THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 547/11

In the matter between:

Heinrich Marthinus Stander Appellant

and

The State Respondent

Neutral citation:	*Stander v The State* (547/11) [2011] ZASCA 211 (29 November 2011)
Coram:	CLOETE, SNYDERS JJA AND PETSE AJA
Heard:	**4 November 2011**
Delivered:	**29 November 2011**
Summary:	Criminal procedure – sentence – s 276B Criminal Procedure Act 51 of 1977 - non-parole period of sentence – only to be imposed in exceptional circumstances

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Eksteen J and Grogan AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the court below refusing the appellant leave to appeal is set aside and replaced with the following:

'The applicant is granted leave to appeal to the Eastern Cape High Court, Grahamstown against the sentence imposed by the Regional Court.'

3 The appellant is directed to deliver a notice of appeal on or before 15 December 2011 based on the findings made in this judgment and containing such further grounds of appeal as may be permitted by the court of appeal.

4 The Director of Public Prosecutions, Eastern Cape, is requested to place this appeal on the roll as a matter of urgency on a date to be arranged with the appellant's counsel.

5 The Registrar of this Court is requested to make three copies of the record filed in this Court available to the appellant's attorney for use in the appeal to the Eastern Cape High Court, Grahamstown, should the Judge President of that Division sanction this arrangement.

6 In the event of any further appeal those copies of the record are to be returned to this Court, and, together with the two remaining copies in this Court, are to be supplemented insofar as may be necessary.

JUDGMENT

SNYDERS JA (Cloete JA and Petse AJA concurring):

[1] The appellant pleaded guilty and was convicted in the Regional Court, Port Elizabeth, on 22 counts of fraud involving R435 450.15. On 25 June 2009 he was sentenced to 8 years' imprisonment of which two years were conditionally suspended for five years. In terms of s 276B of the Criminal Procedure Act 51 of 1977 (the Act) the Magistrate ordered the appellant to serve at least 36 months of his sentence before he may be released on parole (the non-parole order).

[2] The appellant's application for leave to appeal against the sentence was refused by the Magistrate and his petition to the Eastern Cape High Court, Grahamstown (Eksteen J and Grogan AJ) for leave to appeal met the same fate.[1] Thereafter he applied for leave to appeal to the same court against the refusal of the petition and was granted such leave to this Court.[2] This change in view about the appellant's prospects of success on appeal was apparently brought about by a decision in that Division to grant a petition for leave to appeal in similar circumstances, which led to judgment in the matter of *Pauls v S* [2011] JOL 26717 (ECG). That matter was brought to the attention of the court a quo which remarked on it as follows:

'The learned judges who considered the petition in that matter, however, granted leave to appeal and added the following directive:

"In addition to the grounds upon which leave to appeal was sought argument will be required as to whether or not the Regional Magistrate should have brought it to the attention of the accused's legal representatives that he considered fixing a non-parole period in terms of section 276B of Act 51 of 1977 in order to enable argument on this aspect to be presented. The Regional Magistrate's comments, if any, thereon must be requested."'

I deal with that decision later in this judgment.

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[1]This procedure is in terms of s 309C(5)(a) read with *Shinga v The State & another (Society of Advocates (Pietermaritzburg Bar) Intervening as Amicus Curiae; S v O'Connell & others* 2007 (2) SACR 28 (CC) para 59.5.

[2]*Khoasasa v S* [2002] 4 All SA 635 (SCA) paras 19 to 22.

[3] The question to be answered in this appeal is whether the appellant's petition was wrongly refused and therefore whether there are reasonable prospects of success in an appeal against his sentence. Three issues arise in this regard. First, whether the Magistrate was obliged to give reasons in his judgment on sentence for imposing the non-parole order. Second, the circumstances under which a court would be entitled to impose a non-parole order as part of a sentence. Third, whether the Magistrate was obliged to invite or allow argument before the imposition of a non-parole order.

