CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 225/20

In the matter between:

GAOLATLHE SENWEDI Applicant

and

THE STATE Respondent

Neutral citation: *Senwedi v The State* [2021] ZACC 12

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J, Victor AJ

Judgments: Majiedt J (unanimous)

Decided on: 21 May 2021

Summary: Criminal Procedure Act 51 of 1977 — Section 276B — non-retrospectivity of non-parole periods in terms of section 276B — non-applicability of section 276B at the time of sentencing

Section 12(1)(a) of the Constitution — substantive and procedural requirements — fatal misdirection where no opportunity to make representations on non-parole period

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ORDER

On appeal from the Supreme Court of Appeal Court (hearing an appeal from the High Court of South Africa, Northern Cape Division, Kimberley):

1. Leave to appeal is granted.
2. The non-parole period ordered by the High Court of South Africa, Northern Cape Division, Kimberley, on 14 May 2002 – that accused one, Mr Gaolatlhe Senwedi, and accused two, Mr Alfred Khonyane, should not be considered for release on parole until they have each served at least 25 years of their sentence of life imprisonment on count 3, murder – is set aside.
3. The Registrar of this Court is directed to forward a copy of this judgment to the Department of Justice and Correctional Services under cover of a letter or email that indicates that this judgment be brought to the attention of the erstwhile accused two, Mr Alfred Khonyane.

JUDGMENT

MAJIEDT J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J, Victor AJ concurring):

Introduction

[1] The applicant, Mr Gaolatlhe Senwedi, applied to the Supreme Court of Appeal for leave to appeal against his conviction and sentence in the High Court of South Africa, Northern Cape Division, Kimberley. The High Court had refused his application for leave to appeal. The application in the Supreme Court of Appeal suffered the same fate. The applicant then pursued an application for reconsideration of the refusal of leave to appeal to the President of the Supreme Court of Appeal. The

application for reconsideration having also failed, the applicant sought leave to appeal to this Court. The application in this Court is confined to a specific part of the sentence imposed. The central issue concerns a non-parole period of 25 years ordered in respect of a life sentence imposed on the applicant by the High Court during sentencing. What requires determination is the validity of that order, given that the maximum non-parole period was 20 years for such sentence at that time. That enquiry arises from the following facts.

Background

[2] On 2 April 2001, Mr Coetzee was shot dead in the course of an armed robbery. The applicant was arraigned in the High Court together with two co-accused for the murder of Mr Coetzee, housebreaking, robbery with aggravating circumstances and the illegal possession of a firearm and ammunition. On 2 May 2002, they were convicted on all these charges, save for the housebreaking charge.

[3] On 14 May 2002, the applicant was sentenced as follows by the High Court:

(a) Count 2, robbery with aggravating circumstances: 25 years' imprisonment;

(b) Count 3, murder: life imprisonment;

(c) Count 4, illegal possession of a firearm: 3 years' imprisonment; and

(d) Count 5, illegal possession of ammunition: 1 year's imprisonment.

It was ordered that the sentences in respect of counts 2, 4 and 5 run concurrently with the sentence of life imprisonment on the count of murder. It was further ordered "that accused one [applicant] and two [Mr Alfred Khonyane] not be considered for release on parole until they have each served at least 25 years of their life imprisonment sentence".[1]

[1] *State v Senwedi*, unreported judgment of the High Court of South Africa, Northern Cape Division, Kimberley, Case No K/S 54/2001 (14 May 2002) at paras 13.6.

[4] During August 2013, the Superior Courts Act[2] came into operation. After his unsuccessful attempts in obtaining leave to appeal, the applicant was informed during January 2017 by a fellow inmate of the possibility of an application for reconsideration pursuant to section 17(2)(f) of that Act. On 10 June 2019, the applicant lodged an application for reconsideration with the Supreme Court of Appeal. The applicant claimed that there were exceptional circumstances and prospects of success that warrant an appeal to a Full Court. On 28 November 2019, the Registrar of the Supreme Court of Appeal sent a letter to the applicant informing him that the application could not be accepted, as the application was dismissed on 26 January 2009. The Registrar informed the applicant in the letter that "at that time the Superior Courts Act was not in force and the [A]ct has no retrospective effect". It bears mention, for the sake of completeness, that accused 3 (who was not subject to a non-parole period) also applied to the High Court and also petitioned to the Supreme Court of Appeal, but to no avail.

