THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 547/12

Reportable

In the matter between:

MUZIWENHLANHLA SMANGA MTHIMKHULU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mthimkhulu v The State* (547/12) [2012] ZASCA 53 4 April 2013).

Coram: **Maya, Shongwe, Leach and Petse JJA and Mbha AJA**
Heard: **8 March 2013**
Delivered: **4 April 2013**

Summary: Sentence – Imprisonment – Non-parole period – Section 276B(2) of Criminal Procedure Act 51 of 1977 – Sentencing court enjoying discretion whether or not to fix a non-parole period.
Non-parole period – determination of – parties entitled to be heard on whether or not to fix a non-parole period and the length of such period.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Koen J sitting as court of first instance):

1 The appeal is upheld.

2 The order of the court below fixing a non-parole period of 13 years is set aside.

JUDGMENT

PETSE JA (Maya, Shongwe, Leach JJA and Mbha AJA concurring):

[1] The principal issue for determination in this appeal is whether s 276B(2) of the Criminal Procedure Act 51 of 1977 (the Act) impels a court which sentences a person to imprisonment, following a conviction for two or more offences where the sentences of imprisonment are ordered to run concurrently, to fix a non-parole period in respect of the effective period of imprisonment. The subsidiary issue is whether or not the appellant had a right to be heard before the court below invoked s 276B(2) of the Act.

[2] It is necessary at the outset to mention, by way of background, a brief narrative of certain facts and circumstances, which bear on the questions to be decided in this appeal, as they emerge from the record.

[3] The appellant was convicted in the KwaZulu-Natal High Court, Pietermaritzburg (Koen J) on one count of murder, possession of a fully automatic firearm (an AK47 assault rifle) without a licence to possess such firearm and possession of five rounds of live ammunition (7.62 mm) without the required licence.

[4] He was sentenced to 20 years' imprisonment on the murder count and five years for both unlawful possession of a prohibited firearm and ammunition. The court below directed that the term of five years' imprisonment in respect of the latter two counts run concurrently with the 20 years' imprisonment imposed in respect of the murder count. In fixing a non-parole period the court said:

'In view of my order that the sentence of five years run concurrently with that in respect of count 1 [murder] I am enjoined in terms of section 276B(2) of the Criminal Procedure Act 51 of 1997, to fix a non-parole period.'

It then proceeded to fix a non-parole period of 13 years. With leave of the court below the appellant now appeals to this court against that order.

[5] In granting leave to appeal to this court the learned judge in the court below observed that:

'The application of section 276B of Act 51 of 1977 has, to my knowledge, led to some difficulties in this division and it would appear, from speaking to a number of my colleagues, that its application is not always uniform.'

He continued:

'What the present appeal [application for leave to appeal] raises, apart from the applicability of section 276B(2) of Act 51 of 1977, is also the procedure to be adopted, should a trial court, in invoking that section, fix a non-parole period specifically whether the possible likelihood of it being invoked, should be raised during the sentencing stage, so that counsel may address the Court fully on whether it should apply to its full extent, that is, not exceeding two-thirds of the sentence imposed, or then some lesser parole period.'

I shall return to the foregoing remarks by the learned judge later in this judgment.

[6] It is apposite at this juncture to emphasise that the implication of the statement by the high court that the 'application of section 276B of Act 51 of 1977 has, . . . led to some difficulties' . . . and 'that its application is not always uniform' is that the fate or fortune of accused persons is to a large degree dependent upon the views of individual judges, at least in KwaZulu-Natal.

[7] To my mind, the starting point in the present enquiry must be the provisions of s 276B of the Act itself. Section 276B provides:

'276B Fixing of non-parole-period

(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.'

[8] As mentioned above, the high court felt itself bound to fix a non-parole period in respect of the effective term of 20 years' imprisonment imposed on the appellant. It was driven to this conclusion because it ordered the sentences to run concurrently and that the use of the word 'shall' in s 276B(2) made the fixing of a non-parole period peremptory. This then brings to the fore the question whether the language of subsection 2, viewed in the context of s 276B, can sustain the meaning attributable to it by the court below. This is essentially a question of interpretation of the relevant provision.

[9] In *Secretary of Inland Revenue v Sturrock Sugar Farm (Pty) Ltd*[1] Ogilvie Thompson JA said:

'Even where the language is unambiguous, the purpose of the Act and other contextual considerations may be invoked in aid of a proper construction.'