[4] The furnishing of reasons for a decision by a judicial officer is not only a long-standing and salutary practice, it serves the interests of justice. In *S v Immelman* 1978 (3) SA 726 (A) at 729A, Corbett JA said:

'It has been decided in this Court, with reference to the verdict of the Court, that, although there is no provision in the Criminal Procedure Code for the delivery of a judgment when a Judge sits alone or with assessors (when these decisions were given the alternative system of trial by jury still obtained), in practice such a judgment is invariably given and that it is clearly in the interests of justice that it should be given (see *R v Majerero and Others* 1948 (3) SA 1032 (A); *R v Van der Walt* 1952 (4) SA 382 (A)). It seems to me that, with regard to the sentence of the Court in cases where the trial Judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does also serve the interests of justice. The absence of such reasons may operate unfairly, as against both the accused person and the State.' [3]

[5] The Magistrate, in his judgment on sentence, did not observe the stated necessary practice and, by doing so, failed to furnish any reasons for making the non-parole order. However, in the judgment refusing the appellant leave to appeal, the Magistrate dealt with this aspect as follows:

'The only reason why the court imposed this term is to prevent the Department of Correctional Supervision from burdening the court with an application to convert the sentence before the accused has served three years of the sentence.'[4]

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[3]See also *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) paras 31 and 32.

[4]The above quotation is my translation of the following extract from the judgment: 'Die enigste rede waarom die hof hierdie bepaling daargestel het is dat die Departement Korrektiewe Dienste nie die hof belas met aansoeke om [om]skepping van vonnis alvorens beskuldigde die tydperk van drie jaar bereik nie'.

The reference to the conversion of the sentence is to s 276A(3) of the Act, which allows the Commissioner of Correctional Supervision or the Correctional Supervision and Parole Board, 'if he or it is of the opinion that such a person is fit to be subjected to correctional supervision' to apply to the trial court to reconsider the sentence and either confirm the sentence, convert it to correctional supervision or impose another appropriate sentence.

[6] The Magistrate's reasoning reveals that the non-parole order was imposed for the convenience of the court and possibly even the Department of Correctional Services. But the convenience of neither is relevant. Circumstances may arise after sentence has been imposed that render an application under s 276A(3) entirely appropriate. A court that refused to entertain such an application because it was not convenient to itself or the Department would, without doubt, commit a misdirection. This gives rise to, at least, a reasonable prospect that another court would consider that the Magistrate misdirected himself.

[7] Section 276B(1) of the Act provides:[5]

'(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.'

Relevant provisions of the Correctional Services Act 111 of 1998 (the CSA) have also been amended to take account of such an order by a sentencing court.[6]

[8] Prior to s 276B of the Act a decision about parole remained exclusively within the domain of the Department of Correctional Services as an executive function and courts have persistently recognised the need for that to be so. Two principles underlie that perspective. First, the separation of powers; and second, the fact that courts obtain their

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[5]Inserted by s 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997, promulgated on 12 December 1997 but only put into operation on 1 October 2004.
[6]See for example s 73(7) of the CSA.

sentencing jurisdiction from statute and until s 276B no statute has empowered courts to make any orders regarding the period of imprisonment to be served before release on parole is considered.[7]

[9] In *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) Harms JA dealt with the topic as follows:[8]

'The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served. . .

The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the Judiciary (cf Blom-Cooper & Morris *The Penalty for Murder: A Myth Exploded* [1996] *Crim LR* at 707, 716). There are also other tensions, such as between sentencing objectives and public resources (see *Walker & Padfield op cit* at 378). This question relating to the judiciary's true function in this regard is probably as old as civilisation (Windlesham *"Life Sentences: Law, Practice and Release Decisions, 1989-93"* [1993] *Crim LR* at 644). Our country is not unique. Nevertheless, sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction. Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how and how long convicted persons should be detained (see the clear exposition by Kriegler J in *S v Nkosi (1), S v Nkosi (2), S v Mchunu* 1984 (4) SA 94 (T)) courts should also refrain from attempts, overtly or covertly, to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate.'[9]

[10] Looking at s 276B with a view to determining the extent of the statutory power being conferred on courts, it is evident that the only jurisdictional requirement for the operation of the section is that the sentence imposed should be longer than two years'

