JUDICIAL DISCRECTION AND THE IMPACT OF MINIMUM SENTENCE IN SOUTH AFRICA

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I declare that the above dissertation is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the dissertation to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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DEDICATION

To my mother, Gloria Nomust Staffa, and my late father, Sibane Staffa.

ACKNOWLEDGEMENTS

Firstly I would like to thank God for giving me the strength to complete this project.

I would like to sincerely thank my supervisor Ms CP (Pamela) Museka for all the support and encouragement she offered me throughout my research. Thank you very much Ms Museka.

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ABSTRACT

The enactment of Criminal Law Amendment Act 105 of 1997 (hereinafter referred to as CLAA) aimed at discouraging violent crime and reducing sentencing disparities. Section 51 (1) and 51 (2) of CLAA prescribe minimum sentence for certain serious offences. Section 51 (3) (a) of CLAA empowers the Judiciary with a discretion to impose lesser sentence than the sentence prescribed by the Act if 'substantial and compelling circumstances exist which justify the imposition of a lesser sentence'.

Some Judicial officers were opposed to the CLAA criticising it for limiting their sentencing discretion due to the uncertainty of what constitutes 'substantial and compelling circumstances.' The CLAA has been described as an 'invasive' piece of legislation, as challenging to determine its intention as well as that it provides for severe punishment.

This research seeks to critically evaluate the impact of minimum sentence on sentencing discretion and also examines whether the CLAA has achieved its objectives to deter violent crime and reduce sentencing disparities.

The aim of this research is to show that the introduction of CLAA has not achieved its intended sentencing objectives. This research is necessary in order to show that there is a need for clear sentencing guidelines and principles that can ensure consistency in sentencing.

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CHAPTER 1 BACKGROUND TO THE RESEARCH

1.1 Introduction

South Africa's sentencing regime has conventionally been the area of the judiciary.[1] The courts have usually resisted the interference with their discretion to hand down sentence which they considered as an essential facet of judicial independence.[2] In other words, judicial officers[3] considered sentencing as their exclusive domain in so far as it relates to determining the suitable punishment. A sentence is defined as a directive of the court that concludes the criminal case against the wrongdoer.[4] This means that, once the offender has been found guilty of the wrongdoing, what follows is the punishment.

Judicial officers in criminal courts 'are required to exercise discretion at various stages of criminal trial, not only when imposing sentence'.[5] In this research, when reference is made to judicial discretion, that will only relate to sentencing discretion. The application of any discretion entails the 'making of a choice amongst various possibilities'.[6] The objective of a judicial officer in sentencing is to execute his function in such a manner as to realise as close an estimate as possible to a desirable harmonization of the interest of the society and the rehabilitation of the offender.[7]

In South Africa, trial courts are expected to follow the 'triad of Zinn' when imposing the sentence. Zinn-triad requires that judges must consider the seriousness of the offence, the circumstances of the offender and the interest of the society.[8] This

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1 Julia Sloth-Nielsen and Louise Ehlers, 'Assessing the impact: 'Mandatory and Minimum Sentences in South Africa' (2005) 14 SA Crime Quarterly 15.

2 Sloth-Nielsen and Ehlers, 'Mandatory and Minimum Sentence' 15.

3 Judicial officers in this paper refer to judges and magistrates who preside over criminal trial proceedings.

4 Stephan Terblanche, *A Guide to Sentencing in South Africa* (3rd edn, LexisNexis Durban 2016) 4.

5 Terblanche, *Guide to Sentencing in South Africa* 127.

6 Terblanche, *Guide to Sentencing in South Africa* 127.

7 Jan Steyn, and James Midgley Ronald Graser, Issues of *Crime and Punishment in South Africa* 1975 163.

8 Patrick Lenta, 'Judicial restraint and overreach' (2004) 4 South African Journal on Human

means that the courts are expected to strike a balance of the 'triad of Zinn' principles when assessing the appropriate sentence. In other words, the discretion to impose an appropriate sentence must be informed by the 'triad of Zinn' principles. These principles emanate from the old case of *S v Zinn*[9] where the court held that when determining the appropriate sentence, 'what has to be considered is the triad consisting of the crime, the offender and the interest of society'. However, there is an argument that before South Africa enacted the Criminal Law Amendment Act,[10] (hereinafter referred to as the CLAA) judicial officers had unfettered discretion to decide offender sentence.[11] Roth asserts that cases with the same merits in courts were not dealt with in the same manner.[12] This was a consequence of sentencer's having a very broad discretion.[13] The South African public raised concerns regarding this discretion asserting that judges delivered sentences that were too lenient and inconsistent to the crime.[14] In seeking to prevent violent crime and reducing sentencing disparities, South African Parliament enacted the CLAA.[15] The CLAA came into effect on 1 May 1998.

This research seeks to critically evaluate the impact of minimum sentence on judicial discretion. In other words, the paper will analyse whether minimum sentence limits sentencing discretion. The paper will also critically examine on whether minimum sentence has achieved its intended objectives to deter violent crime and reduce sentence disparities. This research argues that the minimum sentence has failed to deter violent crime and reduce sentence disparities. The paper further argues that there is a need for a new sentencing structure and guidelines that will properly regulate sentencing discretion and reduce disparities.

Human Rights 554-555.

9 *S v Zinn* 1969 (2) SA 537 (A) [540G].

10 Criminal Law Amendment Act 105 of 1997.

11 It is also argued that South Africa 'had previously attempted to curb judicial discretion in some respect, for an example: in 1952 Parliament enacted legislation proscribing mandatory corporal punishment', see Sandra Roth M, 'South African Mandatory Minimum Sentence: Reform Require' (2008) 17 MINN.J.INT'L.155 158.

12 Roth, 'South African Mandatory Minimum Sentence': Reform Required 158 quoting South African Law Commission, *Discussion Paper 91* (Project 82) (SALC 2000) 26.

13 SALC *Discussion paper* 91 at 3.

14 Roth, 'South African Mandatory Minimum Sentence: Reform Required' 17 158.

15 CLAA quoted by Roth, 'South African Mandatory Minimum Sentence: Reform required' 160.

1.2 Problem statement

The enactment of CLAA aimed at discouraging violent crime and reducing sentencing disparities.[16] When the Act was passed, it was envisioned to be a short term-measure to address the increasing crime rate and it was to be operative for a period of two years.[17] Section 51 (1) of the CLAA provides that: 'Notwithstanding any law, but subject to subsection (3) and (6), a Regional Court or a High Court shall sentence a person it has convicted referred in Part I of schedule 2 to imprisonment for life'.

Section 51 (2) provides that:

> Notwithstanding any other law but subject to subsection (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of any 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) second offender of any such offence, to imprisonment not less than 20 years, and (iii) a third offender or subsequent offender of any such offence, to imprisonment for a period not less than 25 years, (b) Part III of schedule 2, in 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 case of- (i) a first offender, to imprisonment for a period not less than 5 years, (ii) second offender of any such offence, to imprisonment for a period not less than 7 years, and (iii) A third or subsequent offender, to imprisonment to a period not less than 10 years.[18]

Section 51(3) (a) provides that:

> 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.[19]

Judicial officers are expected to impose the sentence listed in section 51(1) or 51(2) of the legislation if they find the accused guilty of any offence referred to in the CLAA unless they are satisfied that 'substantial and compelling circumstances' exist which permits the imposition of a lesser sentence in terms of section 51(3). According to

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16 Roth, 'South African Mandatory Minimum Sentence: Reform Required' 160.

