentences which were very much severe than what was the initial position before[281].

The minimum sentences Act limits the individualisation of cases thus contributing in putting the criminal justice under pressure. In light of this, Terblanche provides that it is unprincipled

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[274] Ibid

[275] ATC110914: Report of the Portfolio Committee on Correctional Services on factors contributing to overcrowding in correctional centres https://pmg.org.za/tabled-committee-report/1683/ accessed on 13 March 2024.

[276] Goliath, A ‘A short critique of minimum sentences (2022), 43(4), *Obiter* 779-796.

[277] Muntingh, L “Op-Ed: Rethinking life imprisonment” 2 March 2017 https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-lifeimprisonment/ (accessed 01 March 2024)

[278] Sibisi, M & Olofinbiyi, S ‘A Critical Analysis of Overcrowding in South African Correctional Centres’ (2021) 8 (2) *African Renaissance* 209-226.

[279] Giffard C, Muntingh L ‘The effect of sentencing on the size of the prison population’ Report commissioned by the Open Society Foundation for South Africa (2006) at 26.

[280] Ibid at 2.

[281] Ibid at 3.

to use a few sentences for different crimes without sound explanation[282]. This is also different from the procedure of individually considering all factors relevant in each case that courts are required to adhere to. Furthermore, when the act was proclaimed, there was no consideration of whether prisons are in a suitable position to endure the increased imprisonment terms[283]. One can argue that this is largely due to the fact that the Act was meant to be temporary from its design[284]. Terblanche further provides that the number of inmates serving life sentence was 433 in 1995 which increased to 12,658 in 2013[285].

The number of people serving life sentences is increased by the mandatory minimum sentencing regime, for instance in 1994 only 400 prisoners were serving life and today more than 16 000 prisoners are serving life[286]. Looking at a period of over 20 years this is an increase of over 2000 percent[287]. Due to serving longer sentences the population in prison increased despite having sentenced a lesser amount of people to terms of imprisonment[288].

4.2 The effect of the Act on the Constitutional rights of prisoners

South Africa as a state has a duty as per the constitutional provisions to promote, respect and protect the rights of citizens. As such every citizen has a right to equality, a right to freedom and security of a person[289] as well as the right to dignity. Allied to these rights is a duty that citizens will not be subjected to inter alia inhuman, cruel and degrading punishment[290].

International conventions and the South African Constitution both provide for explicit and extensive legislation which aims to protect inmates against treatment that is inhuman, cruel and degrading[291]. There are also regional instruments that highlight the serious issues posed by prison overcrowding, this includes its potential to undermine the prisoner's rights, they also provide for suitable long terms solutions to prison overcrowding as alternatives to

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282 Terblanche, SS 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33(1) *SACJ* 22.
283 Ibid.
284 South African Law Commission (Project 82) 'Report: Sentencing (A New Sentencing Framework)' (2000) at 4.
285 Terblanche, SS 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33(1) *SACJ* 21.
286 Goliath, A 'A short critique of minimum sentences' (2022), 43(4), *Obiter* 779-796.
287 Ibid at 790.
288 Clare Ballard, Crime and punishment don't add up, Mail & Guardian, 7 May 2015- available at https://mg.co.za/article/2015-05-07-crime-and-punishment-dont-add-up/ accessed on 08 June 2023.
289 The Constitution of the Republic of South Africa sec 12(1)
290 The Constitution of the Republic of South Africa sec 12(1)(e)
291 Sibisi, M & Olofinbiyi, S 'A Critical Analysis of Overcrowding in South African Correctional Centres' (2021) 8 (2) *African Renaissance* at 213.

imprisonment in policy and practice[292]. The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa recommend the notion of criminal justice agencies working together to ensure less use of imprisonment[293].

Sibisi and Olofinbiyi made a study with a particular focus on the effects of overcrowding in South African correctional centres, to achieve their goal they conducted a review of empirical research studies[294]. This study found that due to the shortage of staff, inmates found themselves being locked up for the greater portion of the day and in some instances, they were only released for a short period of time to exercise outdoors[295].

Research indicates that South African prisons have persuasive sexual violence, yet it is also massively underreported[296]. This is a human rights violation and the United Nations (UN) Rapporteur on Torture, Cruel, Inhuman, and Degrading Treatment or Punishment considers it as amounting to torture. Due to dire prison conditions, exposure to infection and disease cannot be easily avoided[297].

Overcrowded prisons weaken the prison's system ability to meet the basic needs of prisoners and to provide programmes that seek to educate and rehabilitate prisoners while also providing for recreational activities and training[298]. The Durban Westville correctional centre studied by Nkosi is no exception to this, most basic needs of offenders were not met[299]. Muthaphuli echoes the same words in that the lack of basic needs has a major negative impact on the process of rehabilitation as it affects offender's ability to dedicate themselves to the programmes[300].

Manganye [301], provides that due to the unavailability of resources, there is frustration of being denied or limited the resources and also conflict and competition over limited resources which

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[292] The Kampala Declaration on Prison Conditions in Africa) (Council Resolution, 1997.
[293] Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, 2002.
[294] Sibisi, M & Olofinbiyi, S 'A Critical Analysis of Overcrowding in South African Correctional Centres' (2021) 8 (2) *African Renaissance* at 209.
[295] Ibid at 210.
[296] Commission of Inquiry into Alleged Incidents of Corruption, Maladministration, Violence or Intimidation, at The Department of Correctional Services, as Appointed by Order of The President of The Republic of South Africa in Terms of Proclamation No. 135 Of 2001, as Amended ("the Jali Commission"). Available at: http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/061016jalireport_0.pdf.
[297] Shabangu K Prison overcrowding in the South African Correctional Services: A oenological Perspective. (Unpublished MA Thesis, University of South Africa, 2006) 164.
[298] Ibid at 213.
[299] Nkosi, N *The impact of correctional centre overcrowding on rehabilitation of offenders: a case study of Durban Westville correctional centre* (Unpublished MSS Thesis, University of KwaZulu Natal, 2018) 28.
[300] Muthaphuli, P. *Offenders rights regards to rehabilitation in South Africa* (Unpublished MT Thesis, University of South Africa,2018) 144.
[301] Maganye, PM *Perceptions of offenders and correctional officials on the rehabilitation programmes in maximum correctional centres–North West Province* (Unpublished MA Thesis North West University, 2016).

often leads to violence and aggression. The overcrowding effects are not felt only by the prisoners but also in other sectors including the implementation of effective treatment programmes, hygiene, discipline and control[302].