And in *Venter v R*,[2] Innes CJ expressed himself in these terms:

'It appears to me that the principle we should adopt may be expressed somewhat in this way ─ that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could lead to a result contrary to the intention of the

[1] *Secretary of Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897 (A) at 903.
[2] *Venter v R* 1907 TS 910 at 914-5.

Legislature, as shown by the context or by such other consideration as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the Legislature.'

This approach entails that one may:

'(i) look at the preamble of the Act or other express indications in the Act as to the object that has to be achieved;

(ii) study the various sections wherein the purpose may be found;

(iii) look at what led to the enactment (not to show the meaning, but to show the mischief the enactment was intended to deal with);

(iv) draw logical inference from the context of the enactment.'[3]

[10] Recently, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[4] this court, after an in-depth analysis of the authorities relating to the interpretation of documents stated:

'. . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument . . . having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. . . . consideration must be given to the language used in the light of the rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is diverted and the material known to those responsible for its production. . . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

. . .

The "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

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[3] E A Kellaway *Principles of legal interpretation of statutes, contracts and wills* 1995 at 69; *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662; *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 284.

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[11] Moreover, when courts interpret statutes or any statutory instrument they must adopt a construction that is consistent with the Constitution. And in the context of a criminal trial courts are duty-bound to prefer an interpretation that promotes the accused's fair-trial rights. This imperative was expressed in these terms in *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)*[5] by the Constitutional Court:

'. . . Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights, like the right to a fair trial in s 35(3), which is fundamental to any system of criminal justice . . . The spirit, purport and objects of the protection of a right to a fair trial therefore have to be considered.'

[12] Section 276B of the Act was introduced by the Parole and Correctional Supervision Amendment Act[6] which came into operation on 1 October 2004. It was introduced after this court had expressed disapproval about sentencing courts fixing non-parole periods, which practice it characterised as 'an undesirable incursion into the domain of another arm of the state' with a potential 'to cause tension between the Judiciary and the Executive.'[7] In similar vein Harms JA had earlier remarked that:

'sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction.'[8]

[13] In *S v Pakane and Others*[9] this court said that '. . . the legislature enacted the provisions [s 276B] to address precisely the concerns raised therein [*S v Mhlakaza & another*; *S v Botha*] by clothing sentencing courts with power to

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[5] *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC); (2007 (3) BCLR 219) para 47.
[6] Parole and Correctional Supervision Amendment Act 87 of 1997.
[7] *S v Botha* 2006 (2) SACR 110 (SCA) para 25.
[8] *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) ([1997] 2 All SA 185) at 521g-h.
[9] *S v Pakane and Others* 2008 (1) SACR 518 (SCA) para 47.

control the minimum or actual period to be served by the convicted person . . .'. Consequently it went on to fix a non-parole period.

[14] Notably, in the preamble to the Parole and Correctional Supervision Amendment Act[10] one of the stated objectives of this Act is '. . . to make provision that a court sentencing an offender to a period of imprisonment *may* fix a non-parole period . . .' (My emphasis.) The legislature's use of the word 'may' strongly suggests its intention to give courts overall latitude in deciding whether or not to fix a non-parole period.

[15] Accordingly, if one approaches statutory interpretation in the manner adopted in *Secretary of Inland Revenue v Sturrock Sugar Farm (Pty) Ltd*[11] ie –
(a) studies the terms of s 276B of the Act;
(b) examines what led to the enactment to ascertain the object it was intended to achieve (to clothe a sentencing court with the discretion to fix a non-parole period); and
(c) draws logical inference from the context of the whole of s 276B and the use, in s 276B(2) of the definite article 'the', in the phrase 'fix the non-parole period' which can only denote the non-parole period determined in terms of s276B(1)(a) of the Act; it becomes evident that the legislature did not intend to fetter the discretion conferred on a sentencing court by s 276B(1)(a) of the Act in the way that the court below postulated.

[16] In short, s 276B(2), properly construed, does not oblige a sentencing court to fix a non-parole period in respect of the effective period of imprisonment as a matter of routine whenever it has ordered two or more sentences imposed on a convicted person to run concurrently. What s 276B(2) in fact does is to enjoin a sentencing court, once it has exercised its discretion under s 276B(1)*(a)* against

[10] Footnote 9.
[11] Footnote 1.

the convicted person, to then fix the non-parole period in respect of the effective period of imprisonment taking cognisance of the provisions of s 276B(1)*(b)*.