17 Eric Nzimande, 'Minimum Sentence Legislation in South Africa' (LLM Thesis, Nelson Mandela Metropolitan University January 2012) 1.

18 Section 51(2) of the CLAA.

19 Section 51(3) (a) of the CLAA.

the retired Judge Edwin Cameron, this has strictly reduced the power of judicial officers to determine the length of prison term for offenders.[20] The main problem is that there is no definition of what constitutes substantial and compelling circumstances.[21] Different courts interpreted and still interpret the words 'substantial and compelling circumstances' in a contradictory and unclear manner.[22] *S v Malgas*[23] (hereinafter *Malgas* case) is said to be a seminal judgement which set the criteria on how the courts should deal with the interpretation of the words 'substantial and compelling circumstances', yet, the courts disregard the criteria in some respect.[24]

The *Malgas*[25] case also unequivocally decided against defining the words 'substantial and compelling circumstances' in greater detail. This failure to decide in detail of what constitutes 'substantial and compelling circumstances' created uncertainty which still persists to date. The *Malgas*[26] criteria was also criticised in *S v Kgafela*[27] (hereinafter *Kgafela* case) where the Court remarked that the Supreme Court of appeal might welcome the decision to reconsider its *Malgas* criteria in order to give more definitive or formulation to the words 'substantial and compelling circumstances'. In *Kgafela* case the court was of the view that the courts should begin by enquiring as to what is the appropriate sentence and only thereafter proceed to the prescribed minimum sentence.[28] The Court's views were dismissed by the Supreme Court in *Kgafela*[29] case. In *S v PB*[30] the court 'posed a rather surprising question, in its view "the most difficult question": "What are substantial and

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20 Edwin Cameron, 'Imprisoning the Nation: Minimum Sentence in South Africa' University of Western Cape Faculty of Law Dean's Distinguished Lecture <http://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%Nation19October2017.pdf> accessed 20 August 2022.

21 Jamil Damulira Mujuzi, 'The prospect of rehabilitation as a "substantial and compelling" circumstance to avoid imposing life imprisonment in South Africa: a comment on *S v Nkomo*' (2008) 1 SACJ 2.

22 Mujuzi, 'The prospect of rehabilitation' 2.

23 *S v Malgas* 2001 (2) SA 1222 (SCA).

24 Mujuzi, 'The prospect of rehabilitation' 2.

25 *S v Malgas* 2001 *(2)* SA 1222 (SCA) [19-20].

26 *Malgas* [19-20].

27 *S v Kgafela* 2001 (2) SACR 207 (B) [13].

28 *Kgafela* [13].

29 *S v Kgafela* 2003 (5) SA 339 (SCA) [3] where the court remarked quoting *Young v Bristol Aeroplane* Co Ltd [1944] KB 718 that lower courts are not entitled to question the decisions of the higher courts with freedom.

30 *S v PB* 2013 (2) SACR 553 (SCA).

compelling circumstances?"[31] South African sentencing expert Stephan Terblanche argues and finds this question surprising since the courts have had fifteen years to answer this question.[32]

In light of the above highlighted problems, there is a need to reform South African sentencing regime by establishing sentencing principles and guidelines. This is important as CLAA has significantly changed the way in which sentencing is dealt with in South Africa.[33] The uncertainty of what constitutes substantial and compelling circumstances has the effect on sentencing discretion, thus, perpetuating sentencing disparities.

This research will critically examine on whether the Act has taken away the courts sentencing discretion. In doing so, the paper will evaluate how the courts have interpreted substantial and compelling circumstances through case law. The paper argues that sentence inconsistencies still persist and that the CLAA is not deterring violent crime.

1.3 Research questions

The aim of this research is to critically evaluate the impact of minimum sentence on sentencing discretion and also examine whether the CLAA has achieved its objectives to deter violent crimes and reduce sentencing disparities. Thus, this paper seeks to answer the following questions:

(a) Does CLAA limit sentencing discretion?

(b) How has the CLAA impacted on judicial discretion?

(c) How does the interpretation of substantial and compelling circumstances affect sentencing discretion?

(d) What is judicial discretion?

(e) Has the CLAA achieved its objectives to deter violent crimes and reduce sentencing disparities?

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31 Terblanche, *Guide to Sentencing in South Africa* at 81 quoting *S v PB* 2013 (2) SACR 553 (SCA).

32 Terblanche, *Guide to Sentencing in South Africa* 81.

33 Stephan Terblanche, 'Mandatory and Minimum Sentencing: Considering S51 of the Criminal Law Amendment Act 1997' (2003) 2003 (1) *Acta Juridica* 194.

1.4 Objective of the study

This paper will critically evaluate the impact of minimum sentence in the exercise of sentencing discretion and critically analyse whether the minimum sentence Act has achieved its intended goals to deter violent crime and reduce sentencing disparities. The objective is to answer the questions in 2.1 above and provide possible solutions on how South African sentencing regime can be reformed.

1.5 Research methodology

This research is theoretical. Information will be gathered from relevant legislation on sentencing, books on the subject, academic journals, research papers, thesis as well as relevant South African case law on minimum sentence.

1.6 Literature review

South Africa's court views on judicial discretion with regard to mandatory sentence are said to have been set out clearly in *S v Toms; S v Bruce*[34] where the court remarked that the "mandatory minimum prison sentence has always been regarded as an unwelcomed intrusion by the legislature" on the courts sentencing function.[35] In terms of the Criminal Procedure Act,[36] (herein referred to as the CPA) if the penalty clause prescribes a minimum sentence, the court has to enforce at least that minimum sentence. This provision limits the court's discretion to impose an appropriate sentence as the presiding officer has to consider the prescribed sentence as a starting point.

Legislation prescribing minimum sentence is also said to have the possibility to lead to inconsistencies as they seek to limit court's sentencing discretion and little

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34 *S v Toms; S v Bruce;* 1990 (2) SA 802 (A).

35 Terblanche, *Guide to Sentencing in South Africa* at 48 quoting *S v Toms; S v Bruce;* 1990 (2) SA 802 (A) [822C-D].

36 Section 283 (2) Criminal Procedure Act 51 of 1977 provides that 'the provisions of subsection (1) shall not apply with reference to any offence for which a minimum penalty is prescribed in the law creating the offence or prescribing a penalty therefore'.

attention is given to the offender.[37] In *S v EN*,[38] the court remarked that '...sentencing is the most difficult stage of criminal trial'. Thus, the court was undoubtedly alluding to the fact that the exercise of sentencing discretion is a difficult task. A similar view that the exercise of sentencing discretion is a difficult task was expressed in *S v BF*.[39] In *S v Dzukuda*,[40] the court explained that sentencing discretion could lead to different sentencing courts on exactly the same facts applying their mind to a completely different conclusion. Writers also comment that if a similar case is heard by two different judges, there may be a big difference in sentences that are imposed.[41] Evidence of sentencing disparities resulting from sentencing discretion still emerges in courts judgements.[42] For an example, in *S v Thebus*,[43] the court a *quo* sentenced the accused to eight years imprisonment which was wholly suspended. When the matter went to Supreme Court of Appeal, one judge was of the view that life imprisonment should have been imposed; however, the majority imposed fifteen years imprisonment. In *S v Stenge*[44] the accused was convicted of theft by the Regional Court and was sentenced to seven years imprisonment after being declared a habitual criminal. On appeal, the majority replaced the sentence with a wholly suspended sentence of two years although the minority would have confirmed the original sentence. Some writers conclude that sentencing is ordinarily discretionary and that discretion leads to penal disparities.[45] The unexplained significant variation in courts sentence is due to individual differences amongst judges.[46]

The CLAA also impacted the exercise of judicial discretion in sentencing. The Act prescribes a list of sentences to be imposed once the accused is found guilty in terms of the Act. The prescribed sentences can only be departed from if 'substantial

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37 Esther Gumboh, 'Examining the application of Deterrence in Sentencing in Malawi' (2017) 20 PER/PELJ <https://www.ajol.infor/index.php/pelj/article/view/165876> accessed 23 January 2023.