[5] The applicant now seeks leave to appeal to this Court in order to remedy the alleged infringement of his constitutional rights by the Supreme Court of Appeal in refusing to entertain the application for reconsideration pursuant to section 17(2)(f) of the Superior Courts Act. This application is also preceded by a condonation application for the lengthy delay in bringing this application. The applicant submits that the following constitutional rights were infringed:

(a) the right to equal protection under the law;[3]

(b) the right to access to court;[4] and

(c) the right to appeal to, or review by, a higher court.[5]

[6] The applicant contends that when his application was dismissed by the Supreme Court of Appeal in 2009, the possibility of lodging an application for reconsideration was not available. The applicant claims that the refusal to consider the

[2] 10 of 2013.

[3] Section 9(1) of the Constitution.

[4] Section 34 of the Constitution.

[5] Section 35(3)(o) of the Constitution.

application on the basis that section 17(2)(f) has no retrospective effect undermines the purpose of the section. If his application were to be reconsidered, contends the applicant, it is clear that "the [High Court] was not at liberty to impose a non-parole period prior to 1 October 2004 and he would have enjoyed his right to the least severe sentence".

[7] In the alternative, the applicant seeks leave to appeal the order of the High Court. In particular, the applicant submits that the imposition of a non-parole period of 25 years' imprisonment prior to the enactment of section 276B of the Criminal Procedure Act[6] (the CPA) infringes his constitutional rights. The applicant notes that this issue was not raised in his initial application before the Supreme Court of Appeal, but that this aspect was the only ground of appeal raised in his application for reconsideration. In this regard, the applicant submits that when he was sentenced to life imprisonment (on 14 May 2002), individuals serving life sentences were required to serve a minimum period of 20 years' imprisonment before they became eligible for parole. He points out that the effect of the imposition of the non-parole period by the High Court is that he has to serve 5 years more than fellow inmates sentenced to life imprisonment prior to 1 October 2004. The applicant argues that, since section 276B of the CPA was introduced by section 22 of the Parole and Correctional Supervision Amendment Act,[7] operative as of 1 October 2004, any attempt to stipulate a non-parole period in respect of an offence committed prior to the coming into operation of section 276B, is impermissible. In this regard, the applicant relies on *Zono*.[8]

[8] The applicant contends that the imposition of a non-parole period prior to 1 October 2004 raises an important constitutional issue as it infringes the following rights:

[6] 51 of 1977.

[7] 87 of 1997.

[8] *S v Zono* [2014] ZASCA 188; 2014 JDR 2518 (SCA) (*Zono*) at para 6, where the Court stated that "[i]n the absence of legislative authority to do so, it appears that courts that sought to impose such a non-parole period, as both the sentencing court and the full court in this matter did, misdirected themselves".

(a) the right not to be deprived of freedom arbitrarily and without just cause;[9] and

(b) the right to benefit from the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.[10]

Finally, the applicant contends that the High Court did not invite the legal representatives to address the issue of fixing a non-parole period.

[9] This Court considered the application and issued the following directions to the parties:

> "1. The respondent is directed by Friday, 22 January 2021 to file two copies of the complete trial record in Case No K/S 54/2001 of the High Court of South Africa, Northern Cape Division, Kimberley.
>
> 2. The parties are directed to file written submissions of no longer than 15 pages on the following issues:
>
> a) Whether condonation should be granted.
>
> i. Why did the applicant not approach this Court after his initial petition to the Supreme Court of Appeal was dismissed on 26 January 2009?
>
> b) Whether the non-parole period as ordered by the High Court at paragraph 13.6 of the order is permissible."

[10] Written submissions were received from both the applicant and the respondent. The respondent's submissions support the application in respect of the applicant's alternative contentions regarding the imposition of the non-parole period. The State readily concedes that the length of the non-parole period imposed by the High Court was invalid. This matter is being determined without oral argument.

[9] Section 12(1)(a) of the Constitution.

[10] Section 35(3)(n) of the Constitution.

Condonation

[11] The applicant first applied for leave to appeal to the Supreme Court of Appeal on 26 January 2009, and his application for reconsideration was only filed on 10 June 2019 – more than ten years later. That application was refused on 28 November 2019. Four months later, in March 2020, a national lockdown was announced, due to the Coronavirus pandemic. The present application was only filed on 29 September 2020 in this Court.

[12] The applicant applies for condonation for this extensive delay. He explains that he is a lay person with little education and no history of fixed employment. Further, he did not have legal representation between 2009 and 2018, and only became aware in 2017 of the possibility of an application for reconsideration in terms of section 17(2)(f) of the Superior Courts Act. This information emanated from a fellow inmate. In addition, he is currently incarcerated, and was not able to see his legal representative during the lockdown.