Most correctional centres that are overcrowded lack medical treatment and facilities to treat affected inmates, this has led to South Africa experiencing an exchange range of diseases associated with overcrowding which inter alia include pneumonia, hospitalisation for influenza, tuberculosis, ear infections, rheumatic fever, meningococcal disease and other acute respiratory infections[303]. This can be argued to be in violation of rule 24 of the Nelson Mandela Rules which provides that the healthcare of prisoners is the responsibility of the government including the treatment of diseases that are infectious in nature such as HIV and (TB)[304].

Hochstetler, Delisi and Berg[305] provide that correctional centres have a constitutional obligation to provide an environment that is healthy for all inmates which will allow them to repent, reflect on their crimes while also renewing themselves for the free world that should welcome them after confinement. Case law and the Correctional Services Act are clear in that there is a legal duty on the state to ensure that people are in safe custody and also to maintain standards of human dignity at a high level[306].

A prison environment that is overcrowded and without adequate resources often hampers the responsibility of the correctional services to proffer effective rehabilitation to offenders and this often leads to high rates of recidivism as a result there is a creation of a vicious circle which detains repeat offenders[307], this does not allow many inmates to have a dignified experience or existence[308].

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302 Singh S 'Overcrowding in South African prisons: the reality in the 21st century' (2006) (51) *a journal of historical and human sciences for Southern Africa* 173-201.

303 Nkosi, V...et al 'Overcrowding and health in two impoverished suburbs of Johannesburg, South Africa' *BMC Public Health*, (2019). 19(1), 1-8.

304 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (2008). Rule 24.

305 DeLisi, M., Berg, M. T., & Hochstetler, A. 'Gang members, career criminals and prison violence: Further specification of the importation model of inmate behavior' (2004), 17(4) *Criminal Justice Studies* 369–383.

306 Sibisi, M & Olofinbiyi, S 'A Critical Analysis of Overcrowding in South African Correctional Centres' (2021) 8 (2) *African Renaissance* at 211.

307 Mlomo-Ndlovu V Effectiveness of the criminal justice system strategies in curbing overcrowding in the department of correctional services (Unpublished LLD/PHD Thesis, University of South Africa,2022) 125.

308 Matshaba, T. D. *Imprisonment in South Africa under maximum security conditions in the new millennium* (Unpublished MT Thesis, University of South Africa,2007).

There is a rapid rise of recidivism emanating from overcrowded environments burdened with reduced management efficiency[309]. For sentenced prisoners, prison overcrowding defeats a paramount purpose of their sentence which is listed in section 35(2)(e) of the Constitution[310]. Sentenced offenders as well as remand detainees both have a right to dignified and humane conditions of detention as provided by the constitution[311]. To this end, the Correctional Services Act provides for the protection, human dignity and respect of prisoners[312].

The JICS 2019/2020[313] report stated that certain prison facilities are not fit for human occupation and that some are not satisfactory. The 2021/22 JICS report indicated inter alia that the Bizana correctional service had an approved capacity of 48 but on the day of inspection it had 147 inmates, this represents an overcrowding of 206 %[314]. Based on this report it is safe to argue that prison conditions in South Africa are not in line with the aforementioned regulations.

The issue of prison overcrowding has been going on for many years, but the situation does not seem to be better in fact it is slowly getting worse and this then degrades the respect that the country has for constitutional and human rights because the issue of overcrowding is perpetuated by the mandatory minimum scheme and when looking at our bill of rights, it affirms the democratic values of dignity and our constitution provides for the protection of sentenced and detained prisoners[315].

Several academics have shown their dislike of the provision with the effect it has on prison overcrowding. The South African Law Commission found several flaws that exist in these sentencing practices and laws, the commission did the assessment involving extensive international and local consultation[316]. Although the commission proposed different legislative interventions, much has not been implemented and after 20 years there is no sign of the minimum sentences scheme being replaced[317].

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[309] Ballard, C 'Prisons, the law and overcrowding' In G. M. Khadiagala, P. Naidoo, D. Pillay, & R. Southall *New South African Review 4: A fragile democracy – Twenty years on* (2014) 256–270 Wits University Press.
[310]35(2)(e) of the Constitution provides that everyone who is detained, including every sentenced prisoner, has the right— to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.
[311] The Constitution of the Republic of South Africa, sec 35(2)(e)
[312] Correctional Services Act 111 of 1998.
[313] The Judicial Inspectorate for Correctional Services Annual Report 2019/2020.
[314] The Judicial Inspectorate for Correctional Services Annual Report 2021/2022 at 33.
[315] Cameron, E. (2017). Imprisoning the nation: Minimum sentences in South Africa. *Dean's Distinguished Lecture, University of the Western Cape Faculty of Law.*
[316] Terblanche SS 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33 (1) SACJ 4-22.
[317] Ibid 22.

Currently the South African prison conditions fail to meet the minimum standards which are established in national and international legislation and declarations[318]. One can note that the conditions in South African prisons represent a serious breach of rights which are enshrined in the South African Constitution[319].

4.3 Conclusion

The findings of this chapter indicate that prison overcrowding is exacerbated by mandatory minimum sentences since it limits the individualisation of cases. Overcrowding also negatively impacts the rehabilitation process of inmates. The findings also indicate that the current South African prison conditions fail to meet the minimum standards which are established in national, international legislation and declarations as many facilities are experiencing an exchange range of diseases associated with overcrowding.

[318] Wasserman Z (2020) Prison Violence in South Africa: Context, Prevention and Response, saferspaces
[319] Ibid

CHAPTER 5

Conclusion and Recommendations

5.1 Conclusion

The aim of this dissertation was to critically evaluate some of the unintended consequences of the mandatory minimum sentencing in South Africa, this includes the interpretation of substantial and compelling circumstances by courts and the impact of the mandatory minimum legislation on prison overcrowding.

Section 51 of the Criminal Law Amendment Act 105 of 1997 requires that minimum mandatory penalties be imposed for specific serious crimes, however it also allows the judge of the court to depart where it is determined that substantial and compelling circumstances exist.

The *S v Malgas* case provided guidelines that can be applied in the interpretation of the words substantial and compelling circumstances. Before the *Malgas case* the interpretations of this phrase can be divided into three main categories namely, the strict approach, a more lenient approach and a more balanced approach of interpretation.