38 *S v EN* 2014 (1) SACR 198 (SCA) [14].

39 *S v BF* 2012 (1) SACR 298 (SCA) [8].

40 *S v Dzukuda* 2000 (2) SACR 443 (CC) [35].

41 J.J. Joubert (ed), *Criminal Procedure Handbook* 2014 at 326.

42 Terblanche, *Guide to Sentencing in South Africa* at 130.

43 *S v Thebus* 2002 (2) SACR 566 (SCA).

44 *S v Stenge* 2008 (2) SACR 27 (C).

45 Michael Tonry, *Sentencing matters* (Oxford University Press New York 1996) 180.

46 Michael Gottfredson and Don Gottfredson, *Decision-making in criminal justice* (Plenum Press New York 1988) 153-154.

and compelling circumstances' exist which justify the imposition of a lesser sentence. The uncertainty in what constitutes substantial and compelling circumstances is said to have caused "the judiciary to find loopholes to deviate from the prescribed sentences".[47] This could have the effect of perpetuating sentencing disparities. Writers argue that the chance to depart from mandatory minimum sentence where "substantial and compelling circumstances" exist has "worsened the disparities and inconsistencies that prevail in relations to the offences targeted by the Act".[48]

The CLAA is criticised for its poor language use as well as the difficulty in determining the legislature's intention.[49] In *S v Vuma*,[50] the Act was described as an "invasive" piece of legislation and in *S v RO*,[51] the court remarked that the Act provides for "draconian sanctions". Commentators also argue that the CLAA has goals to deter violent crime and reduce sentencing disparities.[52] Sentencing inconsistencies still permeates the South African judicial systems.[53] The seminal guidelines in *Malgas* case which sort to achieve consistency in sentencing and reduce disparities has not proved to be helpful.[54]

The South African Law Commission (the SALC) has researched on the impact of the CLAA on sentencing and concluded that there are shortcomings.[55] The SALC recommended a new sentencing structure that will be set in legislation.[56] The SALC also made a recommendation on legislated sentencing guidelines and the

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47 Vijay Maharaj, 'An Evaluation of the Effect of Mandatory Minimum Sentencing Legislation on Judicial Discretion in South Africa' *(*LLM, University of KwaZulu-Natal 2021) at 7 quoting Julia Sloth-Nielsen and Louise Ehlers, 'A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa' (2005) Occasional Paper III.

48 Roth, 'South African Mandatory Minimum Sentence: Reform Required' at 167 quoting Sloth-Nielsen and Ehlers, Occasional Paper III.

49 Terblanche, *Guide to Sentencing in South Africa* 51.

50 *S v Vuma* 2003 (1) SACR 597 (W) [599 c].

51 *S v RO* 2010 (2) SACR 248 (SCA) quoted by Terblanche, *Guide to Sentencing in South Africa* at 51.

52 Roth, 'South African Mandatory Minimum Sentence: Reform Required' 164.

53 Sloth-Nielsen and Ehlers, Occasional Paper III 12.

54 Vimbai Chikoko, 'The Interpretation of 'Substantial and Compelling' By South African Courts and Comparison with Minnesota Sentencing Guidelines' *(*LLM Thesis, University of KwaZulu-Natal 2016) 144.

55 SALC *Discussion paper* 91 at 3.

56 SALC *Discussion paper* 91 at 29.

establishment of a sentencing council.[57] Some writers are in support of the SALC's recommendation and are of the view that the government needs to consider them.[58]

In light of the above discussion, this research seeks to explore possible solutions to South Africa's sentencing problems.

1.7 Limitations

This research will only discuss certain case law decided after the enactment of CLAA in so far as they relate to substantial and compelling circumstances criteria. It is beyond the scope of this research to discuss each and every case law that was decided after 1 May 1998 which is the date when CLAA was enacted.

1.8 Significance of the study

This research is important as it aims to show that the introduction of CLAA has not achieved its intended objective to deter violent crimes and reduce sentencing disparities. The paper seeks to demonstrate that there is a need for clear sentencing guidelines and principles that can ensure consistency in sentencing.

1.9 Chapter overview

The research is divided into five chapters. Chapter 1 discusses the introduction which gives an outline of this research. This chapter also discusses research question, problem statement, significance of the study as well as limitations.
Chapter 2 will introduce the reader to mandatory minimum sentence legislation (CLAA) and also discuss the historical background on the reasons why the legislation was enacted. The chapter also deals with the meaning of judicial discretion.
Chapter 3 critically discusses the interpretation of the words 'substantial and compelling circumstances' with reference to South African case law. The chapter also examines the relationship between judicial discretion and minimum sentence.

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57 SALC *Discussion paper* 91 at 30.
58 Kelly Phelps, 'Sentencing: Recent cases' (2014) 27 SACJ at 245.

Chapter 4 examines whether the CLAA has achieved its intended objectives to deter violent crimes and reduce sentencing disparities.

Chapter 5 focuses on conclusion and recommendations on how South African sentencing regime can be reformed in light of the problems identified by this research.

CHAPTER 2 MANDATORY MINIMUM SENTENCE (CLAA)

2.1 Introduction

This chapter discusses the historical background and the reasons why CLAA was enacted. This part of the research also briefly discusses the meaning of judicial discretion. The historical background of CLAA is important in order to ascertain the reasons why the legislation was passed. Furthermore, the understanding of what is judicial discretion is essential in order to evaluate how the CLAA has impacted on sentencing discretion.

2.2 Historical background of CLAA

South African sentencing regime has long been identified to have shortcomings since 1994.[59] Some of the shortcomings were that the seriousness of some offences was downplayed by not hearing the views of the victims.[60] In other words, some crimes were not regarded as serious as the victims would. Term of imprisonment as a punishment was imposed for offences considered less serious although options such as suspended sentence would save prison resources for those offenders deserving direct imprisonment.[61]

During the transition of South Africa to becoming a democratic country, it is said that there was an eruption of violent crime.[62] Crime statistics revealed that in 1995 to 1996 there were approximately 27 000 murders.[63] Public debate emerged highlighting perceived leniency in punishing serious crimes and that offenders were not serving an adequate amount of their sentences due to a sloppy parole policy.[64] The Constitutional Court's abolition of the death sentence in *S v Makwanyane*[65]

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59 South African Law Commission, *Discussion paper 91 (Project* 82) (SALC 2000) 3.

60 SALC *Discussion paper* 91 *3.*

61 SALC *Discussion paper* 91 *3.*

62 Edwin Cameron, 'Imprisoning the Nation: Minimum Sentence in South Africa' University of Western Cape Faculty of Law Dean's Distinguished Lecture <http://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%Nation19October2017.pdf> accessed 20 August 2022 at 5.

63 Cameron, Imprisoning the Nation 6.

64 Julia Sloth-Nielsen and Louise Ehlers, 'Assessing the impact: Mandatory and Minimum Sentences in South Africa' (2005) 14 SA Crime Quarterly 15.

