THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 206/11

In the matter between:

SIMANGE WISEMAN MTHEMBU **Appellant**

and

THE STATE **Respondent**

Neutral citation: ***Mthembu v The State*** **(206/11) [2011] ZASCA 179 (29 September 2011)**

Bench: **PONNAN, SNYDERS, MALAN, BOSIELO JJA and PETSE AJA**

Heard: **16 September 2011**

Delivered: **29 September 2011**

Corrected:

SUMMARY: **Criminal Law Amendment Act 105 of 1997 – s 51 – prescribed sentences – failure to apprise defence that court contemplating sentence higher than prescribed minimum not constituting defect in the proceedings.**

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg)
(Swain, Gorven and Jappie JJ sitting as court of appeal).

The appeal is dismissed.

JUDGMENT

PONNAN JA and PETSE AJA (SNYDERS, MALAN and BOSIELO JJA concurring):

[1] On 9 April 2006 fate conspired, it would seem, to cause the path of the appellant, Simange Wiseman Mthembu to cross that of a 29 year old taxi driver, Derrick Mfanafuthi Majozi (the deceased) not just once, but twice. The first, at about midday in the Pietermaritzburg central business district, ended uneventfully. The second, during the course of the late afternoon near Masons Mill in Edenvale Road, Pietermaritzburg, not so. Each was precipitated, according to the appellant, by the deceased's inconsiderate driving. On the first occasion the appellant and the deceased had to be pulled apart by others, thus averting an altercation. On the second, an incident unrelated to the first, there was a resort to fisticuffs during the course of which the appellant produced a firearm with which the deceased was shot and killed.

[2] The appellant, who was indicted before Nicholson J in the KwaZulu-Natal High Court (Pietermaritzburg) on one count of murder, asserted that in resorting to his firearm he had acted in self-defence in order to ward off a knife-wielding attack by the deceased. But that defence was rightly rejected by the learned trial judge who convicted the appellant as charged and sentenced him to imprisonment for a term of 18 years.

[3] The appellant's appeal to the full court (Jappie, Swain and Gorven JJ) against both conviction and sentence was unsuccessful. The judgment of the full court, which

sets out the facts in far greater detail than we have chosen to do, is reported sub nom *S v Mthembu* 2011 (1) SACR 272 (KZP). The full court had little hesitation in confirming the conviction. In so doing it fully endorsed Nicholson J's factual findings. In that, in our view, it cannot be faulted. What did give it pause for reflection was the sentence imposed by the learned trial judge. Its anxiety was provoked, in particular, by an earlier reported judgment of that division - *S v Mbatha* 2009 (2) SACR 623 (KZP). Both Swain J and Gorven J in separate judgments (with which Jappie J in each instance concurred) held that *Mbatha* had been wrongly decided. They therefore declined to follow it. In the light of those discordant judgments special leave to appeal, solely in respect of sentence, was granted by this Court to the appellant.

[4] At the heart of this appeal therefore is the correctness of *Mbatha*. In *Mbatha,* Wallis J (Van der Reyden and Niles-Duner JJ concurring), held (para 26):

'Consistent with what I have already said about the proper approach to sentence when the court contemplates a sentence greater than the statutory minimum, and consistent also with those cases that have held that if the State intends to rely upon the minimum sentencing legislation the accused must be forewarned of that fact, preferably in the indictment, I think that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation was a defect in the proceedings. What makes that defect of greater significance is that the way in which Badal AJ put his questions to Mr Govender meant that the latter may have been misled. In my view there was a substantial risk of him having been lulled into a sense of false security, in the belief that the court was only concerned with the question whether there were substantial and compelling circumstances justifying the imposition of a sentence less than the minimum, and was not entertaining the possibility of a sentence greater than that. That is particularly so in a case such as the present where the fact that the appellant chose to advance a dishonest defence, which had been correctly rejected by the court, and did not then give evidence, meant that there was little point in advancing a submission that substantial and compelling circumstances were present justifying the imposition of a sentence of less than 15 years' imprisonment. In my view, the court contemplating the imposition of a sentence greater than the statutory minimum should make it apparent to the accused and his or her legal representative, as that may well alter their entire approach to sentence.'