[7] Insofar as the principle of the separation of powers is concerned see *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) paras 111 to 113.
[8] At 521d - 521i.
[9] See also *S v Matlala* 2003 (1) SACR 80 (SCA) para 7; *S v Botha* 2006 (2) SACR 110 (SCA) paras 25 and 26. *S v Mokoena* 2009 (2) SACR 309 (SCA) para 6; *S v Nkosi (1); S v Nkosi (2); S v Mchunu* 1984 (4) SA 94 (T) at 98A-E.

imprisonment. For the rest, no circumstances are specified in which it would be appropriate to impose such an order and it is therefore for the courts to establish those circumstances. Several judgments have dealt with s 276B, but no clear jurisprudence has emerged. These were referred to in *Pauls*, starting with *S v Williams, S v Papier* 2006 (2) SACR 101 (C). In the latter H J Erasmus J, in an obiter dictum of a single line, stated that 'the section should only be applied in exceptional circumstances'.[10] Froneman J in *S v Mshumpa & another* 2008 (1) SACR 126 (E) made a non-parole order in circumstances of which he said that '[i]t is difficult to conceive of a more aggravated form of assault on a pregnant mother than the attempted murder on Ms Shelver in this matter'.[11] He also referred to the undisputed evidence by a psychologist that the accused suffered from an antisocial personality disorder which, in lay terms, manifested as self-centredness, deceitfulness, manipulative behaviour and a lack of conscience, all found to have been features of the conduct of the accused in the commission of the crimes.[12] In para 82 the following conclusion was arrived at:

'Objectively, in the case of Mr Best, a very serious crime or series of offences has been committed by a person who has very little chance of being rehabilitated and who appears will never have any conscience about what he has done.'

[11] In this Court in *S v Pakane & others* 2008 (1) SACR 518 (SCA) it was stated that the Legislature enacted s 276B to address the concerns expressed in *Mhlakaza*, and a non-parole order was issued without considering the circumstances in which it would be appropriate to do so.[13] In *S v Makena* 2011 (2) SACR 294 (GNP) the full court dealt with a sentence which contained a recommendation that the appellant not be considered for parole until he had served 30 years of a 50-year sentence of imprisonment. Without reference to s 276B the court concluded that recommendations of such a nature should be avoided and the question of parole was best left in the hands of the appropriate department.

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[10]The quote is my translation of an extract from the following sentence, para 15 of the judgment: 'Onder die omstandighede is dit gerade dat ek nie meer sê nie as dat die artikel slegs in uitsonderlike omstandighede toepassing behoort te vind, sonder om te probeer uitspel wat uitsonderlike omstandighede sal daarstel'.
[11]Para 81.
[12]Paras 77 and 78.
[13]Paras 47 and 48.

[12] Despite the fact that s 276B grants courts the power to venture on the terrain traditionally reserved for the Executive, it remains generally desirable for a court not to exercise that power. I will now proceed to illustrate that, generally, courts are not equipped to make decisions about the parole of a prisoner at the time when sentence is imposed. The CSA grants the Department of Correctional Services the authority to incarcerate a prisoner for the full duration of the sentence imposed,[14] but at the same time it tasks the Department to attempt to rehabilitate prisoners and authorises it to release them prior to the expiry of the sentence imposed. Section 42 of the CSA establishes a case management committee which is obliged to, inter alia, assess each prisoner sentenced to more than 24 months' imprisonment, to design a developmental program for each individual prisoner, and to interview each prisoner at regular intervals to assess the suitability of the program and the prisoner's compliance therewith. Ultimately, the case management committee submits a report on each prisoner to the relevant Correctional Supervision and Parole Board. The report deals with the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of the prisoner and the likelihood of his or her relapse into crime. In order to fulfil these functions the Department employs suitably skilled people. The Correctional Supervision and Parole Board considers the report submitted to it and also takes into account the views of the complainant in certain identified instances of serious crime. Such a complainant has the right in terms of s 299A of the Act to attend the meeting of the Correctional Supervision and Parole Board and make representations when the parole of the perpetrator is considered. This serves to illustrate that the consideration of the suitability of a prisoner to be released on parole requires the assessment of facts relevant to the conduct of the prisoner after the imposition of sentence.

[13] This short summary of the statutory procedure prescribed for the consideration of a prisoner's release on parole illustrates why the Department, and not a sentencing court, is far better suited to make decisions about the release of a prisoner on parole and why it remains desirable to respect the principle of the separation of powers in this regard.