65 *S v Makwanyane* 1995 (3) SA 391 (CC).

(hereinafter referred to as *Makwanyane*) is said to have instilled fear in many South Africans as they perceived that the death sentence served as an effective deterrent for crime, although that is not based on sound theory.[66] The Court in the *Makwanyane* case acknowledged the threats of a surge criminal activities and remarked that the level of vicious crimes in our country has reached disturbing proportions and poses a danger to the "…transition to democracy..."[67] This meant that criminals were beginning to undermine South Africa's efforts to transition into becoming a democratic state.

Many newspapers reported the desperation and dissatisfaction of the public concerning the increase in violent crimes. There were several reports of people being murdered, raped, and ill-treated either through political or gang-violence.[68] The general view of the public were that the government would never be able to deal with grave economic crimes and corruption if no new measures were put in place to deal with such.[69] The public called for harsh prison term sentence to be imposed on those who abuse children as this could serve as deterrence against child abuse.[70] It was reported that a member of the Correctional Services on one occasion informed the court that an offender serving a life sentence would automatically be considered for parole after serving 20 years of imprisonment.[71] The common public's sense of fear after 1994 was also exacerbated by the rapid weakening of institutional proficiency as regards the new democratic state.[72] It is said that the South African police force inherited by the first post-apartheid government were poorly trained as a result were considered to be failing to combat crime[73] There was repeated reformation of the police service which contributed negatively to its operational efficiency.[74] In essence, new inexperienced officers were tasked to deal with a surge in crime without

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66 Cameron, Imprisoning the Nation at 7.
67 Cameron, Imprisoning the Nation at 6 quoting *Makwanyane* para [117].
68 Eric Nzimande, 'Minimum Sentence Legislation in South Africa' (LLM Thesis, Nelson Mandela Metropolitan University January 2012) quoting *The Citizen* Thursday, 26 October 1995.
69 Nzimande, 'Minimum Sentence Legislation in South Africa' at 4 quoting The *Pretoria News* Thursday, 26 October 1995.
70 Nzimande, 'Minimum Sentence Legislation in South Africa' at 5 quoting *Sowetan* Friday, 10 November 1995.
71 Nzimande, 'Minimum Sentence Legislation in South Africa' at 5 quoting *The Citizen* Saturday, 25 November 1995.
72 Cameron, Imprisoning the Nation at 7.
73 Antony Altberker, *The Dirty Work of Democracy* (Jonathan Ball 2005) 261.
74 Altberker at 261-262.

adequate training. The public outcry resulting from the rise of crime mounted pressure on the government to put measures in place in order to deal with the problem.

2.2.1 Government response to public outcry and sentencing shortcomings

In an attempt to respond to sentencing problems, the Minister of Justice and Constitutional Development proposed that a project committee with the South African Law Reform Commission investigate South African sentencing practices and the possibility of passing mandatory minimum sentencing legislation.[75] The committee was named as The Van Heever Committee (hereinafter the Committee) named after a Judge who presided over it. The Committee produced its findings in the Issue paper 11 in 1997.[76] The committee scrutinized the sentencing regimes of other countries in order to establish the general justification of sentencing guidelines and mandatory minimum sentence in those nations.[77] The committee found that the justification by these nations[78] is informed by theories of retribution, incapacitation, reducing disparity and inducement of cooperation.[79] The committee after taking into consideration the South Africa's agony regarding sentencing leniency and disparity recommended the following solutions:

(a) Presumptive sentencing guidelines which would allow for the establishment of a sentencing committee to create sentencing guidelines,

(b) Voluntary sentencing guidelines which entail guiding the courts in the exercise of their sentencing discretion. With these types of guidelines, the Judiciary would not necessarily be bound by law to follow them,

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75 Sandra Roth M, 'South African Mandatory Minimum Sentence: Reform Require' (2008) 17 *MINN.J.INT'L.155 158* quoting Sloth-Nielsen and Louise Ehlers, 'A Pyrrhic Victory? Mandatory And Minimum Sentence in South Africa' (2005) Occasional Paper III.

76 South African Law Commission, Issue Paper 11 (*Project* 82) Mandatory Minimum Sentence (SALC 2007).

77 Roth, 'South African Mandatory Minimum Sentence: Reform Required' 159.

78 The committee specifically examined sentencing regimes of United States, Sweden, Germany, England, Canada and Greece. See the Issue Paper 11 at 32-59.

79 Retribution is said to originate from the old Testament in the Bible also termed as the law of vengeance "an eye for an eye", incapacitation relate to the notion that incarceration incapacitates criminals i.e they cannot commit crimes while in prison , minimum sentences are also perceived to have a possibility of reducing disparities in sentencing and also encourages the citizens to cooperate with the law; see Cameron, Imprisoning the Nation at 7.

(c) Implementation of legislative guidelines that can aid in determining the choice and length of punishment,

(d) Implementation of sentencing principles including guidelines which regulate the Imposition of imprisonment,

(e) Implementation of presumptive sentencing guidelines to assist when imposing custodial and non-custodial sentence, and

(f) Implementation of "mandatory minimum sentences combined with discretion to depart from the sentence under certain conditions". [80]

2.2.2 South Africa's adoption of the Implementation of mandatory minimum sentence with a discretion to depart under certain conditions

In implementing minimum sentence legislation, South Africa enacted section 51 to 53 of CLAA. These provisions were intended to be of temporary measures to address the increasing crime rate and were to be operational for a period of two years.[81] The passing of the CLAA took place under the backdrop of a variety of other legislative and policy shifts with the intention of dealing with the perception that government was not taking the crime problem seriously.[82] The CLAA operational period was repeatedly extended, ultimately section 53 was repealed and effectively section 51 was made permanent on 31 December 2007 by Criminal Law (Sentencing) Amendment Act.[83] Although the enactment of the CLAA was a good step in the right direction in an attempt to deal with increasing crime rate, some commentators were of the view that minimum sentences are generally 'poorly-thought, misdirected and ineffective to punishing criminals.[84] There is an argument that the enactment of the CLAA was purely a political response to counter the rising

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80 SALC Issue Paper 11 60-62, also see Roth, 'South African Mandatory Minimum Sentence: Reform Required' at 159.

81 Nzimande, 'Minimum Sentence Legislation in South Africa' 1.

82 This research will only focus on CLAA as part of other policy shifts, see Sloth-Nielsen and Ehlers, 'Mandatory and Minimum Sentence' 15.

83 Nzimande, 'Minimum Sentence Legislation in South Africa' at 1 quoting Criminal Law Sentencing) Amendment Act 38 of 2007; see Government Gazette 21122 GN 20, April 2000, Government Gazette 7059 GN 29, 30 April 2001, Government Gazette 24804 GN 40, 30 April 2003, Government Gazette 27549 GN 21, 29 April 2005, Government Gazette 29831 GN, 25 April 2007.

84 Cameron, Imprisoning the Nation at 5.

violent crime South Africa experienced when it transitioned to democracy.[85] The government is said to have been haste in enacting the CLAA and this was to inspire a belief that those who were responsible to deal with crime effectively were in fact taking action regarding the situation at the time.[86]

Section 51 (3) of the CLAA gives the judiciary a discretion to depart from the prescribed sentence as prescribed by legislation if they are satisfied that 'substantial and compelling' circumstances exist which permit the imposition of a lesser sentence. The judiciary has grappled and is still grappling to interpret what constitutes 'substantial and compelling circumstance'. Chapter 3 of this research will attempt to critically discuss the interpretation of the words substantial and compelling circumstances with reference to South Africa case law.

