

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A1038/2013

In the matter between:

ANDILE NHLANHLA MTINTSO

21/4/2015
Appellant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
17/04/15	DATE	 SIGNATURE

THE STATE

Respondent

JUDGMENT

Tuchten J:

- 1 The appellant was convicted in a regional court of murder. He pleaded guilty to murdering the deceased on 6 December 2009 at about 23h30 after the deceased, the appellant and others had left a tavern at which they had been drinking. There was an argument during which the appellant caused the death of the deceased by stabbing him in the neck with a knife.

- 2 The appellant was sentenced to 8 years imprisonment and was declared unfit to possess a firearm. In addition, the court *a quo* ordered that the appellant had to serve two thirds of his sentence before he could be considered for parole.
- 3 The appellant has no quarrel with the sentence of 8 years or the declaration in relation to firearms but appeals, with the leave of this court granted on petition, against that part of the sentence restricting his right to be considered for parole until he had served two thirds of his sentence.
- 4 The order under consideration was made pursuant to the provisions of s 276B of the Criminal Procedure Act, 51 Of 1977 the relevant provisions of which read as follows:

(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.

- 5 The regional magistrate gave no reasons for the non-parole order he made. In *S v Stander* 2012 1 SACR 537 SCA, after referring in para 9 to the salutary principle that the function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve and has no control over the minimum or actual period served or to be served, the SCA held at para 12 in relation to non-parole orders that despite the fact that s 276B grants courts the power to venture onto the terrain traditionally reserved for the executive, it remains generally desirable for a court not to exercise that power. The SCA held at para 13 that the authorities vested with the power to detain offenders in prison and release them on parole are far better suited than a sentencing court to make decisions about the release of a prisoner on parole and that it remains desirable to respect the principle of the separation of powers in this regard.
- 6 *Stander*, para 22 is further authority for the proposition that a court which is considering whether to make a non-parole order must give the parties an opportunity to be heard on the issue. Failure by a court to hear the parties before making a non-parole order constitutes a misdirection.

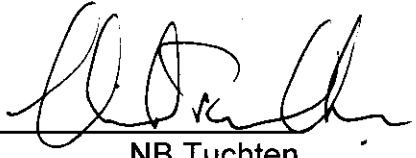
7 Where a sentencing court's discretion as to an appropriate sentence is vitiated by misdirection, an appeal court is at large to substitute its own assessment of an appropriate sentence for that of the court below.

8 In the present case, there was simply no material before the court *a quo* to justify a non-parole order. In addition, the parties were not heard on the question before the non-parole order was made. The court *a quo* thus misdirected itself. There was nothing before the court *a quo* and there is nothing before us to justify a departure from the general rule that it is for the correctional and parole authorities and not the court to determine when, if at all, a prisoner should be released on parole. To this extent the order of the court *a quo* cannot stand.

9 I make the following order:

1 The order that the appellant, Andile Nhlanhlo Mtintso, may not be released on parole before he has served two thirds of his sentence is set aside;

2 The balance of the sentence, ie that the appellant must serve a sentence of 8 years imprisonment and that the appellant is declared unfit to possess a firearm, is confirmed.


NB Tuchten
Judge of the High Court
~~19 May 2014~~
17 April 2015

I agree.


SP Mothle
Judge of the High Court
~~19 May 2014~~
20 April 2015