REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 599/08

In the matter between:

SIMANGA WISEMAN MTHEMBU **APPELLANT**

versus

THE STATE **RESPONDENT**

APPEAL JUDGMENT Delivered on 17 September 2010

GORVEN J.

1]I have had the benefit of reading the judgment of Swain J in this matter. I agree with both the reasoning and the conclusion. I wish, however, to add further reasons why I am of the respectful view that the approach adopted in *S v Mbatha* [1] in the particular application of s 51 of the Criminal Law Amendment Act, No. 105 of 1997 dealt with there is clearly wrong.

2]*Mbatha* has as its stated point of departure the clarification given by Marais JA in the case of *S v Malgas* [2] to "the proper starting point in determining an appropriate sentence in a case falling within the minimum sentencing

1 2009 (2) SACR 623 (KZP)
2 2001 (1) SACR 469 (SCA)

legislation".[3]

3]Sections 51(1), (2) and (3)(a) provide as follows:

> 51 Discretionary minimum sentences for certain serious offences
>
> (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
>
> (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
>
> (a) Part II of Schedule 2, in the case of-
>
> (i) a first offender, to imprisonment for a period not less than 15 years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
>
> (b) Part III of Schedule 2, in the case of-
>
> (i) a first offender, to imprisonment for a period not less than 10 years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
>
> (c) Part IV of Schedule 2, in the case of-
>
> (i) a first offender, to imprisonment for a period not less than 5 years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

3 *Mbatha* para [13]

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

3) (a) If any court referred to in subsection (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 must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

4]The court in *Mbatha* essentially relied for its approach on two passages in *Malgas*. The first was where Marais JA stated that the purpose of the legislation in question was that of:

> … ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.[4]

5]The second was items B, C and D of the summary of the correct approach to be taken in applying the section found in the following passage:

> B. Courts are required to approach the imposition of sentence conscious that

4 *Malgas* para [8], *Mbatha* para [15]

> the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
>
> C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
>
> D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.[5]

6]Wallis J, in whose judgment van der Reyden J and Niles-Dunēr J concurred, concluded from *Malgas*, and in particular the passages referred to above, that:

> I can see no reason why those remarks are not of equal application in the situation where a court is considering the imposition of a sentence greater than the prescribed minimum. It needs to bear in mind that the emphasis in determining an appropriate sentence in respect of these offences is the objective gravity of that particular crime and the public's need for an effective sanction against it.[6]

7]I have considerable difficulty with the use in *Mbatha* of the words “statutory minimum” and “prescribed minimum” which appear to underlie the approach adopted.[7] In my view these phrases confuse the concept of a prescribed minimum sentence with that of a prescribed sentence. This is evident in the

5 *Malgas* para [25], *Mbatha* para [16]
6 *Mbatha* para [17]
7 These terms are used extensively in the judgment, eg in paras [13], [14], [17], [18], [19], [24] and [26].

following phrase as to the procedure to be adopted:

> The trial judge should identify the circumstances that impel her or him to impose a sentence greater than the *prescribed minimum* and explain why they render the particular case one where a departure from the *prescribed sentence* is justified.[8]

I do not believe that the distinction is only of grammatical significance but that it goes to the heart of the issue addressed in both the matter before us and *Mbatha*. The words "statutory minimum" or "prescribed minimum" are used in *Mbatha* to mean a sentence of imprisonment for a period of 15 years under s 51(2)(a)(i), which was the applicable section in that matter and also applies to the matter before us. It is in the interpretation of this section that the difficulty arises. Since the terms of each of the sub-paragraphs is identical in this regard, the comments relating to s 51(2)(a)(i) apply equally to the rest of s 51(2).

8]The Act speaks, in s 51(2)(a)(i) of a sentence of a period of imprisonment of "not less than 15 years". There is a significant difference between saying that a sentence is the prescribed sentence and that the sentence is the prescribed minimum sentence. In my view, *Mbatha* errs in using the latter where the former would be a more accurate interpretation of the legislation and would yield an entirely different result. I say this for the reasons set out below.

9]What are provided for in both ss 51(1) and (2) are prescribed sentences and not prescribed minimum sentences. In s 51(1), that prescribed is life imprisonment. In s 51(2), that prescribed, in each of the subcategories, is

8 *Mbatha* para [20] – my emphases.

"imprisonment for a period not less than" the specified number of years. In other words, the prescribed sentence under s 51(2) is one of a range of years' imprisonment. In the present matter, for example, falling as it does under s 51(2)(a)(i), the prescribed sentence is a period of imprisonment which is equal to *or greater than* 15 years. In other words, one of 15 years or more is prescribed. Whilst it is conceptually possible to impose a sentence which is longer than, or, in the words of *Mbatha* "greater than"[9], the lowest number of years prescribed under s 51(2), it is not conceptually possible to impose one longer than that prescribed, since what is prescribed is the entire range, starting at the lowest number of years and ending, notionally, with life imprisonment. In other words, there is only a lower limit to the range of the prescribed sentence, not an upper one. Thus any number of years above the 15 years specified in s 51(2)(1)(a) meets the description of a "prescribed sentence" under that section. Since there is no upper limit, the only direction the range can conceptually be departed from is downwards. Most importantly for the purposes of this matter, the legislature did not stipulate that the lowest number of years in the range prescribed must be regarded as the starting point or as the prescribed sentence as appears to have been done in *Mbatha*.