This study has established that the substantial and compelling standard applied when departing from the prescribed sentences is one of the concerning aspects of South Africa's sentencing regime. This is so because the phrase substantial and compelling has not been interpreted consistently by the South African courts despite the guidelines provided by the *S v Malgas* case.
This is evidenced by the rape cases of *S v M*[320], *S v Abrahams*[321] and *S v Mahamotsa*[322]. The *Mahamotsa* decision emphasised that courts need to keep their discretion and that just because a specific rape case falls within the aggravating factors does not lead to the conclusion that substantial and compelling circumstances cannot be found. This principle forms part of the *S v Malgas* guidelines for interpretation. In the case of *S v M*, Judge Satchwell does the opposite instead of following this principle. Satchwell J failed to grade this rape as such imposed a life

[320] 2007 (2) SACR 60 (W).
[321] 2001 (2) SACR 116 (CC)
[322] 2002 (2) SACR 435 (SCA)

imprisonment sentence. The sentencing process involves grading the seriousness of the offence in order to ensure that the punishment fits the crime as well as ensuring proportionality.

When comparing the *S v M* judgement to the Abrahams case one can discern that these cases have somehow similar facts in that the aggravating factors in *S v M* included the relationship that existed between the offender and the victim, the age and vulnerability of the victim and the position of power that the offender had. These factors are similar to those from *Abrahams* however in *S v M* a sentence of life imprisonment was imposed while in *Abrahams* a sentence of 12 years imprisonment was imposed.

Various judgements of the Supreme Court of Appeal have warned against a strict approach to interpreting the phrase substantial and compelling circumstances however the cases of *S v PB*[323] and *S v Matyityi*[324] have gone against this. This indicates that some judgements tend to disregard the importance of the constitutional considerations of proportionality and the need to still consider the traditional sentencing principles thus raising questions of whether courts are paying attention to some of the inconsistencies that result from their judgements.

When considering substantial and compelling circumstances in rape cases, some courts have required a higher showing of violence in order to not depart from the prescribed sentences. Using absence of violence in a rape case as a mitigating factor is a disregard of the Criminal Law (Sentencing) Amendment Act[325]. This study has revealed that the absence of physical injury in rape cases does not make the crime less serious and that the lack of physical injuries cannot always mitigate the seriousness of rape as such the lack of physical violence should not be used to perpetuate a mythical rape paradigm that rape in itself is not violent.

Some cases have used the prospect of rehabilitation as justification to depart from the prescribed minimum sentences. Using rehabilitation as a substantial and compelling factor is problematic because this factor is present in most cases except for a few unique and exceptional cases. As a result, the consideration of rehabilitation as a substantial and compelling circumstance would lead to unnecessary and unexplainable departures which would then circumvent the intention of the legislature in ensuring consistent sentences.

This study has also revealed that the Minimum Sentences Act also contributes to putting the South African Criminal Justice System under pressure because it limits the individualisation

[323] 2013 (2) SACR 553 (SCA).
[324] 2011 (1) SACR 40 (SCA).
[325] Act 38 of 2007.

of cases thus being different from the procedure that courts are expected to adhere to which is to individually consider relevant factors in each case. Some scholars have argued that it is unprincipled to use few sentences for different crimes without proper explanation and that the proclamation of the act did not consider whether the prisons are in a suitable position to cope with the increased imprisonment terms.

This study has also revealed that the growth of prison numbers has direct implications on inmates and also increases pressure on resources, infrastructure as well as exacerbating the security-associated risks, safety and health. A prison environment that is overcrowded also hamper effective rehabilitation to offenders and this often leads to high rates of recidivism as a result there is a creation of a vicious circle which detains repeat offenders. This study has also revealed that the current South African prison conditions fail to meet the minimum standards established in national and international legislation and declarations.

5.2 Recommendations

5.2.1 Sentencing guidelines

Chikoko argues that the guidance provided by the *Malgas* case has not proved to be helpful when it comes to achieving consistency in the South African sentencing system[326]. Chikoko supports the idea of a sentencing council as proposed by the SA Law Commission after it had researched and identified the problems in the sentencing system[327]. The sentencing council will create guidelines to be used by courts when sentencing[328].The SALRC initially advocated for sentencing principles to be clearly expressed in legislation thus taking a break from common law divergent sentencing[329]. Cameron[330] also supports the argument that parliament should consider the implementation of a Sentencing Council which will replace or reform the mandatory minimum sentences. An independent Sentencing Council would then develop sentencing guidelines for a particular sub-category or category of an offence in order to supplement the sentencing principles[331].

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[326] Chikoko, V. *The interpretation of substantial and compelling by South African courts and a comparison with Minnesota sentencing guidelines*. (Unpublished LLM Thesis, University of KwaZulu Natal, 2017) 144.
[327] Ibid.
[328] Neser, J "Reformation of Sentencing in South Africa" (2001) 14(2) *Acta Criminologica* 88.
[329] South African Law Commission (Project 82) 'Report: Sentencing (A New Sentencing Framework)' (2000).
[330] Cameron, E 'Comment and analysis - The crisis of criminal justice in South Africa' 2020 *SACQ* 69.
[331] Ibid.

Judicial officers will be encouraged to play a crucial role to ensure the council's independence, by assisting with practical experience and institutional knowledge[332]. The established guidelines ought to be flexible in order to allow departure if the circumstances are appropriate[333]. Some Comparable jurisdictions are already using a sentencing council. South Africa needs a cooperative approach in order to reform sentencing, and in order to make a positive impact, all three branches of government need to cooperate for an effective criminal justice system[334].

Sentencing guidelines refer to any general standards that give guidance to the courts to determine a suitable sentence that should be imposed in a specific case as was done in the state of Minnesota[335]. The Minnesota's system of guidelines is one of the highly rated systems as it has achieved most of the objectives it had set out, it is balanced and flexible as it has adapted to the changing circumstances while also retaining its simplicity and ease of use[336].

The sentencing guidelines will allow the diverse opinions of the public to be heard as well as giving potential offenders a sense of what punishment they may expect for committing a particular crime because the lack of sentencing guidelines allows the court's sentencing discretion to be exercised inconsistently thus making it difficult to determine whether like cases are being treated alike[337]. Various experts[338] have submitted that the current system is lacking a meaningful principle as there is no guidance for courts and this has led to outcomes that are inconsistent. The South African system needs consistent weighing of factors that in actual fact constitute substantial and compelling in order to achieve fairness[339].