2.3 Reasons why CLAA was enacted

It is clear from the above discussion that the main aim for the enactment of the CLAA was an attempt by the government to deal with the rising violent crimes and to attend to the public outcry with regard to sentencing disparities. The abolition of the death sentence by the *Makwanyane* case caused the public to lose confidence in the government in that it will not be able to deal with violent crimes in the absence of the death penalty as a deterrent. This was the case although there was no supporting evidence that death sentence can serve as deterrent. The widespread public debate which culminated in reports by various newspapers also pressurised the government into responding to South Africa's sentencing problem and the need to impose harsher sentences on offenders of violent crimes.

2.4 Judicial discretion

Judicial discretion is said to be a vague concept not only to the general public, but to legal practitioners, academics and judges themselves.[87] It tends to become

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85 Goliath Alphonso, ' A short critique of minimum sentences': Obiter (2022) 43 Port Elizabeth 779-796 available from < http://www.scielo.org.za/scielo.php?script=sci_arttex&pid=S1682-585320220004000008&Ing=en&nrm=iso>.accessed 25 September 2023.

86 Cameron, Imprisoning the Nation 5-8.

87 Vincent Isaac Jameson, 'Structuring the exercise of sentencing discretion in South African Criminal courts' (LLD Thesis, North-West University 2018) at 22 quoting Arthur Selwyn Miller *The Supreme Court: Myth and Reality*.

ambiguous with regards to issues such as the determinacy and penal policies.[88] My submission is that the uncertainty is necessitated by the absence of precise definitive standard governing it. Criminal trial proceedings involve various facts, factors and features which may have some effect on the sentence which is to be imposed.[89] The judicial officer after taking into account all the facts and factors applies his or her mind and imposes an appropriate sentence in accordance with his or her discretion.[90] Some writers have defined the exercise of sentencing discretion as follows:

> [p]sychological process which commences with the separation or distinguishing of subject-matter by the exercise of discernment or judgement, upon which based a choice from amongst alternative courses of action, which choice is expected to be made in a judicious or sagacious manner.[91]

It is clear from the above quotation that judicial discretion entails the process in which a judicial officer makes a choice of what he or she deems an appropriate sentence based on the alternatives he or she is faced with. This can correctly be said to explain the reason why a different judicial officer presiding on the same matter with the same facts could arrive at a different decision.

The concept of judicial discretion is an old idea that can be traced back as far as when the monarchs were the rulers. It is said that criminal punishment was arbitrary and subject to the wishes of monarchs or nobles who were delegated by monarchs to punish.[92] As a result, there was no consideration for proportionality of the punishment since officials could impose capital punishment for almost every violation from murder to minor theft offences.[93] This means that monarchs had unlimited discretion to impose any sentence they deemed fit without necessarily considering the nature of the offence committed. It is also said that in the last quarter of the

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88 William W. Schwarzwer, *Judicial Discretion in Sentencing, 3 Federal Sentencing Reporter* 339 (1991) Available at <https://repository.uchastings.edu/facculty_scholarship/118> accessed 30 May 2023.

89 Stephan Terblanche, *A Guide to Sentencing in South Africa* (3rd edn, LexisNexis Durban 2016) 127.

90 Factors would include but not limited to personal circumstances of the offender, interest of The society, seriousness of the offence and the impact the crime has on the part of the victim.

91 Terblanche, *Guide to Sentencing in South Africa* at 128-129 quoting Lawrence Baxter *Administrative law* (1984) Juta Cape Town at 80.

92 Kieran Riley, 'Trial by legislation: Why Statutory Mandatory minimum Sentences violate the Separation of powers' (2009) 19 Int. LJ 285 287.

93 Riley, 'Trial by legislation' 287.

twentieth century, many state law making bodies adopted 'mandatory, determinate sentencing systems' which were carried out by the judges.[94] Although this removed discretion to impose any sentence, this strictly curtailed the possibility to modify the sentence to individual circumstances.[95] In other words, the prescribed mandatory sentence was imposed without considering the personal circumstances of the offender. As the rule of law developed, judges created rules and procedures that allowed them to avoid convicting offenders whom they did not consider fit for punishment.[96] Thus, judicial discretion developed.

In South Africa, as early as in the twentieth century the court(s) asserted that sentencing discretion belongs to the courts. For an example, in *R v Mapumulo* the court mentioned that:

> [t]he infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than the appellate tribunal.[97]

In *S v Mpetha*,[98] it was held that the courts value their sentencing discretion and are opposed to prescribed mandatory sentences which they view as detrimental to the proper administration of justice. My submission is that this indicates that the courts jealously guard against their sentencing discretion and are not receptive to mandatory sentences. This is true as the court in *S v Toms*; *S v Bruce*[99] was apprehensive about mandatory minimum sentence and remarked that:

> [It] reduces the court's normal sentencing function to the level of a rubber stamp. It negates the idea of individualisation. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence. Harsh and inequitable results inevitably flow from such situation. Consequently judicial policy is opposed to mandatory sentences as they are detrimental to proper administration of justice and the image and standing of the courts.

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94 Susan F. Mandiberg, 'Why Sentencing by a Judge Satisfies the Right to Jury Trial: A Comparative Law Look at Blakely and Booker' (2008) 40 McGeorge L. Rev 107.

95 Mandiberg, 'Why Sentencing by a Judge Satisfies the Right to Jury Trial' 107.

96 Mandiberg, 'Why Sentencing by a Judge Satisfies the Right to Jury Trial' 107 119.

97 Vincent Isaac Jameson, 'Structuring the exercise of sentencing discretion in South African Criminal courts' (LLD Thesis, North-West University 2018) 25 quoting R v Mapumulo 1920 AD 56.

98 *S v Mpetha* 1985 3 SA 705 (A) [710E].

99 *S v Toms; S v Bruce* 1990 2 SA 802 (A) [13].

The submission is that the views expressed by the court in the above quotation case are to some extent correct as mandatory sentences limits judicial discretion. Judicial officers are ordinarily expected to impose minimum sentences if they are prescribed by the legislation. For an example, judicial discretion in the context of the CLAA is provided for by section 51 (3) (a) of the Act. In terms of section 51 (3) (a) of the CLAA, courts have the discretion to depart from minimum sentence if there are substantial and compelling circumstances justifying the imposition of a lesser sentence in a given case. In *S v Dodo*,[100] (hereinafter referred to as *Dodo* case) the High Court challenged the constitutionality of section 51 of CLAA. The High Court decided that the provisions of the CLAA undermine the judicial independence and that the imposition of severe sentence falls within the exclusive discretion of the sentencing court.[101] However, the Constitutional Court disagreed with the fact that the imposition of heavy sentence fell within the exclusive discretion of the sentencing court and decided that this did not properly reflect the law.[102] My submission is that this means that judicial direction is in the present day viewed as not in conflict with the constitutions. It is important to note that the Constitutional Court has previously acknowledged the imperfection of our sentencing system. For an example, in *S v Makwanyane*[103] the court remarked about the existence of "lenient" and severe judicial officers. The submission is that this undoubtedly has the effect in the exercise of sentencing discretion.