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[14] Section 73(1)(*a*).

[14] The CSA recognises the need, in some instances, to place facts that arose after the imposition of sentence before the sentencing court in order to obtain an amendment of the sentence. One such example is the very provision the Magistrate wanted to avoid, s 73(7)(*d*), which provides for the conversion of a sentence from direct imprisonment to correctional supervision in circumstances where a prisoner is 'fit to be subjected to correctional supervision'.[15] Another such provision is s 75(1)(*b*). It entitles the Correctional Supervision and Parole Board to make recommendations to a court in respect of a person who was declared a dangerous criminal in terms of s 286A. Such a prisoner could only be placed under correctional supervision by an order of court. The recommendation placed before a court in such an instance would be based on the prisoner's behavior and development since the sentence was imposed.

[15] The sentencing court that considers the imposition of a non-parole order is, insofar as an assessment of future behaviour is to be made, in a similar position to a court considering a declaration and sentence in terms of ss 286A and 286B of the Act. The two sections deal with the declaration of a convicted person as a dangerous criminal and the imposition of an indefinite period of imprisonment respectively. In *S v Bull & another; S v Chavulla & others* 2001 (2) SACR 681 (SCA) Vivier ADCJ did an in-depth analysis of the two sections and repeatedly emphasized that a 'predictive judgment', based on facts, is required to determine likely behaviour in the future. In the words of that judgment, a non-parole order is a 'present determination' that the person will not deserve being released on parole in the future.[16]

[16] Seen in this context, 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 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 before the sentencing court that would continue, after sentence, to result

[15] S 73(7)(*d*) of the CSA read with s 276A(3) of the Act.
[16] *S v Bull & another; S v Chavulla & others* 2001 (2) SACR 681 (SCA) at 692d and i; 693d and g; 697a.

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.

[17] In *Pakane,* this Court did not consider the circumstances under which it would be appropriate to make a non-parole order. The court found compelling mitigating factors, weighed those against the aggravating factors and confirmed the imposition of the prescribed minimum sentence of 15 years' imprisonment. It added that '[i]n accordance with the provisions of s 276B(2), it is ordered that the second appellant shall serve a non-parole period of not less than ten years'. The aggravating factors that had been established included the serious nature of the crime, that it was committed by a police officer who was under a legal duty to protect the public, who showed a lack of remorse, who had an iron resolve to conceal the truth, who took elaborate steps to cover up and hamper the police investigations, who knowingly allowed innocent people to languish in jail for two years, who made false statements and who gave false evidence. These facts, although aggravating, do not constitute exceptional circumstances required for the imposition of a non-parole order and do not exclude the possibility of the rehabilitation of the offender after sentence.

[18] It does not appear from the judgment in *Pakane* or the heads of argument delivered in the matter (which are in the archives of this Court) that any of the parties asked for the imposition of an order in terms of s 276B by the Court on appeal. Such an order was not part of the trial court's order. This Court further seems not to have taken s 73(6)(*b*)(v) of the CSA into account, which provides:

'A person who has been sentenced to incarceration contemplated in section 51 or 52 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), may not be placed on parole unless he or she has served at least four-fifths of the term of incarceration imposed or 25 years, whichever is the shorter, but the court, when imposing incarceration, may order that the sentenced offender be considered for placement on parole after he or she has served two thirds of such term.'[17]

[17] S 73(6) came into operation on promulgation of the CSA on 31 July 2004. It has subsequently been substituted by s 48(*c*) of the Correctional Services Amendment Act 25 of 2008, but the date of commencement of the new section has not yet been proclaimed. The substituted s 73(6)(*b*)(v) reads as follows: 'A person who has been sentenced to incarceration contemplated in section 51 or 52 of the

[19] It appears from the context of the judgment in *Pakane* that this Court wanted to ensure that the second appellant would not be released on parole until he had been in prison for at least ten years, but, paradoxically, that would be a lesser period than that prescribed by the CSA, which is 12 years. For these reasons *Pakane* should not be regarded as precedent for the imposition of a non-parole order.