Terblanche provides that the sentencing task is made easier when one has an understanding of how the sentencing guidelines work. One is then able to predict the sentence that will be

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[332] Ibid.
[333] Ibid.
[334] Ibid 8.
[335] Chikoko, V. *The interpretation of substantial and compelling by South African courts and a comparison with Minnesota sentencing guidelines*. (Unpublished LLM Thesis, University of KwaZulu Natal, 2017) 145.
[336] Chikoko, V. *The interpretation of substantial and compelling by South African courts and a comparison with Minnesota sentencing guidelines*. (Unpublished LLM Thesis, University of KwaZulu Natal, 2017) 145.
[337] Ibid 146.
[338] Terblanche, SS & Roberts, JV "Sentencing in South Africa lacking in principle but delivering justice" (2005) 18(2) *SACJ* at 200.
[339] Chikoko, V. *The interpretation of substantial and compelling by South African courts and a comparison with Minnesota sentencing guidelines*. (Unpublished LLM Thesis, University of KwaZulu Natal, 2017) 146.

imposed in a particular situation with a certain degree of accuracy which is a crucial aspect that can contribute to the consistency of sentences.[340]

The writer supports the establishment of an Independent Sentencing Council. The council would comprise of 2 Constitutional Court judges, 2 trial court judges, 2 Supreme Court of Appeal judges, 1 defence attorney, 1 prosecutor, 2 sentencing experts, a member of the Correctional and 2 citizens who have been victims of the crimes listed in the Act[341]. The objective of the council will be the creation of sentencing guidelines for the interpretation of substantial and compelling in the South African sentencing system.[342] The first task of the Sentencing will be to draft a clear list of principles that the South African sentencing system seeks to embody[343]. Clearly drawn sentencing guidelines will ensure that like cases are treated alike[344]. These principles should be flexible in order to allow courts to retain their discretion while also making room for unusual cases.

After extensive research, the Sentencing Council will then be tasked with creating a comprehensive but not exhaustive list of what factors can be taken into account by courts when determining whether substantial and compelling circumstances exist[345]. This list will also include factors that can be regarded as mitigating as well as aggravating and another list of factors that should not be part of deciding whether to depart or impose the prescribed sentence[346]. The Sentencing Council will also play a crucial role in conducting annual research and analysis of cases that fall within the ambit of the Act to ensure that courts are following the guidelines[347].

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[340] Terblanche, SS "Rape Sentencing with the aid of sentencing guidelines" (2006) 39(1) Comparative and International Law Journal of South Africa 38.
[341] Chikoko, V. *The interpretation of substantial and compelling by South African courts and a comparison with Minnesota sentencing guidelines*. (Unpublished LLM Thesis, University of KwaZulu Natal, 2017) 148.
[342] Ibid 149.
[343] Ibid.
[344] Van Zyl Smit, D "Human Rights and Sentencing Guidelines" (2001) 5 Law, Democracy and Development at 50.
[345] Chikoko, V. *The interpretation of substantial and compelling by South African courts and a comparison with Minnesota sentencing guidelines*. (Unpublished LLM Thesis, University of KwaZulu Natal, 2017) 149.
[346] Ibid.
[347] Ibid.

5.2.2 Restorative Justice

Delomoney argues that the Act's implementation has not evidently met its intended objectives but has rather resulted in further challenges[348]. Due to the call for harsher sentencing and high crime rates, many sentences are purely delivered as a punitive measure. Delomoney proposes restorative justice as a solution to the sentencing problems as well as other challenges of the justice system[349]. The primary essence of restorative justice is upholding the rights of the victim while also ensuring that the offender is held accountable.[350]

Njoko also supports the notion of a restorative approach which will result in the restoration of the victim as it will repair the damages suffered as a result of the crime[351]. Njoko provides that mandatory minimum sentences should be approached with a degree of caution because courts may easily deviate from the prescribed sentences for flimsy reasons in light of what amounts to substantial and compelling circumstances[352]. When courts are empowered to recognise the concept of restorative justice as forming part of the sentencing process, this will ensure that they strike a balance between the offender, the offence and the interests of the society[353].

The victim's involvement in the sentencing process can be achieved through victim impact statements thus assisting the court to achieve proportionality as the seriousness of the offence can be ascertained from the expressed impact of the crime on the part of the victim[354]. As the victim relays the impact of the crime to the court, this will assist the court in finding substantial and compelling circumstances in the evidence that the victim has adduced[355]. If the courts base the final decision on the impact of the crime, the legislation will still be compatible with a more restorative approach[356]. The recognition of restorative justice in the sentencing process will ensure that an appropriate sentence is achievable, such sentence will punish the accused, restore the victim and repair the damages suffered by the commission of the crime as seen in *DPP, North Gauteng v Thabethe*[357] where the SCA highlighted the issue of restorative justice and observed that restorative justice was gaining recognition. The judge also highlighted that the

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[348] Delomoney, D Will a restorative justice approach to sentencing improve the efficacy and functioning of the criminal justice system? (Unpublished LLM thesis, University of Kwazulu Natal, 2015) 53.
[349] Ibid 54.
[350] Ibid.
[351] Njoko, T What constitutes substantial and compelling circumstances In the mandatory minimum context? (Unpublished LLM thesis, university of Kwazulu Natal, 2015) 111.
[352] Ibid 126
[353] Ibid
[354] Ibid
[355] Ibid
[356] Ibid
[357] 2011 2 SACR 567 (SCA).

restorative justice advantages could not be doubted as a viable sentencing alternative option provided that it is applied properly.

The restorative justice approach option can innovatively create an opportunity to provide alternative access to justice in rural areas as they lack proper court facilities and support services which are provided by various government sectors, this *inter alia* includes diversion and legal aid services[358].

Skelton and Batley[359] provide that restorative justice has emerged clearly in South African practice, jurisprudence and writing as it has made significant inroads with several pieces of legislation including the Probation Services Act[360] and the Child Justice Act[361]. Restorative justice is implemented fully in various international justice systems, Canada appears to have successfully integrated this approach into their criminal justice system. The restorative justice concept has greatly influenced the legal system and there are a lot of projects driven and implemented by NGOs.

The writer supports the notion of restorative justice However, it is equally important to note that although restorative justice processes can have significant improvement on the functioning of the justice system, its successful integration depends on its proper implementation.

5.2.3 Prison Overcrowding

It is equally important to understand that solutions to the overcrowding issue are not simple, this is because its causes are systemic in nature and they vary across poor management, limited resources, backlogs and maladministration of different government departments[362]. There is a need for a meaningful and informed effort by different stakeholders towards alleviating the severe effects suffered by a large number of inmates[363]. It has been over 20 years since the enactment of the constitution, so surely the rights of inmates cannot be ignored any longer.