[5] Thus far our courts have simply accepted that if, upon an evaluation of the cumulative effect of all the circumstances of a case, a higher sentence was called for, there were no constraints on its discretion to impose a sentence far in excess of the ordained minimum (*Director of Public Prosecutions v Venter* 2009 (1) SACR 165 (SCA)

para 19). And so, in arriving at that conclusion Wallis J appreciated that he was venturing into unchartered territory. As he put it (para 14):

'I appreciate that the Supreme Court of Appeal laid down this approach in the context of cases concerned with a departure from the statutory minimum sentence by virtue of the presence of substantial and compelling circumstances. I am also alive to the fact that the legislation contains no provision corresponding to s 51(3)(a) when the departure from the prescribed minimum sentence is upwards rather than downwards. Nonetheless it seems to me that this must remain the correct approach when the court is contemplating imposing a greater sentence than the prescribed minimum, in the same way as where it is contemplating imposing a lesser sentence. Otherwise the process of determining the appropriate sentence will be bifurcated in a most undesirable way. If the approach is different from that which I have indicated it will lead to the following situation. The court will first determine whether the case is one falling within the minimum sentencing legislation. If it is, then it will enquire whether there are substantial and compelling circumstances justifying the imposition of a lesser sentence. If it concludes that there are none, it will then abandon all that has gone before and simply determine in the exercise of its discretion an appropriate sentence, having no regard to the legislation.'

[6] Wallis J continued (para 15 and 16):

'In my view such an approach disregards one of the purposes of the minimum sentencing legislation, which is to provide a measure of uniformity and not simply to limit in one direction the discretion of courts in imposing sentence in particular cases, whilst leaving them entirely at large in the other direction. In para 8 of his judgment in *Malgas*, Marais JA said that the purpose of the legislation 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."

Later he set out the general principles to be applied in approaching the issue of sentence in these cases, some of which bear upon the present problem. They are the following:

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

[7] In our view, the starting point in an inquiry such as the present is s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). Sections 51(1), (2) and (3)(a) provide:

'(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 1 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
  (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'

[8] It is noteworthy that s 51 is headed 'Discretionary minimum sentences for certain serious offences'. That together with repeated references to the words 'not less than' in ss 2 is the clearest indicator that the legislature did not intend to fetter the discretion of the sentencing court in the way that Wallis J postulates.

[9] In *Mthembu*, Swain J had this to say (para 19.1):

'The statement in *Malgas* that the prescribed periods of imprisonment "are to be taken to be ordinarily appropriate", was uttered by the Supreme Court of Appeal in the context of determining when a departure from the statutory minimum sentence was justified. Acknowledging this, Wallis J, however, held the view that the starting point must be the prescribed minimum sentence and the court must then consider if a departure is justified in imposing a greater, or lesser, sentence. Although the prescribed minimum sentence should be the starting point, this is solely for the purpose of deciding whether a sentence less than the prescribed minimum sentence should be imposed. The exercise of a discretion by the presiding officer to impose a sentence greater than the prescribed minimum sentence, does not have to be justified by reference to the prescribed minimum sentence. There can be no danger of an undesirable bifurcation in the sentencing process referred to by Wallis J, if it is borne in mind that the object of the Act was simply "to provide for minimum sentences for certain serious offences". Once the presence or absence of substantial and compelling circumstances is determined, then the exercise of the discretion required of the presiding officer, by the Act, is complete. If no such circumstances are found to be present, I respectfully disagree that the determination of an appropriate sentence will result in an impermissible abandonment of "all that has gone before". That the presiding officer thereafter need have no regard to the legislation, will simply be because the object of the legislation will have been achieved, i e a determination that a sentence less than the prescribed minimum sentence should not be imposed because of the absence of substantial and compelling circumstances.'

[10] As Marais JA made plain in *S v Malgas* 2001 (1) SACR 469 SCA (para 18) the legislature has '. . . deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case called for a departure from the prescribed sentence'. He added (para 25): 'What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases . . . '.