2.5 Conclusion

This chapter has attempted to outline the historical background on the reasons why CLAA was enacted. It is clear from the discussion that there were various factors that led to the government passing the said legislation. The leading factor(s) were to deal with the rising violent crimes and to attend to the public outcry regarding sentencing disparities. The concept of judicial discretion was also discussed in view of the fact that section 51 of CLAA is titled 'discretionary minimum sentence for certain serious offences'. This indicates the relationship between judicial discretion and minimum sentence which will be discussed in Chapter 3 of this research.

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100 *S v Dodo* 2001 (3) SA 382 (CC).
101 *Dodo* case [8].
102 *Dodo* case [13].
103 *S v Makwanyane* 1995 2 SACR 1 (CC) [54].

CHAPTER 3
SUBSTANTIAL AND COMPELLING CIRCUMSTANCES AND THE EXAMINATION OF THE RELATIONSHIP BETWEEN JUDICIAL DISCRETION AND MINIMIM SENTENCE

3.1 Introduction

Section 51 (3) (a) of CLAA empowers the court(s) to depart from minimum sentence if it satisfied that 'substantial and compelling circumstances' exist which justify the imposition of a lesser sentence. This chapter begins by briefly discussing the court's views on why CLAA was passed. My submission is that it is important to understand the court's views in order to appreciate the fact that judicial officers held contradictory sentiments on what was the intention of the CLAA. Moreover, this chapter seeks to critically discuss the words 'substantial and compelling circumstances' with reference to South African case law. This part of the research also examines the relationship between judicial discretion and minimum sentence. The reader will be acquainted with the position of how the courts have interpreted the words 'substantial and compelling circumstances' prior to the seminal judgement of *Malgas* case as well as the position after the judgement.

3.2 Court's view about the purpose of CLAA

Earlier judgements after the passing of CLAA attempted to express views on the intention of the legislature. For example, in *S v Mofokeng and Another*[104] (hereinafter *Mofokeng* case) the court opined that the intention of the legislature was to dissuade perpetrators and potential perpetrators through the imposition of severe sentence.[105] In *S v Montgomery*[106] *(*hereinafter *Montgomery* case*)* the court held that the intention

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104 *S v Mofokeng and Another* 1999 (1) SACR 450 (C).

105 *Mofokeng* [454 C].

106 *S v Montgomery* 2000 (2) SACR 318 (N) [322 H], also see *S v Blaauw* 1999 (2) SACR 295 (W) [303 A], (*S v Majafela and another*: Unreported judgement of the Witwatersrand Local Division delivered 22 October 1998.

of the CLAA was to prevent 'surprisingly' incongruent sentences by different courts for certain offences. In other words, the court was of the view that the objective of the legislature was to prevent sentencing disparities. In *S v Homareda*[107] (hereinafter *Homareda* case) the court expressed the view that deterrence and retribution theories were the main foundation of CLAA. In its remarks, the court was however not convinced that these intended objectives can merely be achieved through prescribed minimum sentence since it had failed in the past in respect of offences relating to drugs and drug trafficking.[108] My submission is that the views expressed in this case ought to be supported as one could correctly wonder on why it could be believed that the CLAA could achieve its objective if prescribed sentences failed in the past.

It is apparent from the above brief discussion that the courts held contradictory views on what was the intention of CLAA. A further example can be noted in *S v Zitha*[109] (hereinafter *Zitha* case) where the court held that the purpose of CLAA was not to promote uniformity in sentences as the legislation was of a temporary nature. I submit that that the views expressed in *Mofokeng* and *Montgomery* case are correct and are in accordance with the CLAA preamble.[110] In *Homareda* case, the court was doubtful that prescribed minimum sentence can achieve deterrence since it has failed in the past. Although the views in *Homareda* case are to be supported, my submission is that that the court ought to have taken the argument further and provide solutions on what could serve as deterrence if the prescribed minimum sentence cannot serve as such. Similarly, it is my further submission that the views expressed in *Zitha* case are correct in so far as they relate to the temporary nature of CLAA, but, the fact that the CLAA was intended to operate for a shorter period does not mean that it was not intended to promote uniformity.

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107 *S v Homareda* 1999 2 SACR 319 (W) [324 h).

108 *Homareda* [325].

109 *S v Zitha* 1999 2 SACR 404 (WLD) [409e-g].

110 Preamble Act 105 of 1997 provides ' for minimum sentences for certain serious offences' (amongst other things).

3.3 Interpretation of 'substantial and compelling circumstances' before the Malgas judgement

The interpretation of the words 'substantial and compelling circumstances' has long been the subject of debate. This debate resulted in a wide range of interpretation as the courts developed three different extremes of what constitutes 'substantial and compelling circumstances'.[111] The *Mofokeng* case was the first judgement where the court held that the words 'substantial and compelling circumstances' left the court with almost no discretion and that the court was obliged to impose the minimum sentence. The court held that:

> [I] consider it to be clear enough that, for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstances that are exceptional in nature and that so obviously exposes the injustice of the statutory prescribed sentence in the particular case, that is can rightly be described as "compelling" the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.[112]

The court in this case held the view that 'substantial and compelling circumstances' are factors that are uncommon and extraordinary in that the 'Parliament cannot be thought to have had in contemplation when prescribing standard penalties for certain crimes'.[113] In this case, Stegmann J opined that factors that would ordinarily be considered as aggravating or mitigating circumstances cannot be simply assessed in order to determine if they amount to 'substantial and compelling' circumstances that justify the departure from minimum sentence, unless they are 'unusual and exceptional'.[114] The court also remarked that to consider circumstances that are usual and not exceptional would mean that the court preferred its own judgement to that of Parliament and that it would compromise the integrity of the courts.[115] I submit that the *Mofokeng* interpretative approach is flawed since the CLAA do not make provisions that circumstances must be 'exceptional' in order to justify departure from minimum sentence.

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111 South African Law Commission, *Discussion paper 91 (Project* 82) (SALC 2000) 11.
112 *Mofokeng* [523c-d].
113 *Mofokeng* [524d].
114 *Mofokeng* [524d].
115 *Mofokeng* [523b].

My further submission is that the *Mofokeng* approach was incorrectly followed in *S v Segole*[116] where the court held that 'substantial and compelling circumstances' are circumstances that are 'exceptional' in that they reveal the injustice of the prescribed sentence to induce the conclusion that a lesser sentence than that prescribed is justified. My submission is that this interpretative approach is faulty as it is already pointed out that the CLAA do not make provisions that the circumstances must be 'exceptional' to justify departure from minimum sentence. The submission is that the *Mofokeng* case clearly eliminates the courts sentencing discretion. This is so in the light of the fact that in order for mitigating circumstances to have weight in sentencing, they had to be considered 'unusual' and 'extraordinary' before they can be viewed as 'substantial and compelling' to justify departure from the prescribed sentence. In other words, not much weight is attached by the court to the mitigating and aggravating circumstances if they are not 'exceptional' and 'unusual'. Although it could correctly be argued that this approach may result in consistency in sentencing, this would however mean that the judicial officer's role in sentencing will be to rubber stamp the prescribed sentence as stipulated in the legislation passed by Parliament.