[358] Delomoney, D Will a restorative justice approach to sentencing improve the efficacy and functioning of the criminal justice system? (Unpublished LLM thesis, University of Kwazulu Natal, 2015) 65.
[359] Skelton, A ‘Face to Face: Sachs on Restorative Justice’ (2005) 25(1) *SAPR* at 96.
[360] Act 116 of 1991.
[361] Act 75 of 2008, the preamble of this act provides for Restorative justice.
[362] Ballard, C ‘Prisons, the law and overcrowding’ In G. M. Khadiagala, P. Naidoo, D. Pillay, & R. Southall *New South African Review 4: A fragile democracy – Twenty years on* (2014) 256–270 Wits University Press.
[363] Ibid at 266.

Looking at the extent to which the correctional facilities are overcrowded, the situation is undoubtedly unconstitutional[364]. The solution might not necessarily be the building of more prison facilities from scratch or the transfer of prisoners from overcrowded prisons to less overcrowded prisons away from their communities but rather adding the necessary capacity to those overcrowded prisons might be a step towards alleviating overcrowding[365].

The National Overcrowding Task Team (NOTT) of the Department of Correctional Services had implemented the eight-pronged strategy aimed at managing overcrowding from 2006 to 2020, however their approach failed to yield the desired expectations insofar as the reduction of overcrowding[366]. In 2023 the NOTT explored strategies aimed to manage inmate population. They identified self-sufficient centres as one probable solution[367]. The writer supports this approach as it would contribute to developing the skills of offenders thus ultimately resulting in reducing overcrowding. This is a necessary and best practical approach to address overcrowding as it would be done through categorisation, assessment and placing prisoners in out-of-prison sentence programmes. This can be imposed on offenders who are particularly young and nonviolent and first-time offenders[368].

Issues faced by inmates and prisons are often outside the eye of the public and thus generally ignored. Therefore, there is a need to provide an approach which will focus on the pressing issues of incarceration in order to ensure that these violations are highlighted thus preventing further erosion of the inmate's human rights[369]. In order to achieve the protection and promotion of human rights in South Africa, there is a necessity to educate people about their rights, an important intervention regarding prison issues is awareness raising and education programmes which involve multiple tiers of impact[370].

One way is to make legislators aware of conditions and the violation of the inmate's rights which is ongoing in the South African prisons, the purpose of such is to put pressure on them and ensure that they prioritise these issues and promulgate policies which will be effective and

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[364] Ibid.
[365] Ibid.
[366] http://www.dcs.gov.za/?page_id=8334
[367] http://www.dcs.gov.za/?page_id=8334
[368] Ensor, L "Prison overcrowding a 'disturbing' problem for government" 17 July 2019 https://www.businesslive.co.za/bd/national/2019-07-17-prison-overcrowding-adisturbing-problem-for-government/ (accessed 2019-10-08).
[369] Wasserman Z (2020) Prison Violence in South Africa: Context, Prevention and Response, saferspaces
[370] Ibid

responsive[371]. Another solution will be to conduct peer-education and training programmes with previously incarcerated persons and inmates, the focus will be on sexuality, gender and toxic masculinity[372]. The hope of these programmes is to shift the norms around gender and masculinity which could as a consequence reduce the normalisation and perpetration of sexual violence.

Litigation can also be a crucial tool in ensuring that the rights of marginalised and vulnerable people are protected and guaranteed, when looking at the jurisprudence concerning the health rights of incarcerated people one can discern that it is limited[373], however, it also contains several landmark judgements like the case of *Lee v Minister of Correctional Services*[374] where a detained had contracted TB, the court found that the Department of Correctional Services could be held liable for damages with regards to its negligent omissions such as a failure to provide health care that is adequate and conditions of detention that respect human dignity[375]. Another judgement is that of *the Sonke Gender Justice v The Government of the Republic of South Africa*[376] where the severe overcrowding and other inhuman conditions of incarceration for remand detainees at Pollsmoor Remand Detention Facility (RDF) were challenged by the Sonke Gender Justice (Sonke) and Lawyers for Human Rights. The court found in favour of Sonke and provided that the detention conditions in Pollsmoor RDF amounted to a violation of the detainee's constitutional rights to health and that the conditions were not consistent with human dignity. The court furthermore ordered that the government reduce within 6 months the overcrowding to no more than 150% of its approved capacity. In addition, the Department of Correctional Services was also ordered to develop a plan for rectifying prison conditions within Pollsmoor RDF.

Another important factor is prison oversight, this is because largely prisons operate outside the eye of the public hence why they are referred to as closed institutions because they are not easily accessible to the general population[377]. It is for this reason that prison transformation activists have been calling for the improvement of prison oversight, including supervision and inspection by bodies that are independent. Wasserman of the Sonke Gender Justice [378] provides

[371] Ibid.
[372] Ibid.
[373] Ibid.
[374] (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC).
[375] Keehn, E & Nevin, A Health, 'Human Rights, and the Transformation of Punishment: South African Litigation to Address HIV and Tuberculosis in Prisons' (2018) 20(1), *Health and Human Rights Journal* 231-224.
[376] Sonke Gender Justice v The Government of the Republic of South Africa 24087/15 (unreported).
[377] Wasserman, Z (2020) Prison Violence in South Africa: Context, Prevention and Response, saferspaces
[378] Zia Wasserman is a Consultant for the Policy Development and Advocacy Unit at Sonke Gender Justice.

that research has indicated prison oversight to be playing a vital role in the protection of inmate's human rights[379]. Regular monitoring can act as a preventative measure when looking at the abuse of human rights in prisons[380]. Reporting regularly will allow prison issues to infiltrate the public sphere thus making the general public conscious and consistent oversight will ensure accountability and action on the DCS's part[381].