[11] Plainly what we are dealing with is a legislative provision that fetters only partially

the sentencing discretion of the court. That much emerges from ss 3(a) which entitles a court to impose a lesser sentence than the sentence prescribed if it is satisfied that substantial and compelling circumstances exist which justify the imposition of such lesser sentence. It follows that even were a court to conclude that substantial and compelling circumstances do indeed exist, it may in the exercise of its sentencing discretion nonetheless impose the prescribed minimum or such higher sentence as to it appears just.

[12] On Wallis J's approach the legislative provision would be so prescriptive in its terms as to strip the sentencing court of its sentencing discretion. Construed as Wallis J does, the provision would be mandatory in effect and may well not pass constitutional muster. Of such a provision, Marais JA stated in *Malgas* (para 3):

'What *is* rightly regarded as an unjustifiable intrusion by the Legislature upon the legitimate domain of the courts, is legislation which is so prescriptive in its terms that it leaves a court effectively with no sentencing discretion whatsoever and obliges it to pass a specific sentence which, judged by all normal and well-established sentencing criteria, could be manifestly unjust in the circumstances of a particular case. Such a sentencing provision can accurately be described as a mandatory provision in the pejorative sense intended by opponents of legislative incursions into this area. A provision which leaves the courts free to exercise a substantial measure of judicial discretion is not, in my opinion, properly described as a mandatory provision in that sense. As I see it, this case is concerned with such a provision.'

[13] Whilst ss 3(a) obliges a sentencing court to enter the circumstances on the record if it is minded to impose a lesser sentence than that ordained by the legislature, there is no indication in the language of that provision that a similar course must be followed where a more severe sentence is contemplated. That notwithstanding, Wallis J concluded that ‘the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation was a defect in the proceedings’. Conceptually we must confess to experiencing some difficulty with that conclusion. While it may be notionally axiomatic that the State should forewarn an accused person of its intention to invoke the minimum sentencing provision the same can hardly hold true for a court. For, surely, a court only arrives at its conclusion as to what a proper sentence is, after having received all of the evidence and hearing argument. Often it is the very act of

consideration after the hearing of argument that properly concentrates the judicial mind to the task at hand. Until then such views as may be held by a court may well be no more than tentative.

[14] When then should the defence be apprised by the court of the fact that a sentence in excess of the ordained minimum is contemplated? 'At the outset of the sentencing phase' was counsel's answer to that question. One suspects that it would have to be as early as then. Any later, may in all likelihood render the warning illusory, particularly if the complaint is - and that was the thrust of the complaint - that an accused person may (not would) conduct his or her case differently if forewarned. Notwithstanding the *sui generis* nature of the sentencing phase, the mere notion that a court should be obliged, *ante omnia* so to speak, to disclose its view, even if simply tentative, on pain that failure to do so would vitiate the proceedings and, moreover, to thereafter be bound to that view (for that is its corollary) is anathema to our law. No such duty existed prior to the coming into operation of the minimum sentencing legislation. And no such duty is to be found in the legislation itself.

[15] Where then would this duty derive from? Counsel submitted that it was to be sourced in our conception of a fair trial. But resort to vague notions of fairness hardly serve to elucidate the enquiry. At present an accused person is warned at the time of the charge or the indictment that s 51 of Act 105 of 1997 would be applicable in the event of a conviction. A reference to the Act in the charge forewarns the accused not just that he or she is on risk for the minimum sentence ordained by the legislature unless substantial and compelling circumstances are found to exist, but also that the sentencing jurisdiction of the regional court (should that be the forum) has been enhanced to give practical efficacy to the legislative intent. At the commencement of the trial therefore an accused person can hardly be under any illusion as to the risk that he or she faces. Thus, the warning to an accused person where the minimum sentence applies is far more comprehensive than would be the case if it does not apply. But, on the approach of Wallis J, that appears to be insufficient. Something further, it seems, is required. Counsel was asked during argument to indicate in more concrete terms what

that additional something was or how the existing warning should be further supplemented. Unsurprisingly, he was unable to do so. We are thus none the wiser as to what the inadequacy is or how the perceived inadequacy should be remedied.