[20] After having considered all the abovementioned authorities, the court in *Pauls* came to the correct conclusion, namely that a court, before making a non-parole order, should carefully consider whether exceptional circumstances exist. It also found, correctly in my view, that exceptional circumstances cannot be spelled out in advance in general terms, but should be determined on the facts of each case. These should be circumstances that are relevant to parole and not only aggravating factors of the crime committed, and a proper evidential basis should be laid for a finding that such circumstances exist.

[21] It is not contended by any of the parties that exceptional circumstances of the nature that would warrant a non-parole order exist in the present case. The Magistrate therefore misdirected himself when such an order was imposed and there are consequently reasonable prospects that the sentence would be amended on appeal. The misdirection also impacts on the term of imprisonment imposed as the prospect of making a non-parole order may have influenced the period of imprisonment imposed in the mind of the Magistrate. I should add at this juncture that, in addition, there are reasonable prospects of success in an appeal against the severity of the sentence irrespective of the non-parole order.

[22] The third issue for consideration is that the Magistrate gave the parties no indication that the imposition of a non-parole order was being considered by him.[18] It came as a surprise to the parties. At least two questions arise when such an order is considered: first, whether to impose such an order and second, what period to attach to

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Criminal Law Amendment Act, 1997 (Act 105 of 1997), may not be placed on parole unless he or she has served the period determined by the National Council in terms of section 73A.' S 73A has also been inserted into the CSA by Act 25 of 2008 and its date of commencement has similarly not yet been proclaimed. The new section adopts a more flexible and individualised approach towards the determination of the compulsory minimum period of sentence to be served by each prisoner.

[18]This situation is to be distinguished from that which arose in *Mthembu v S* (206/11) [2011] ZASCA 179 (29 September 2011).

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. On this aspect too it could be found that there is a reasonable prospect of success on appeal.

[23] The petition for leave to appeal against the sentence imposed by the Regional Court should have been granted as there are indeed reasonable prospects of success on appeal.

[24] The appellant has already served 17 months of his effective sentence. But for the non-parole order his sentence could already have been converted in terms of s 73(7)(*c*)(i), read with s 73(7)(*d*) and 276A(3) of the CPA, after 18 months ie after 24 December 2011. Due to the order this could now happen only after 36 months which expires on 24 June 2012, which is also the effective date in terms of s 73(6)(*a*) on which he would be eligible to be considered for parole.

[25] The potential prejudice created by the non-parole order could still be curtailed if the appellant's appeal is considered as soon as possible. It is not within this Court's power to deal with the matter on the merits despite the exigencies that pertain to the case.[19] However, the order below should facilitate a speedy appeal.

[26] The following order is made:

1 The appeal is upheld.

2 The order of the court below refusing the appellant leave to appeal is set aside and replaced with the following:

'The applicant is granted leave to appeal to the Eastern Cape High Court, Grahamstown against the sentence imposed by the Regional Court.'

3 The appellant is directed to deliver a notice of appeal on or before 15 December 2011 based on the findings made in this judgment and containing such further grounds of appeal as may be permitted by the court of appeal.

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[19] *S v N* 1991 (2) SACR 10 (A) at 16a-d; *S v Khoasasa* 2003 (1) SACR 123 (SCA) para 12; *Matshona v S* [2008] 4 All SA 68 (SCA) para 4.

4 The Director of Public Prosecutions, Eastern Cape, is requested to place this appeal on the roll as a matter of urgency on a date to be arranged with the appellant's counsel.

5 The Registrar of this Court is requested to make three copies of the record filed in this Court available to the appellant's attorney for use in the appeal to the Eastern Cape High Court, Grahamstown, should the Judge President of that Division sanction this arrangement.

6 In the event of any further appeal those copies of the record are to be returned to this Court, and, together with the two remaining copies in this Court, are to be supplemented insofar as may be necessary.

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S SNYDERS

Judge of Appeal

APPEARANCES:

For the Appellant: J W Wessels

Instructed by:

Legal Aid Board; Port Elizabeth

Legal Aid Board, Bloemfontein

For the Respondent: W J de Villiers

Instructed by:

The Director of Public Prosecutions; Port Elizabeth

The Director of Public Prosecutions, Bloemfontein