[17] I now turn to deal with the subsidiary issue concerning whether or not the appellant's fair-trial rights dictated that he should have been heard first on at least two interrelated issues before the high court invoked s 276B(2) of the Act. First, whether s 276B ought to be invoked at all. And if that question is answered in the affirmative, what the length of the non-parole period should be. Before us counsel were *ad idem* that the appellant was not heard in relation to both issues before the court fixed a non-parole period.

[18] The argument advanced before us on behalf of the appellant, with reference to sound authority,[12] was essentially this:

(a) a sentencing court must first determine whether there are exceptional circumstances that imperatively call for the invocation of s 276B of the Act;

(b) if such exceptional circumstances are found to exist a determination must be made as to what the length of the non-parole period should be; and

(c) that the facts of this case militated against the invocation of s 276B for the high court itself had found the appellant 'to be a good candidate for rehabilitation' and that the commission of the offences of which he had been convicted was 'probably brought about by a unique and exceptional set of facts which [the appellant] faced and had to deal with constituting as it did a threat to [his life]. . . .'

[19] In *Stander*[13] this court expressed itself on this score in these terms (para 16):

'. . . s 276B is an unusual provision and its enactment does not put the court in any better position to make decisions about parole than it was in prior to its enactment. Therefore the remarks by this court prior to s 276B still hold good. An order in terms of s 276B should therefore only be made in exceptional circumstances, when there are facts

[12] *S v Stander* 2012 (1) SACR 537 (SCA) para 16; *S v Mshumpa & another* 2008 (1) SACR 126 (ECD) para 79; *S v Pauls* 2011 (2) SACR 417 (ECG) para 15.
[13] Footnote 13.

before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole. *Mshumpa* offers a good example of such facts, namely undisputed evidence that the accused had very little chance of being rehabilitated.'

[20] As to the consequences of the sentencing court failing to afford the parties a hearing before invoking s 276B of the Act this court said the following in *Stander*[14] (para 22):

'. . . At least two questions arise when such an order [non-parole order] is considered: first, whether to impose such an order and, second, what period to attach to the order. In respect of both considerations the parties are entitled to address the sentencing court. Failure to afford them the opportunity to do so constitutes a misdirection.'

[21] In the context of fair-trial rights of accused persons, the failure to afford the parties the opportunity to address the sentencing court might, depending on the facts of each case,[15] well constitute an infringement of such fair-trial rights.

[22] As I have said, it is common cause that the parties were not afforded the opportunity to be heard in regard to the non-parole period it remains to decide what the consequences of that failure should be. Counsel were both agreed that if we found that the court below should have afforded the parties the opportunity to address it, as we have, it would be proper to remit the case to the court below for it to hear the parties on this aspect in the light of this judgment. Although this would ordinarily be the proper course to adopt the peculiar circumstances of this case are such that the interests of justice will not be served by doing so.

[23] As already mentioned, a court should only exercise its discretion to impose a non-parole period in exceptional cases. In this case there are

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[14] Footnote 13.

[15] See eg *Key v Attorney-General, Cape Provincial Division and Another* 1996 (2) SACR 113 (CC) para 13 in which it was stated: 'What the Constitution demands is that the accused be given a fair trial. Ultimately . . . fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision.'

numerous factors which operate against the exercise of the discretion against the appellant. He was a first offender, some 45 years of age at the time he was sentenced. He pleaded guilty, a fact which the high court found indicated that he accepted responsibility and remorse for his actions. Although he had acted unlawfully in killing the deceased, the appellant had done so as he had feared for the lives of himself and his family and, in these circumstances, the high court went on to find that the fatal incident was 'not part of a routine criminal life but an exceptional circumstance'. It also found that the appellant was a candidate for rehabilitation. This is clearly a factor of paramount importance in assessing whether to impose a non-parole period.

[24] In the light of these facts, there do not appear to be any of the exceptional circumstances present which would justify the high court exercising its discretion under s 276B(1)*(a)* to fix a non-parole period. Indeed the very opposite appears to be the case. Moreover, it is not without significance, that the high court granted leave to appeal to this court. If it had been of the view that the facts of the case were such that it would in any event have exercised its discretion against the appellant, leave
. to appeal would surely not have been granted.