[16] It may be advisable to retrace our steps. That an accused person should be informed that the minimum sentence is applicable to his or her case owes its genesis to *S v Legoa* 2003 (1) SACR 13 (SCA). There Cameron JA, after an examination of the earlier judgments of this court, expressed the conclusion that under the common law it was 'desirable' that the charge-sheet should set out the facts the State intended to prove to bring the accused within an enhanced sentencing jurisdiction. Cameron JA continued (para 20 and 21):

'But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.

The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court, from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.'

[17] It is noteworthy that Cameron JA declined to lay down any general rule in *Legoa*. *Legoa* was followed shortly thereafter by *S v Ndlovu* 2003 (1) SACR 331 (SCA). In *Ndlovu,* Mpati JA stated (para 12):

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what

circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.'

In both *Legoa* and *Ndlovu*, unlike here, this court was concerned with the case where the accused had not been warned that the minimum sentence legislation might be invoked. And, whilst *Ndlovu* went somewhat further than *Legoa,* both emphasised that a fair trial enquiry does not occur *in vacuo* but that it is first and foremost a fact-based enquiry.

[18] It may well be a salutary practice for a court, if it holds a view adverse to a particular litigant, to put that to the litigant or such litigant's representative during argument. But we cannot imagine that where a view is just in its embryonic stage, a failure to do so, without more, would constitute a defect in the proceedings. In particular Wallis J's approach, that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation constitutes, without more, a defect in the proceedings, cannot be endorsed. In our view such failure in and of itself will not result in a failure of justice, which vitiates the sentence. After all, any sentence imposed, like any other conclusion, should be properly motivated (*S v Maake* 2011 (1) SACR 263 SCA). And we should not lose from sight that our appellate courts have, in terms of long standing practice, reserved for themselves the right to interfere where a sentence has been vitiated by a material misdirection or where it is shocking or startlingly inappropriate. As both *Legoa* and *Ndlovu* make plain a 'vigilant examination of the relevant circumstances' is required. Here, the indictment was explicit. It stated: '**MURDER** read with the relevant provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997'. Thus, right from the outset, the accused was informed in unambiguous terms that the State intended to rely on the minimum sentencing provisions. No specific irregularity was alluded to in argument. A careful perusal of the record reveals that there was none.

[19] One further aspect merits mention. *Maake,* in support of the broad hypothesis that conclusions by a court should be properly motivated, called in aid *Mbatha.* It was

submitted to us that *Maake* cited *Mbatha* with apparent approval and that that constitutes an endorsement of its correctness on this score. We do not agree. *Maake* did not subject the judgment in *Mbatha* to careful scrutiny nor was the correctness of its conclusion or reasoning properly considered. It sought support from *Mbatha* in a wholly different context.

[20] Turning then to the merits of the present appeal against sentence. Swain J stated (para 11 and 12):

'The learned judge found that the appellant had shown true contrition and regret for what he had done, was a first offender, and accepted that he was a good candidate for reformation "as provided for in the Correctional Services system". The learned judge however, identified the incident as one which fell within what has become known as "road rage". By reference to the decision of Borchers J in the case of *S v Sehlako* 1999 (1) SACR 67 (W), he held that the facts were very similar to the present case, and endorsed the view of Borchers J, that:

"[E]ven where an accused's personal circumstances are extremely favourable, as they are in this case, they must yield to society's legitimate demand that its members be entitled to drive the roads without risk of being murdered by other irate drivers."

In *Sehlako* the accused was sentenced to 18 years' imprisonment. The learned judge found there was very little to differentiate that case from the present one, and sentenced the appellant to 18 years' imprisonment.'

He accordingly concluded (para 22 and 23)):

'This court can of course only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection, or where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed, had it been the trial court, is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"—*Malgas* at 478e-h.

The sentence imposed by the learned judge suffers from none of these defects, and accordingly must stand.

The order I make is the following:

The appeal against conviction and sentence is dismissed.'

[21] We can find no fault with the approach of the court below. It follows that the appeal must fail and it is accordingly dismissed.

V M PONNAN
JUDGE OF APPEAL

X M PETSE
ACTING JUDGE OF APPEAL

APPEARANCES:

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For Respondent:	R du Preez
	Instructed by: The Director of Public Prosecutions Pietermaritzburg