The second extreme is the judgement in *Majafela*[117] case where the court held that notwithstanding the fact that the Parliament has passed CLAA, the starting point in sentencing remained that consideration had to be given to all aggravating and mitigating factors in a traditional way. This means that the view of the court was that CLAA was introduced in an attempt to introduce a measure of conformity in sentencing process and should not be regarded as introducing a major change in the approach to sentencing.[118] My submission is that this approach needs to be supported since it ensures that judicial officers engage in proper weighing and balancing of both aggravating and mitigating circumstances. This approach was correctly followed in an unreported case of *S v Cimani*[119] where Jones J remarked that he would attempt to define 'substantial and compelling circumstances' and held that:

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116 *S v Segole* 1999 2 SACR 115 (W).
117 *Majafela* case quoted extensively in *Blaauw* case at [305i-306i].
118 SALC *Discussion Paper* 91 12.
119 *S v Cimani* Unreported judgment of the ECPD, case CC/99, delivered on 28 April 1999.

> In every case, however, the nature of the circumstances must convince the reasonable mind that a lesser sentence is a proper sentence and that it is justifiable when regard is had to the aggravating and mitigating features attendant upon the commission of what it already classified by the law-giver as amongst the most serious of offences and the interest of society weighed against the interest of the other.[120]

Jones J's Judgement reasserts the traditional sentencing principles by weighing both aggravating and mitigating factors in order to determine whether 'substantial and compelling circumstances' are present in a given case.[121] Similarly this was the approach in *S v Mthembu*[122] where the court opined that the legislature did not intend that 'substantial and compelling circumstances' imply stricter criteria than those previously regarded as mitigating factors. My submission is that this is a much lenient approach compared to the first extreme of interpretation as discussed above.

The third extreme is said to fall somewhere between the two of the above mentioned approaches.[123] In this approach, the court in *Blaauw*[124] case held that CLAA did narrow the courts sentencing discretion and it did so severely than if the court had merely had to find that there were "circumstances" that justified it from departing from prescribed sentence. The court went on and held that the Parliament had not defined the meaning of 'substantial and compelling' as qualifiers of circumstances. Furthermore, the legislature did not specify that the circumstances should be 'exceptional'. In order to determine if a departure was allowed, the court needed not to look for exceptional circumstances but at the accumulative effect of all aggravating and mitigating factors of the case.[125] This assessment correctly calls for a balanced consideration of both mitigating and aggravating circumstances and it is an approach that needs to be supported.

In *S v Boer,*[126] in assessing whether substantial and compelling circumstances are present, the court considered the seriousness of the offence against the mitigating factors of the accused persons. In this case, the court found that the seriousness of

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120 *Cimani* Case [paragraph number not specified].
121 SALC *Discussion Paper* 91 13.
122 *S v Mthembu* Unreported judgement, case number 365/98.
123 Vincent Isaac Jameson, 'Structuring the exercise of sentencing discretion in South African Criminal courts' (LLD Thesis, North-West University 2018) 139.
124 *S v Blaauw* 1999 (2) SACR 295 (W).
125 *Blaauw* at [311a-h].
126 S *v Boer 2000* (2) SACR 114 (NC).

the offence outweighed the mitigating factors, thus, imposing the prescribed sentence. This was a similar approach followed by the court in In *S v Jansen*[127] where it held that less severe injuries to a rape victim make the case to be a less serious one compared to other rape cases, as a results, that amounts to the existence of 'substantial and compelling circumstances' justifying the departure from the prescribed sentence.[128] In this approach, the courts put more weight to the mitigating factors to assess whether they justify departure from the minimum sentence. This approach fails to take into account a balanced approach of weighing both mitigating and aggravating circumstances. This reasoning was also adopted by the court in *S v Abrahams*[129] where the court held that a father who is the offender for raping his own daughter and who was not a threat to the society is an example of the existence of 'substantial and compelling circumstances' which justifies departure from minimum sentence.

The above discussion shows that after the passing of CLAA, the courts differed in the interpretation of 'substantial and compelling circumstances'. This prompted the Supreme Court of Appeal (hereinafter SCA) in *S* v *Malgas*[130] to enunciated guidelines to be followed when interpreting what constitutes 'substantial and compelling circumstances'.

3.4 The Malgas judgement

In this case a 22 year old woman was convicted of murder in the South Eastern Cape Local Division of the High Court and sentenced to life imprisonment.[131] The facts of the case were that the appellant shot the deceased in the head while he lay asleep at his home. The appellant had been living for about a month in the deceased house together with him, his wife Carol and their children.[132] The nature of the appellant's relationship with the deceased was unclear; however, she testified that the night before the deceased was shot he had assaulted her because he believed

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127 *S v Jansen* 1999 (2) SACR 368 (C).
128 *Jansen* [378g].
129 *S v Abrahams* 2001 2 SACR 116 (C) [121e].
130 *S v Malgas* 2001 (1) SACR 469 (SCA).
131 *Malgas* [26].
132 *Malgas* [26].

she had been sexually involved with another man.[133] Leave to appeal her sentence was granted by the court of first instance. The court a *quo* in sentencing the accused remarked that there was a lack of unanimity in the interpretation of CLAA and regarded it to be bound by the *Mofokeng* case where it was found that: for substantial and compelling circumstances to be found, the facts of a particular case must present circumstances that are 'exceptional' in nature.[134] The court in this instance could not find 'exceptional' circumstances, thus, life imprisonment was imposed.

On appeal, the court disagreed with the view that 'circumstances' in a case ought to be 'exceptional' in order to warrant deviation from the prescribed sentence. The court remarked that the CLAA does not make provisions for circumstances to be 'exceptional' for the court to depart from prescribed sentence.[135] Thus, the court of first instance blundered in making such findings.[136] The appeal court in its attempt to interpret the words 'substantial and compelling circumstances' provided detailed guidelines as follows:

> (A) Section 51 has limited but not eliminated the court's discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
>
> (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 the flimsy reasons. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubt as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degree of participation between co-offenders are to be excluded.
> (E) The legislature has deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence.
> (F) All traditional factors taken into account in sentencing continue to play a role; none is excluded at the outset from consideration in the sentencing process.
> (G)The ultimate impact of all circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as

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133 *Malgas* [26].
134 *Malgas* [30].
135 *Malgas* [31].
136 *Malgas* [31].

cumulatively justify a departure from the standardised response that the legislature has ordained.
(H) In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
(I) If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
(J) In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed.[137]

Although the appeal court in *Malgas*[138] case deliberately decided against defining 'substantial and compelling' in greater detail, the Constitutional court in *S v Dodo*[139] endorsed the view that the court should weigh all considerations traditionally relevant to sentencing. The *Malgas* interpretation was likewise endorsed in a number of cases with some modification while other judgements criticised the interpretation. My submission is that the Malgas guidelines are assisting in regard to what factors are to be taken into account when interpreting the words 'substantial and compelling'. However, my further submission is that the failure to define the words is worrying as the courts will continue to be uncertain on what exactly constitutes 'substantial and compelling circumstances'.