10]The only upper limitation to the range of the prescribed sentence is found in the proviso to s 51(2) limiting a regional court to "not more than five years longer than the minimum sentence that it may impose in terms of this subsection". This is not characterised as a departure from the prescribed sentence, as is done in s 51(3), but as an imposition of the prescribed sentence, subject to a limitation in the range prescribed. The difference to the rest of s 51(2) is that, in addition to the specified minimum which applies to

9 Eg paras [17], [20], [26]

sentences not subject to the proviso, it specifies a maximum. The prescribed sentence still provides for a range but, unlike in the rest of s 51(2), sets an upper limit to the range.

11]This approach is consistent with *Malgas*. The *dicta* of Marais JA in *Malgas* do not envisage a "prescribed minimum". They refer throughout to the "ordained"[10], "specified"[11], "particular"[12] or "prescribed"[13] sentences in question. There is nowhere any reference in *Malgas* to prescribed minimum sentences. Although he was dealing with a situation involving s 51(1) where life imprisonment was prescribed, Marais JA dealt with the general basis of sentencing under ss 51(1), (2) and (3)(a). He said that "the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances".[14] When referring to the "particular prescribed period of imprisonment" he must have been dealing with s 51(2). If this were not so, he would have limited his comments to the circumstances where life imprisonment was prescribed and not gone on to deal with the latter situation. The "particular period of imprisonment which should *ordinarily* be imposed" must, therefore, include the entire range denoted by the words "not less than" contained in s 51(2). I can think of no warrant for limiting the words "should *ordinarily* be imposed" to the lowest number of years in the range prescribed. When Marais JA said that the purpose of the legislation was to provide for the "severe, standardised, and

10 eg. para [8] p476*g*
11 eg. para [8] p477*b*, para [9] p477*c*-*d*, para [20]
12 eg. para [14], p479*b*-*c*
13 eg. para [16], [17],[18] p480*b*-*c*, para [21], [22], [23] and others
14 Para [8], his emphasis

consistent response from the courts to the commission of such crimes",[15] he was therefore referring to any sentence within the range introduced by the words "not less than" in the various subsections of s 51(2). The use of the word "severe" in that phrase is consistent with this approach. It is clear that the reasoning of Marais JA applied to all cases under s 51 and that his use of language was deliberate in this regard.

12]Further weight is lent to this interpretation by the well established principle of interpretation that the legislature must be taken to have intended to interfere with the common law as little as possible in order to achieve the purpose of the legislation. This is all the more so when it intrudes on the discretion of a court in imposing sentence.[16] Marais JA was, in *Malgas,* evaluating the extent to which the legislation placed limitations on a previously unfettered discretion.[17] If he had considered that the legislature was fettering the discretion of a trial court to impose any sentence within the entire range specified in the manner envisaged in *Mbatha*, one would expect him to have pertinently addressed it.

13]I am therefore respectfully unable to agree with *Mbatha* where it is stated that "[t]he starting point of the enquiry is the prescribed minimum sentence and thereafter the court considers whether the circumstances are such that a departure from that sentence is justified".[18] The starting point is not, in my view, the minimum number of years in the range of the prescribed sentence

15 At para [8]
16 *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 807D-E
17 Paras [2] & [3]
18 Para [13]

but the whole range of the prescribed sentence. A similar difficulty arises with the requirement that "[t]he trial judge should identify the circumstances that impel her or him to impose a sentence greater than the prescribed minimum and explain why they render the particular case one where a departure from the prescribed sentence is justified".[19] No departure from the prescribed sentence takes place if any sentence in the range of those prescribed, beginning in the present matter with 15 years and ending with life imprisonment, is imposed. As mentioned above there is no basis for using even the minimum sentence of the range prescribed under that subsection as a starting point. For the same reasons I consider that it is incorrect to refer to a situation "when the departure from the prescribed minimum sentence is upwards".[20] The only conceivable circumstances in which a departure from the range prescribed can take place are those set out in s 51(3), as reasoned above, which is a downwards departure from the range prescribed.

14]There is also nothing in the Act which lends support to the approach that any procedure out of the ordinary applies when, under s 51(2), a court intends to impose a longer sentence than the lowest number of years in the range prescribed. In the context of *Mbatha* it is further instructive that, in the proviso to s 51(2), no procedure is specified, neither is there any indication that a specific set of circumstances must be taken into account when the minimum number of years in the prescribed range is to be exceeded. This is consistent with the interpretation above. It is also in stark contradistinction to the provisions of s 51(3) and, where the two are juxtaposed as they are in the

19 Para [20]
20 Para [14]

section, the conclusion seems inescapable that in imposing a sentence greater than the lower end of the range prescribed, a regional court is still imposing the prescribed sentence. No more need be done than enquire whether s 51(3) has application before imposing the appropriate sentence, being imprisonment for any number of years in the range prescribed.

15]In my view, therefore, the imposition of a sentence of 18 years' imprisonment in the present matter simply involved the imposition of the prescribed sentence since it was one in the prescribed range, ie. "not less than 15 years". Because no departure took place from the prescribed sentence, no procedure out of the ordinary had to be observed prior to the court imposing it.

GORVEN J.

I agree.

JAPPIE J.