Currently in South Africa, the Judicial Inspectorate for Correctional Services (JICS) acts as the prison oversight body[382]. It inspects the prisons, processes the complaints of inmates as well as reporting on treatment and conditions. It is important to note that some issues have been brought forward as crippling the effectiveness of the JICS, these factors inter alia include the lack of independence as it lacked financial, associational and functional independence, however, some of these issues have been resolved as the Constitutional court[383] confirmed the order of constitutional invalidity which was made by the Western Cape High Court in *Sonke Gender Justice NPC v President of the Republic of South Africa and Others*[384], this was in regards to certain provisions of the Correctional Services Act that deal with the independence of the JICS. The said provisions are set out in sections 88A(1)(b) and 91 of this Act and they deal with the position of the Chief Executive Officer of JICS providing that they are accountable to the National Commissioner of Correctional Services regarding matters relating to their incapacity or misconduct and all monies spent which is the very department that it is supposed to hold accountable. The Department of Correctional Services (DCS) is responsible for all expenses related to JICS, this means that JICS did not have an independent budget vote before Parliament as a result they were financially reliant on the department that they have to oversee[385]. This allowed for the DCS to limit JICS the resources it needs to hold the Department accountable[386].These provisions did not give JICS adequate independence to enable it to effectively oversee the DCS in light of the treatment of prisoners and conditions of detention.

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[379] Wasserman, Z (2020) Prison Violence in South Africa: Context, Prevention and Response, saferspaces
[380] Ibid.
[381] Ibid.
[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Sonke Gender Justice, What are the current problems facing JICS? Available at https://genderjustice.org.za/card/why-is-sonke-going-to-court-to-address-prison-oversight/what-are-the-current-problems-facing-jics/ accessed on 11 July 2023.
[386] Ibid

It is also not capacitated adequately in terms of personnel shortages and budgetary constraints as a result, inspectors are said to be only able to inspect each prison once every three years[387]. Another important factor is that the recommendations to DCS by the JICS are not binding thus limiting the efficacy of the JICS. So, it is important for policy makers to strengthen the JICS and make follow-ups on its recommendations[388].

5.2.4 Review of the Mandatory Minimum Legislation

The Human Rights Committee of the United Nations has shown concern that minimum sentencing can lead to punishments that are not proportionate to the seriousness of the committed crimes thus raising compliance issues with various articles of the ICCPR[389]. Studies indicate that mandatory minimum sentences constrain judicial discretion as such they are not an effective sentencing tool because they do not offer any increased crime prevention benefits[390].

In order to achieve justice based on proportionality and fairness principles, courts need to have some leeway to individualise sentencing in order to take into account the vulnerabilities and background of the offender and the circumstances of the concerned offence while also giving sufficient attention to the rehabilitative needs of the offender[391]. Such discretion should allow courts to select appropriate types of sentences and the length of prison terms where appropriate[392]. To this end, policymakers and legislators are encouraged to consider repealing mandatory minimum sentences that do not allow for any discretion when sentencing[393].

There is a need to abolish minimum sentences for crimes that are non-serious, non-violent and most low-level[394]. This is vital for offences that are drug-related, a step in the right direction was shown by the constitutional court in the case of *Minister of Justice and Constitutional Development v Prince*[395] where it was ruled that the criminalisation of cultivation, use, or possession of cannabis by adults which is for personal consumption in private is

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[387] Ibid.
[388] Wasserman Z (2020) Prison Violence in South Africa: Context, Prevention and Response, saferspaces
[389] United Nations Office on Drugs and Crime (UNODC) in cooperation with the International Committee of the Red Cross (ICRC), Handbook on strategies to reduce overcrowding in prisons, Criminal Justice Handbook Series, 2013.
[390] Ibid 48.
[391] Ibid 49.
[392] Ibid.
[393] Ibid.
[394] Ibid 7.
[395] [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC).

unconstitutional. The war on drugs is hugely expensive and has a negative impact on lives as well as resources. Punishments which are more suitable for drug related non-violent offences should be utilised, for instance community service, probation, shorter sentences, medical treatment or electronic monitoring[396].

All stakeholders that interacted with the parliamentary monitoring group supported the idea that amending the Act would contribute positively towards reducing the inmate population[397]. In order to reduce overcrowding, courts are encouraged to make greater use of non-custodial sentences as an alternative, this can include those contained in sections 276(1)(h) and (i) of the Criminal Procedure Act[398]. These steps will positively facilitate the speedy reintegration of offenders into society because the continued incarceration of those serving shorter sentences negatively impacts the provision of rehabilitation programmes. With proper monitoring and where appropriate, alternative sentencing benefits far outweigh those of incarceration[399].

This is not to suggest that we should be lenient or soft on white-collar crimes but minimum sentences unfairly exempt the people who are at the top of the food chain and mostly impact the dispossessed and poor[400]. For instance, when looking at the current minimum sentencing scheme, sentences that apply for murder also apply for drug trafficking. Sentences that are unnecessarily harsh should be reviewed in order to ensure proportionality of various types of crime[401]. There is a need to revisit the mandatory minimum sentences legislation looking at the extent to which overcrowding is driven by the sentenced prison population, particularly because this sentencing scheme was intended to be in operation as a temporary two-year measure[402].

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[396] Cameron, E 'Comment and analysis - The crisis of criminal justice in South Africa' 2020 *SACQ* 69.

[397] ATC110914: Report of the Portfolio Committee on Correctional Services on factors contributing to overcrowding in correctional centres https://pmg.org.za/tabled-committee-report/1683/ accessed on 13 March 2024.

[398] Criminal Procedure Act 51 of 1977, section 276(1)(h) and (i).

[399] ATC110914: Report of the Portfolio Committee on Correctional Services on factors contributing to overcrowding in correctional centres https://pmg.org.za/tabled-committee-report/1683/ accessed on 13 March 2024.

[400] Ibid 8.

[401] Ibid.

[402] Ballard, C 'Prisons, the law and overcrowding' In G. M. Khadiagala, P. Naidoo, D. Pillay, & R. Southall *New South African Review 4: A fragile democracy – Twenty years on* (2014) 256–270 Wits University Press.

BIBLIOGRAPHY

BOOKS AND BOOK CHAPTERS

Ballard, C 'Prisons, the law and overcrowding' In G. M. Khadiagala, P. Naidoo, D. Pillay, & R. Southall *New South African Review 4: A fragile democracy – Twenty years on* (2014) 256–270 Wits University Press.

Terblanche, S.S *A Guide to Sentencing In South Africa* 3ed (2016). (Durban: LexisNexis).

CASE LAW

DPP, North Gauteng v Thabethe 2011 2 SACR 567 (SCA)

Lee v Minister of Correctional Services (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC)

Minister of Justice and Constitutional Development v Prince [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC)

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

S v Blaauw 1999 (2) SACR 295 (W)

S v Davids 2016 JDR 1864 (ECM).