[13] The applicant concedes that he has not provided very good reasons to justify the extensive delay, but submits that his case is important as it raises important constitutional issues, and that there are significant prospects of success. The respondent does not oppose the applicant's condonation application, and in fact argues in the applicant's favour. It refers to *Mzizi*[11] on the importance of prospects of success for condonation to be granted, and considers the applicant's case to have good prospects of success, as the 25 year period of non-parole was legislated only after the imposition of sentence on the applicant.

[14] While the applicant's justification of his delay is somewhat tenuous, the strong prospects of success[12] and the importance of the constitutional rights involved,

[11] *S v Mzizi* [2009] ZASCA 32; 2009 JDR 0267 (SCA) at para 9.

[12] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20 and *S v Van der Westhuizen* [2009] ZASCA 48; 2009 (2) SACR 350 (SCA) at para 4.

compensate for that shortcoming. Further, the respondent does not oppose condonation. In the premises, condonation ought to be granted.

Jurisdiction and leave to appeal

[15] The imposition of a non-parole period of 25 years prior to the enactment of section 276B of the CPA engages this Court's jurisdiction as a constitutional matter, pursuant to section 167(3)(b)(i) of the Constitution.

[16] Section 12(1)(a) of the Constitution, which provides for the right not to be deprived of freedom arbitrarily or without just cause, is implicated here. In *Makhokha,*[13] the Regional Court had ordered that the applicant "must never be released on parole". An appeal to the High Court and an application for leave to appeal to the Supreme Court of Appeal were unsuccessful. This Court held that "[that] portion of the non-parole period that is proscribed by section 276B(1)(b) [of the CPA], namely the portion in excess of two-thirds of 15 years' imprisonment, constitutes an infringement of the applicant's right under section 12(1)(a) of the Constitution: the right not to be deprived of freedom arbitrarily or without just cause".[14] It is clear that the applicant approaches this Court to vindicate this critical constitutional right. Freedom of the person is of particular importance in our democratic dispensation, given the utterly reprehensible manner in which persons were deprived of their liberty at will during the abominable apartheid era. This Court's jurisdiction is therefore engaged.

[17] The prospective appeal against the High Court ordering a non-parole period of 25 years prior to the enactment of section 276B has strong prospects of success, as will be demonstrated presently. It is necessary for this injustice to be remedied and it is in the public interest for this Court to reaffirm the legal position on fixed non-parole periods.

[13] *S v Makhokha* [2019] ZACC 19; 2019 (2) SACR 198 (CC); 2019 (7) BCLR 787 (CC) at para 2.

[14] Id at para 14.

Merits

[18] The main ground contained in the application, challenging the Supreme Court of Appeal's refusal to reconsider its earlier decision, is devoid of merit. Section 17(2)(f) of the Superior Courts Act[15] applies to both criminal and civil proceedings.[16] However, the Superior Courts Act does not apply retrospectively. This is based on the well-established principle that there is a presumption against the retrospective operation of a statute. Generally, a statute will be construed as operating prospectively, unless the Legislature has clearly expressed a contrary intention.[17] The Supreme Court of Appeal was therefore correct in not entertaining the application for reconsideration under section 17(2)(f). The alternative contention – that the non-parole period of 25 years was not yet a competent order for the High Court to make – stands on an entirely different footing.

[19] It is well established in our law that criminal liability arises on the date when the particular crime is committed, and not when a person is either convicted or sentenced. Similarly, the concomitant penalty for that crime is to be determined in relation to that date, subject to the benefit conferred by section 35(3)(n) of the Constitution which guarantees the least severe sentence if punishment was changed between the time of the commission of the offence and the date of sentencing. In *Phaahla*, this Court explained that "punishment, and parole eligibility, should be determined by the date of commission of the offence".[18] An increase in penalty will ordinarily not operate with retrospective effect in circumstances where that added sanction did not apply at the time

[15] Section 17(2)(f) reads:

> "The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation."

[16] *S v Liesching* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC) at para 57.

[17] *S v Acting Regional Magistrate, Boksburg* [2011] ZACC 22; 2011 (2) SACR 274 (CC); 2012 (1) BCLR 5 (CC) at para 16 and *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC) at paras 26-7.