[25] For the foregoing reasons the following order is made:

1 The appeal is upheld.

2 The order of the court below fixing a non-parole period of 13 years is set aside.

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X M PETSE
JUDGE OF APPEAL

LEACH JA (Shongwe JA concurring)

[26] I have read the judgment of my colleague Petse JA and agree with his conclusion that, properly construed, s 276B(2) of the Criminal Procedure Act 51 of 1977 does not oblige a sentencing court, in the event of it imposing sentences of imprisonment to run concurrently, to fix a non-parole period in respect of the effective period of imprisonment as a matter of course. The section clearly only becomes operative once the court, in the exercise of its discretion under s 276B(1)(*a*), has decided to impose a non-parole period in respect of a sentence of imprisonment which is to run concurrently with another period of imprisonment. Although my learned colleague reaches the same conclusion, I feel I should set out my reasoning on the issue in the hope it may be of assistance to any person interested in the issue.

[27] The determination of an appropriate sentence for a convicted offender has historically been regarded as the function of the court while the parole of a prisoner has been a function of the executive exercised through parole boards and officers. However the situation was altered by the enactment of s 276B, sub-section 1(*a*) of which provides that a court, when imposing a sentence of imprisonment for a period of two years and longer, 'may as part of the sentence fix a period during which the person shall not be placed on parole'. The use of the word 'may' in that sub-section clearly gives a discretion to the sentencing court to decide whether or not to fix such a non-parole period as part of the sentence. As pointed out by this court in *Stander,*[16] a court should only fix a non-parole period in exceptional circumstances when there are facts 'that would continue, after sentence, to result in a negative outcome for any future decision about parole'.

[16] *S v Stander* 2012 (1) SACR 537 (SCA) para 16.

[28] Section 276B(2) goes on to provide that where an offender is convicted of two or more offences in respect of which sentences of imprisonment running concurrently are imposed, 'the court shall . . . fix the non-parole period in respect of the effective period of imprisonment'. It was this provision that persuaded the court a quo that in all cases in which sentences of imprisonment are to run concurrently it is necessary to fix a non-parole period in respect of the effective period of imprisonment. But in my view that is not what the section prescribes.

[29] In contradiction to 276B(1)(*a*), there is in s 276B(2) no reference to a time period in respect of the sentences of imprisonment which are mentioned. However the legislature cannot have intended to refer merely to any sentences of imprisonment, especially given the restrictions of s 276B(1) in regard to non-parole sentences. Section 276B(2) must be read in context, particularly the provisions of 276B(1)(*a*) which limits a court's discretion to sentences of imprisonment of at least two years before a non-parole period may be imposed. Clearly, the 'sentences of imprisonment' running concurrently, to which reference is made in s 276B(2), must include at least one sentence which the court in exercising its discretion under s 276B(1)(*a*) has determined should be subject to a non-parole period.

[30] Any possible doubt about this is dispelled by the use of the definite article 'the' in the phrase 'the effective period of imprisonment' in s 276B(2). This indicates that a decision to fix a non-parole period has already been made,[17] and it can only have been made under s 276B(1)(*a*).

[17] Compare *Telkom SA Ltd v ZTE Mzanzi (Pty) Ltd* (383/12) [2013] ZASCA 14 (18 March 2013) para 11.

[31] Absurd consequences would follow if a court was obliged to impose a non-parole period in all cases in which sentences of imprisonment are to run concurrently. It would mean that if a court wished to extend the benefit to an offender of ordering sentences to run concurrently, it would in the same breath be obliged to penalise the offender by imposing a non-parole period as part of the sentence. And, although a non-parole period should only be fixed in exceptional circumstances, it would also result in a sentencing court being obliged to impose a non-parole period when ordering sentences to run concurrently, even if it was of the view that such a period was wholly inappropriate and not in accordance with justice.

[32] It is clear from this that on a proper construction of s 276B as a whole, a sentencing court's obligation to 'fix the non-parole period in respect of the effective period' under 276B(2) only arises once the court, after convicting the offender on two or more offences for which imprisonment is to be imposed, has decided to exercise its discretion under s 276B(1)(*a*) to impose a non-parole period in respect of at least one of the sentences. That was not the case in the present matter.

[33] It is for these reasons that I feel the court a quo erred and that its judgment on the non-parole period should be set aside.

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L E LEACH
JUDGE OF APPEAL

Appearances:

Appellant:	L Barnard Instructed by: Kunene Attorneys, Pietermaritzburg Honey Attorneys, Bloemfontein
Respondent:	S S Sankar Instructed by: The Director of Public Prosecutions, Pietermaritzburg The Director of Public Prosecutions, Bloemfontein