S v Dithotze 1999(2) SACR 314 (W)

S v Dodo 2001 (3) SA 382 (CC)

S v Gqamana 2001 (2) SACR 28 (C)

S v Homareda 1999 (1) SACR 502 (W).

S v Ibrahim 1999 (1) SACR 106 (C).

S v Jansen 1999(2) SACR 368 (C)

S v Kgafela 2001 (2) SACR 207 (B)

S v Khathi 2008 (2) SACR 589 (W)

S v M 2007 (2) SACR 60 (W)

S v Mahomotsa 2002 (2) SACR 435 (SCA)

S v Majola 2001 (1) SACR 337 (W)

S v Makwanyane 1995 (3) SA 391 (CC)

S v Malgas 2001 (1) SACR 469 (SCA)

S v Matewane 2013 JDR 2755 (GNP).

S v Matyityi 2011 (1) SACR 40 (SCA)

S v Mofokeng 1999 (1) SACR 502 (W)

S v Mxolisi 2018 JDR 0586 (GJ).

S v Njikelana 2003 (2) SACR 166 (C)

S v Nkomo 2007 (2) SACR 198 (SCA)

S v PB 2013 (2) SACR 553 (SCA)

S v Pillay 2018 (2) SACR 192 (KZD)

S v Segole and Another 1999(2) SACR 115 (W)

S v Shongwe 1999 (2) SACR 220 (O)

S v SN [2022] 3 All SA 497 (ECG)

S v Van Wyk 2000 (1) SACR 45 (C)

S v Vilakazi 2009 (1) SACR 552 (SCA)

S v Zitha and others 1999 (2) SACR 404 (W)

UNREPORTED JUDGEMENTS

Sonke Gender Justice v The Government of the Republic of South Africa 24087/15 (unreported).

S v Abrahams Unreported judgment of the CPD, case SS 99, delivered 20 September 1999.

S v Cimani Unreported judgment of the ECPD, case number CC11/99, delivered on 28 April 1999.

S v Madondo Case number CC/99 Delivered on 30 March 1999.

S v Majalefa and Another: Unreported judgment of the Witwatersrand Local Division delivered on 22 October 1998.

S v Mthembu and Another Case number 365/98 Delivered on 22 October 1998.

INTERNET SOURCES

ATC110914: Report of the Portfolio Committee on Correctional Services on factors contributing to overcrowding in correctional centres https://pmg.org.za/tabled-committee-report/1683/ accessed on 13 March 2024.

Clare Ballard, Crime and punishment don't add up, Mail & Guardian, 7 May 2015- available at https://mg.co.za/article/2015-05-07-crime-and-punishment-dont-add-up/ accessed on 08 June 2023.

Ensor "Prison overcrowding a 'disturbing' problem for government" (17 July 2019) https://www.businesslive.co.za/bd/national/2019-07-17-prison-overcrowding-a-disturbing-problem-for-government/ (accessed 01 March 2024)

Muntingh, L "Op-Ed: Rethinking life imprisonment" 2 March 2017 https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-lifeimprisonment/ (accessed 01 March 2024)

Hansard: NA: Unrevised Hansard (EPC) "Debates on the National Assembly- Vote No 18 Correctional Services" 17 July 2019 https://pmg.org.za/hansard/28891/ (accessed 05 March 2024).

Sibuliso Duba 'Overcrowding in prisons continues to be a problem, says Popcru' IOL 13 January 2023, available at https://www.iol.co.za/news/south-africa/western-cape/overcrowding-in-prisons-continues-to-be-a-problem-says-popcru-6cb4b14d-fdb5-4569-bc40-6108a7eec89e, accessed on 05 June 2023.

Sonke Gender Justice, What are the current problems facing JICS? Available at https://genderjustice.org.za/card/why-is-sonke-going-to-court-to-address-prison-oversight/what-are-the-current-problems-facing-jics/ accessed on 11 July 2023.

Wasserman Z (2020) Prison Violence in South Africa: Context, Prevention and Response, saferspaces available at https://www.saferspaces.org.za/understand/entry/prison-violence-in-south-africa-context-prevention-and-response accessed on 22 June 2022.

JOURNAL ARTICLES

Baehr, KS'Mandatory minimums making minimal difference: Ten years of sentencing sex offenders in South Africa' (2008–2009) 20 *Yale J L & Feminism* at 240–241.

Cameron, E 'Comment and analysis - The crisis of criminal justice in South Africa' 2020 *SACQ* 69.

DeLisi, M., Berg, M. T., & Hochstetler, A. 'Gang members, career criminals and prison violence: Further specification of the importation model of inmate behavior' (2004), 17(4) *Criminal Justice Studies* 369–383.

Goliath, A 'A short critique of minimum sentences' (2022), 43(4), *Obiter* 779-796.

Keehn, E & Nevin, A Health, 'Human Rights, and the Transformation of Punishment: South African Litigation to Address HIV and Tuberculosis in Prisons' (2018) 20(1), *Health and Human Rights Journal* 231-224.

Kubista, NJ. "Substantial and compelling circumstances: Sentencing of rapists under the mandatory minimum sentencing scheme." (2005) 1 *SACJ* 77-86.

Metz T 'Reconciliation as the Aim of a Criminal Trial: Ubuntu's Implications for Sentencing' (2019) 9 (1) *Constitutional Court Review* 114.

Mujuzi, JD "The 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) *SACJ* 4.

Neser, JJ 'Mandatory Minimum Sentences in the South African context' (2001) 3 *Crime Research in South Africa (CRSA)* 1.

Neser, JJ. "Reformation of sentencing in South Africa." (2001) 14(2) *Acta Criminologica* 84-89.

Nkosi, V...et al 'Overcrowding and health in two impoverished suburbs of Johannesburg, South Africa' BMC Public Health, (2019). 19(1), 1-8.

Roth, SM. "South African mandatory minimum sentencing: Reform required" (2008) 17(1) University of Minnesota Law School Scholarship Repository, *Minnesota Journal of International Law* 155-182.

Sibisi, M & Olofinbiyi, S 'A Critical Analysis of Overcrowding in South African Correctional Centres' (2021) 8 (2) *African Renaissance* 209-226.

Singh S 'Overcrowding in South African prisons: the reality in the 21st century' (2006) (51) *a journal of historical and human sciences for Southern Africa* 173-201.

Skelton, A 'Face to Face: Sachs on Restorative Justice' (2005) 25(1) *SAPR* 94-107.

Sloth-Nielsen, J; Ehlers, L. "A pyrrhic victory? Mandatory and minimum sentences in South Africa." (2005) *Institute for Security Studies* [ISS Paper 111].