[18] *Phaahla v Minister of Justice and Correctional Services* [2019] ZACC 18; 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC) at para 70.

when the offence was committed.[19] This is a necessary corollary of the principle of legality, that no court may impose a sentence more severe than the sentence legally permitted at the time of the commission of the relevant crime (*nulla poena sine lege*). In this case, there was no increase in penalty between the time of the commission of the crime and the time of sentencing. However, a penalty was applied that was not statutorily permitted at the time of sentencing.

[20] Section 276B of the CPA reads:

> "(1) (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
>
> (b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.
>
> (2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)(b), fix the non- parole-period in respect of the effective period of imprisonment."

[21] As stated, section 276B of the CPA was introduced by section 22 of the Parole and Correctional Supervision Amendment Act. That Act was assented to on 26 November 1997, but came into operation only on 1 October 2004.[20] In *Jimmale,*[21] this Court extensively discussed the system of parole and described it as "an acknowledged part of our correctional system", and as "a vital part of reformative treatment for the paroled person who is treated by moral suasion".[22] This Court held

[19] *R v Mazibuko* 1958 (4) SA 353 (A) at 357D-E; *R v Sillas* 1959 (4) SA 305 (A) at 311E-G; *S v Mpetha* 1985 (3) SA 702 (A) at 707G-708A and 717H-718B.

[20] Van der Merwe "Sentencing" in Du Toit et al *Du Toit Commentary on the Criminal Procedure Act* Revision (2019); Kruger "Sentence" in Kruger *Hiemstra's Criminal Procedure* Revision (2020); Terblanche *A Guide to Sentencing in South Africa* 3 ed (LexisNexis, Durban 2016) 259-60; Moses *Parole in South Africa* (Juta & Co Ltd, Cape Town 201*2)* 40-3.

[21] *S v Jimmale* [2016] ZACC 27; 2016 (2) SACR 691 (CC); 2016 (11) BCLR 1389 (CC) (*Jimmale*).

[22] Id at para 1.

that a non-parole order should be made only in exceptional circumstances, to be established by the investigation of salient facts, legal argument and sometimes further evidence upon which a decision for non-parole rests.[23] When it determines a non-parole period following sentence, a court is in effect making "a prediction on what may well be inadequate information as regards the probable behaviour of the accused. Therefore, a need for caution arises because a proper evidential basis is required".[24]

[22] This Court further cautioned that "a section 276B non-parole order should not be resorted to lightly".[25] Courts should show deference to the Parole Board and the Department of Correctional Services officials to make assessments and decisions regarding parole.[26] That approach would also respect the principle of the separation of powers. In citing a passage from *Strydom*,[27] this Court observed that:

> "a section 276B non-parole order [can be] described as 'an order which is a determination in the present for the future behaviour of the person to be affected thereby. . . [I]t is an order that a person does not deserve being released on parole in future'."[28]

[23] A factor that bears consideration, when contemplating the imposition of a non-parole period, is that section 73 of the Correctional Services Act[29] – and in particular subsection 73(6) thereof – deals with parole. A person sentenced to life incarceration may not be placed on parole before having served at least 25 years of that sentence.[30]

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[23] Id at para 13. See also: *S v Stander* [2011] ZASCA 211; 2012 (1) SACR 537 (SCA) (*Stander*) at para 16.

[24] *Jimmale* id.

[25] Id at para 20 and *S v Mhlongo* [2016] ZASCA 152; 2016 (2) SACR 611 (SCA) (*Mhlongo*) at paras 6-7.

[26] *Jimmale* n 21 above at para 20.

[27] *S v Strydom v S* [2015] ZASCA 29; 2015 JDR 2566 (SCA) (*Strydom*) at para 16.

[28] *Jimmale* n 21 above at para 13.

[29] 111 of 1998.

[30] Section 73(6)(*b*)(iv) reads:

> "a person that has been sentenced to – life imprisonment, may not be placed on parole or parole until he or she has served at least 25 years of the sentence."

[24] The fixing of a non-parole period constitutes an increased sentence. In accordance with the general principle, it cannot operate retrospectively. Absent any legally recognised special circumstances, no departure from this principle is warranted, and the fixing of a non-parole period that purports to operate retrospectively, is impermissible in law.[31]

[25] The applicant and his co-accused were convicted on 2 May 2002 and sentenced on 14 May 2002, in respect of offences committed on 2 April 2001. These dates all precede the enactment of section 276B of the CPA. That section introduced a maximum of two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter, for a non-parole period. Consequently, the High Court has fatally misdirected itself in fixing a non-parole period of that length in respect of the sentence of life imprisonment for the murder conviction. At the time of sentencing, individuals serving life sentences were required to serve a minimum period of 20 years' imprisonment before they became eligible for parole. In *Phaahla*, this Court summarised the position as follows:

