

THE REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>03/09/2025</u> DATE	 SIGNATURE

Case No: A225/2024

EVELINA MOLOI

APPELLANT

and

THE STATE

RESPONDENT

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

J U D G M E N T

Coram: SENYATSI J, HASSIM J (Ms) and MBOWENI AJ(Ms)

A. Introduction:

[1] This is an appeal, with leave granted by Mokgoatlheng J, against the non-parole provision imposed by the court a quo on 31 January 1996 by Curlewis J, now deceased Ms. Evelina Moloi, the appellant, was convicted of murder and armed robbery. She received a sentence of thirty (30) years' imprisonment for murder and another thirty (30) years for armed robbery. Curlewis J ordered that these sentences be served consecutively, resulting in a total effective sentence of sixty (60) years' imprisonment. Additionally, the court a quo directed that parole should not be considered until fifty years had been served. This appeal is specifically concerned with the challenge to the non-parole provision.

B. Background:

[2] For nearly thirty years, the applicant sought appellate relief from prison but faced obstacles like missing records and limited legal support. The court, per Mokgoatlheng J, condoned the late application

for leave to appeal and granted her leave to appeal on 24 February 2024.

[3] The appellant's co-accused has been released on parole.

[4] The only issue we must consider is whether the trial court erred in rendering the appellant ineligible for parole before she had served 50 years of the 60-year prison sentence. The State does not oppose the appeal. It is common cause that the part of the sentence imposing a non-parole period of 50 years must be deleted.

Legal Framework: Non-Parole Periods and Parole Eligibility

[5] Section 276B of the Criminal Procedure Act 51 of 1977 came into operation on 1 October 2004. It permits a sentencing court, when imposing a term of imprisonment of two years or more, to fix as part of the sentence a period during which the offender shall not be placed on parole. The non-parole period may not exceed two-thirds of the term of imprisonment or twenty-five (25) years, whichever is the shorter. Section 73(6)(a) of the Correctional Services Act 111 of 1998 provides that, absent such an order, an offender becomes eligible for consideration for parole after serving half the sentence. However, the appellant was sentenced eight (8) years before section 276B was placed on the statute books. Prior thereto the sentencing court was not empowered to dictate the minimum term of imprisonment that a convicted person serves.

[6] A non-parole order is exceptional. It is a judicial intrusion into the ordinary executive domain of parole management and must therefore

be approached with circumspection. In **S v Mhlakaza and Another**¹, the Supreme Court of Appeal emphasized that parole is an executive function, and courts should not sentence in a manner that seeks to remove parole from consideration altogether. The SCA furthermore held that non-parole periods must not undermine the executive's role in parole. A trial court is restrained. Harms JA aptly put it thus:

"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..."²

And cautioned –

"...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."³

[7] The trial court has, in our view, overstepped its sentencing jurisdiction. In imposing sentencing the trial court remarked –

"....the politicians have done way with one of the most potent weapons against crime, that is to say the death penalty, it must be brought home that that does not mean that people can simply commit

¹ 1997 (1) SACR 515 (SCA)

² *S v Mhlakaza* 521D-E.

³ *S v Mhlakaza* 521G-I.

crimes of this nature or any nature and expect to get out of jail on some, let out by some bureaucrat on parole as it is called or some other nature and be lightly treated.

I hardly need mention that it is common cause that crime in this country is in a shocking state of affairs, this particular type of crime has to be properly dealt with and I certainly, as long as I sit on this bench, I shall see to it that appropriate sentences are passed for this type of crime"

[8] Sentences must remain proportionate and individualized. The Constitutional Court in **S v Dodo**⁴ reaffirmed that punishments must not be grossly disproportionate and that sentencing discretion must be exercised judicially, with due regard to the triad of the crime, the offender and the interests of society. The trial court took the seriousness of the crime into account but not the interests of the offenders. The trial exercised its sentencing discretion improperly in the circumstances. Apart from not having the jurisdiction to impose a non-parole period, remarkably the trial court did not alert the accused persons that it intended to impose a non-parole period. This failure strikes at the heart of the constitutional right to a fair trial. Since the introduction of section 276B the SCA decisions have on a number of occasions stressed adherence to procedural fairness before fixing a non-parole period, the accused must be alerted to the possibility of such an order and heard on the point; reasons must be given; and the order must be clearly pronounced and recorded. Where those requirements are not met, a non-parole order is liable to be set aside

⁴ 2001 (3) SA 382 (CC)

on appeal. This affirms the constitutional requirement that sentences be proportionate and individualized.

Discussion and Reasons:

[9] Counsel for the appellant, Mr. Alberts, and counsel for the State, Mr. Jacobs, have both indicated that the appellant's continued incarceration does not align with current sentencing standards and interests of justice. They propose that the non-parole provision be removed to allow the Executive to consider the appellant for parole. The court acknowledges this position.

[10] The applicant has now spent nearly thirty years in custody. It is evident that the fifty-year non-parole period reflected on the warrant conflicts with both the sentencing transcript and the statutory limits, rendering it excessive based on the principles articulated above., Imposing a non-parole period of fifty years on a sixty-year effective sentence would closely approach the statutory maximum and would necessitate substantial justification. Such justification does not appear in the record.

[11] This approach is consistent with legal requirements and the constitutional rights to freedom, personal security, and a fair trial (see sections 12 and 35 of the Constitution). Accordingly, we are of the view that the appeal must be upheld.

Order:

[12] In the result the following order is made:

- (a) The appeal is upheld.
- (b) Paragraph 3 of the order on sentencing made on 2 February 1996 which reads as follows is deleted:

“3. Beskuldigde mag nie oorweeg word vir parool voor ten minste vyftig (50) jaar uitgedien is nie”



MBOWENI AJ

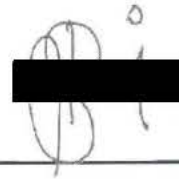
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

I agree



ML SENYATSI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree

A handwritten signature in black ink, appearing to be 'SK Hassim', is written over a solid black rectangular redaction box. The signature is positioned above a horizontal line.

SK HASSIM

JUDGE OF THE HIGH OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date of Hearing:

01 September 2025

Date of Judgment:

03 September 2025

Appearances:

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For the Respondent:

Instructed by:

Adv. J.J Jacobs

Director of Public Prosecutions

Pretoria

VB 11/2025