Terblanche, SS 'Comparing sentencing for robbery with Strafzumessung für Raub' (2022) 35(2) *SACJ* at 163.

Terblanche, SS; Mackenzie, G. "Mandatory sentences in South Africa: Lessons for Australia?" (2008) 3. *Australian and New Zealand Journal of Criminology* 402-418.

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

Terblanche, SS "Rape Sentencing with the aid of sentencing guidelines" (2006) 39(1) *Comparative and International Law Journal of South Africa* 1-38.

Terblanche, S 'Research on the Sentencing Framework Bill – Report 4' *Open Society Foundation for South Africa* (2008) 7-8.

Terblanche, SS & Roberts, JV "Sentencing in South Africa lacking in principle but delivering justice" (2005) 18(2) *SACJ* 200.

Terblanche, S "Sentencing" (2008) 21 *SACJ* 128.

Terblanche, SS 'Sentencing in South Africa: Dominated by minimum sentences' (2020) 33(1) *SACJ* 4-22.

Terblanche SS ‘Twenty Years of Constitutional Court Judgments: What Lessons are there about Sentencing?’ *PER / PELJ* 2017(20).

Van Zyl Smit, D “Human Rights and Sentencing Guidelines” (2001) 5 *Law, Democracy and Development* 45-52.

Van Zyl Smit, D ‘Mandatory Sentences: A Conundrum for the new South Africa?’ (2000) 2(2*) Punishment and Society* 197-212.

RESEARCH PAPERS, REPORTS AND LAW COMMISSION PAPERS

Cameron, E *Imprisoning the Nation: Minimum Sentences in South Africa* University of the Western Cape Faculty of Law Dean’s Distinguished Lecture Thursday 19 October 2017 19h00.

Commission of Inquiry into Alleged Incidents of Corruption, Maladministration, Violence or Intimidation, at The Department of Correctional Services, as Appointed by Order of The President of The Republic of South Africa in Terms of Proclamation No. 135 Of 2001, as Amended (“the Jali Commission”). Available at: http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/061016jalireport_0.pdf.

Donovan, MO, M; Redpath, J. “The Impact of Minimum Sentencing in South Africa.” (2006) (Report 2) Open Society Foundation for South Africa 7-12.

Giffard C, Muntingh L ‘The effect of sentencing on the size of the prison population’ Report commissioned by the Open Society Foundation for South Africa (2006).

Judicial Inspectorate for Correctional Services Annual Report 2019/2020.

Judicial Inspectorate for Correctional Services Annual Report 2021/2022.

South African Law Commission Discussion Paper 11 (Project 82) ‘Sentencing: Mandatory Minimum Sentences.

South African Law Commission (Project 82) Report: Sentencing (A New Sentencing Framework) (2000).

Viljoen, G Report of the Commission of Enquiry into the Penal System of the Republic of South Africa. Pretoria: Government Printer (1976).

SOUTH AFRICAN LEGISLATION

Child Justice Act 75 of 2008.

Children's Act 38 of 2005.

Constitution of the Republic of South Africa, 1996.

Correctional Services Act 111 of 1998.

Criminal Law Amendment Act 105 of 1997

Criminal Law (Sentencing) Amendment Act 38 of 2007.

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Criminal Procedure Act 51 of 1977.

Firearms Control Act 60 of 2000.

Probation Services Act 116 of 1991.

THESES

Chikoko, V *The Interpretation of 'Substantial and Compelling' By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (Unpublished LLM Thesis, University of KwaZulu-Natal, 2016).

Delomoney, D *Will A Restorative Justice Approach To Sentencing Improve the Efficacy and Functioning of the Criminal Justice System?* (Unpublished LLM Thesis, University of KwaZulu-Natal, 2015).

Deziel, J *The Effectiveness of Mandatory Minimum Sentences: A Comparative Study of Canada and South Africa* (Unpublished LLM Thesis, University of Cape Town (2013).

Goliath, A *Rethinking minimum sentence legislation* (Unpublished LLM Thesis, Nelson Mandela university, 2020).

Maganye, PM *Perceptions of offenders and correctional officials on the rehabilitation programmes in maximum correctional centres–North West Province* (Unpublished MA Thesis North West University, 2016).

Maharaj, v. *An evaluation of the effect of mandatory minimum sentencing legislation on judicial discretion in South Africa* (Unpublished LLM Thesis, University of KwaZulu Natal, 2021).

Matshaba, T. D. *Imprisonment in South Africa under maximum security conditions in the new millennium* (Unpublished MT Thesis, University of South Africa,2007).

Mlomo-Ndlovu, V Effectiveness of the criminal justice system strategies in curbing overcrowding in the department of correctional services (Unpublished LLD/PHD Thesis, University of South Africa,2022).

Muthaphuli, P. *Offenders rights regards to rehabilitation in South Africa* (Unpublished MT Thesis, University of South Africa,2018).

Njoko, T.B *What constitutes "Substantial and Compelling Circumstances" In the Mandatory and Minimum Sentencing Context?* (Unpublished LLM Thesis, University of KwaZulu-Natal, 2016).

Nkosi, N *The impact of correctional centre overcrowding on rehabilitation of offenders: a case study of Durban Westville correctional centre* (Unpublished MSS Thesis, University of KwaZulu Natal, 2018).

Nzimande, E.S *Minimum Sentence Legislation in South Africa* (Unpublished LLM Thesis, Nelson Mandela Metropolitan University, 2012).

Shabangu K *Prison overcrowding in the South African Correctional Services: A oenological Perspective.* (Unpublished MA Thesis, University of South Africa, 2006).

TREATIES, DECLARATIONS AND INTERNATIONAL LEGISLATION

Kampala Declaration on Prison Conditions in Africa) (Council Resolution, 1997.

Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, 2002.

United Nations Office on Drugs and Crime (UNODC) in cooperation with the International Committee of the Red Cross (ICRC), Handbook on strategies to reduce overcrowding in prisons, Criminal Justice Handbook Series.

United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (2008).

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mr Banele Prince Nkosi (217064010)
School Of Law
Pietermaritzburg

Dear Mr Banele Prince Nkosi,

Original application number: 00017774
Project title: A critical evaluation of some of the unintended consequences of the mandatory minimum sentencing legislation in South Africa.

Exemption from Ethics Review

In response to your application received on 22 September 2022 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

Mr Matthew Blain Kimble
obo Academic Leader Research
School Of Law