> "[I]nmates sentenced to life imprisonment [for offences committed] before 1 October 2004 are eligible for parole after having served 20 years; and inmates sentenced to life imprisonment [for offences committed] from 1 October 2004 onwards must serve a minimum of 25 years before they may be considered for release on parole. Section 136(1) [of the Correctional Services Act] thus created a dual system of assessment . . . ."[32]

[31] *S v Mchunu* [2013] ZASCA 126; 2013 JDR 2103 (SCA) at para 5; *Zono* above n 8 at para 6; *S v Mvubu* [2016] ZASCA 184; 2016 JDR 2224 (SCA) (*Mvubu*) at paras 9-10; *SM v S* [2018] ZASCA 162 at para 8.

[32] *Phaahla* above n 18 at paras 9 and 70. See section 136(1) of the Correctional Services Act above n 25 which reads:

> "Any person serving a sentence immediately before the commencement of this Act will be subject to the provisions of the Correctional Services Act, 1959 (Act No. 8 of 1959), relating to his or her placement under community corrections but the Minister may make such regulations as are necessary to achieve a uniform policy framework to deal with prisoners who were sentenced immediately before the commencement of this Act, and no prisoner may be prejudiced by such regulations."

[26] The effect of the imposition of that non-parole period by the High Court is that the applicant will have to serve five years more than fellow inmates who were sentenced to life imprisonment prior to the date when section 276B came into operation, 1 October 2004. The additional five years of the applicant's sentence would commence during 2022.

[27] Our Courts must defend and uphold the Constitution and the rights entrenched in it. One of the most important rights, from a historical perspective, is unquestionably the deprivation of an individual's liberty. This Court said in *Ferreira* that "[c]onceptually, individual freedom is a core right in the panoply of human rights".[33] The apartheid regime repulsively and capriciously deprived people of their freedom under illegitimate legislation that paid no respect to the rights to freedom and security of the person. We are therefore constrained to jealously guard the liberty of a person under our Constitution, particularly in terms of section 12 of the Bill of Rights. The part of the order imposing 25 years as a non-parole period must therefore be set aside.

[28] There is another aspect that bears mention. When a sentencing court considers ordering a non-parole period, it must afford the parties an opportunity to address that issue.[34] A failure to do so would also be a fatal misdirection,[35] and may well – depending on the circumstances – amount to an infringement of an accused person's fair-trial rights.[36] The right in section 12 consists of both substantive and procedural elements.[37] Courts play an important role in ensuring that procedural prescripts are complied with.[38] Here, the High Court failed to afford the parties an opportunity to

[33] *Ferreira v Levin NO; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 47.

[34] *Jimmale* n 21 above at para 17; *Stander* n 23 above at para 20; *S v Mthimkhulu* [2013] ZASCA 53; 2013 (2) SACR 89 (SCA) (*Mthimkhulu*) at para 21.

[35] *Stander* n 23 above at para 22; *Mhlongo* above n 25 at paras 9-13*; Mvubu* above n 31 at para 10.

[36] *Mthimkhulu* above n 35 above at para 21.

[37] *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527; 1997 (4) BCLR 437 at para 159 and *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paras 145-7.

[38] *Lawyers for Human Rights v Minister of Home Affairs* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC) at para 35

address the possible fixing of a non-parole period. That, too, is a fatal misdirection, but it becomes academic in view of the first fatal misdirection that requires a setting aside of that part of the order.

[29] The erstwhile second accused at the trial in the High Court, Mr Alfred Khonyane, is in exactly the same position as the applicant as far as the non-parole order is concerned. This order ought therefore to be brought to his attention.

[30] The following order is issued:

1. Leave to appeal is granted.
2. The non-parole period ordered by the High Court of South Africa, Northern Cape Division, Kimberley, on 14 May 2002 – that accused one, Mr Gaolatlhe Senwedi, and accused two, Mr Alfred Khonyane, should not be considered for release on parole until they have each served at least 25 years of their sentence of life imprisonment on count 3, murder – is set aside.
3. The Registrar of this Court is directed to forward a copy of this judgment to the Department of Justice and Correctional Services under cover of a letter or email that indicates that this judgment be brought to the attention of the erstwhile accused two, Mr Alfred Khonyane.

For the Applicant:	Legal Aid South Africa, Kimberley Local Office.
For the Respondent:	Director of Public Prosecutions, Northern Cape.