3.5 Post Malgas case law on interpretation of 'substantial and compelling circumstances'

The case of *S v Vilakazi*[140] (hereinafter Vilakazi) confirmed the *Malgas* guidelines and emphasised the importance of proportionality by making reference to the Constitutional Court judgement in *Dodo*[141] case. The court in *Vilakaz*i commented that punishment must always be proportionate to the "deserts" of the particular offender, no less, but also no more.[142] The court went on and held that proportionality was the "essence of *Malgas* and *Dodo"* and that the court is not obliged to perpetrate the injustice by imposing a sentence that is disproportionate to

137 *Malgas* [25 a-j].
138 *Malgas* [18].
139 *S v Dodo* 2001 (1) SACR 594 594 (CC) [11].
140 *S v Vilakazi* 2009 (1) SACR 552 (SCA).
141 *Dodo* [38].
142 *Vilakazi* [3].

the particular offence.[143] When the court is of the view that the prescribed sentence would be unjust, it is permitted to impose a lesser sentence as was noted in the *Malgas* case.[144] The court further affirmed the view in *Malgas* that all relevant traditional circumstances must be taken into account in sentencing.[145] *Vilakazi* judgement endorses *Malgas* guidelines in many aspects, however, it is criticised for its failure to reflect the emphasis of *Malgas* that prescribed sentences should be the starting point of departure.[146] In other words, the court failed to take into account other principle guidelines of *Malgas* case. Some commentators observe that the courts ordinarily neglect the important elements of the *Malgas* assessment.[147] In *DPP KZN v Ngcobo*,[148] the SCA commented that the guideline principles in *Malgas* case are the starting point when assessing whether to depart from prescribed sentence and that these guidelines are uncomplicated. My submission is that this means that it should not be difficult for the courts to take into account all of the *Malgas* principles when assessing whether there is a justification to depart from the prescribed sentence.

Commentators argue that the *Malgas* guidelines are modified by the courts in order to suit the realities of a particular case.[149] The other view is that the interpretation of 'substantial and compelling' had not being ''textually'' interpreted but had been consigned to the effect of an instinctive reaction and response.[150] In other words, *Malgas* judgement did not define what amounts to substantial and compelling but rather suggested an approach on how the judicial officers should react when faced with the problem of assessing whether departure from minimum sentence is justified or not. There is also a view that the statement in *Malgas* that the courts should not

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143 Stephan Terblanche, *A Guide to Sentencing in South Africa* (3rd edn, LexisNexis Durban 2016) quoting *Vilakaz*i [20].

144 *Vilakazi* [14-15], also see *S v Mqikela* 2010 (2) SACR 589 (GNP) [3], *S v MM* 2011 (1) SACR 510 (GNP) [5].

145 *Vilakazi* [15].

146 Terblanche, *Guide to Sentencing in South Africa* at 80.

147 Terblanche, *Guide to Sentencing in South Africa* at 83.

148 *DPP v Ngcobo* 2009 (2) SACR (SCA) [12].

149 Jamil Damulira Mujuzi, 'The prospect of rehabilitation as a "substantial and compelling" circumstance to avoid imposing life imprisonment in South Africa: a comment on *S v Nkomo*' (2008) 1 SACJ 2.

150 Vimbai Chikoko, 'The Interpretation of 'Substantial And Compelling' By South African Courts And Comparison with Minnesota Sentencing Guidelines' *(*LLM Thesis, University of KwaZulu-Natal 2016) 144 quoting *S v Kgafela* 2001 (2) SACR 207 (B).

depart from minimum sentence for flimsy reasons is a least useful guideline as no court will depart and give reasons for such departure satisfied that those reasons are flimsy.[151] My submission is that the argument can even be taken further in that ordinarily there could be no judicial officer who would admit to have departed from prescribed sentence for flimsy reasons even if they knew that was a fact.

The case of *S v Matyityi*[152] is said to be one of the cases that also failed to consider all of the *Malgas* guidelines in its judgement and selectively considered certain principles and ignored others. Some writers probe the question that it is possible that the criteria set in *Malgas* case are deliberately disregarded.[153] The long-term effect of this will result in a sentencing scheme that misuses factors to depart from prescribed sentence.[154] The SCA in *S v Nkomo*[155] modified the *Malgas* guidelines and found that prospects of rehabilitation constitutes 'substantial and compelling circumstances'. Theron AJA dissented (for the minority judgement) and held that 'there can be hardly any person of whom it can be said that there is no prospect of rehabilitation'.[156] The minority judgement went on and held that they could not agree in this case that the prospects of rehabilitation are 'truly convincing' reasons to depart from the prescribed sentence.[157] Thus, the court held against the *Malgas* guidelines where it was held that courts should not entertain 'speculative hypothesis favourable to the offender' (amongst other things).[158] This, I submit indicates that judicial officers are still uncertain on what should or should not constitute substantial circumstances. Mujuzi argue that if rehabilitation is to be embedded in South African Criminal law jurisprudence, the SCA need to define the criteria to be used in determining whether persons are capable of rehabilitation.[159] In *S v Bailey*,[160]

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151 Steven Terblanche, 'Sentencing: Annual Survey of South African Law' (2011) 1 Juta's Law Journals1186, 1206-1207.

152 *S v Matyityi* 2001 (1) SACR 40 (SCA) quoted by Terblanche, *Guide to Sentencing in South Africa* at 81.

153 Mujuzi, 'The prospect of rehabilitation' at 2

154 Nicole Kubista ' Substantial and Compelling Circumstances' Sentencing of rapists under mandatory minimum sentence scheme: comment (2005) 1 South African Journal of Criminal Justice 18 77 85.

155 *S v Nkomo 2007* (2) SACR 198 (SCA) [13].

156 *Nkomo* [30].

157 *Nkomo* [31]

158 *Malgas* [25d]

159 Mujuzi, 'The prospect of rehabilitation' 1.

160 *S v Bailey* 2013 (2) SACR 533 (SCA) [21].

(hereinafter *Bailey* case) the court commented that the most difficult question to answer is always a question of what are 'substantial and compelling circumstances'. My submission is that this problem is exacerbated by the fact that there is no definition of the words substantial and compelling circumstances.

3.6 Relationship between judicial discretion and minimum sentence

It is already indicated in Chapter 2 above that section 51 of CLAA is titled 'discretionary minimum sentence for certain serious offences'. This means that judicial officers are expected to exercise sentencing discretion to determine whether substantial and compelling circumstances exist which justifies departure from the prescribed sentence. In *S v Pieters*,[161] the court commented that sentencing discretion should be exercised 'judiciously' and 'reasonably'. This view was supported in S v *PB*[162] case where the court held that the discretion must be exercised judiciously in accordance with recognised valid principles governing sentencing in prominent cases such as *Malgas*. The problem is that discretionary principles are not exact.[163] In other words, there are no defined principles governing it. Invariably a suggestion is found that the sentencing discretion exists in order to allow the judicial officer to do as she considers fit.[164] In *S v Makwanyane*[165] the court remarked that the values and basic philosophy of the person exercising the discretion always influence the end results of the case. This means that the interpretation of the existence or non-existence of substantial circumstances will always be informed by the subjective point of view of the judicial officer concerned. I submit that this may continue to perpetuate sentencing inconsistency. The absence of sentencing consistency is said to be a major problem in South Africa.[166]

Some commentators argue that prescribed minimum sentences are generally designed to eliminate judicial discretion in choosing amongst various punishment

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161 *S v Pieters* 1987 (3) SA 717 (A) [727 G-H].
162 *S v PB* 2013 (2) SACR 553 (SCA) [19].
163 Terblanche, *Guide to Sentencing in South Africa* at 132.
164 Terblanche, *Guide to Sentencing in South Africa* at 135.
165 *S v Makwanyane* 1995 (3) SA 391 (CC) [54].
166 Steven Terblanche, 'Sentencing guidelines in South Africa': Lessons from elsewhere (2003) 4 South African Law Journal 858.

options.[167] The ambiguous 'substantial and compelling circumstances' standard and the failure of the Parliament to define the term has undermined the CLAA's attempt to promote consistency in sentencing.[168] It is my further submission that the argument that minimum sentences are designed to eliminate judicial discretion is not entirely correct. Although the CLAA limits judicial discretion to some extent, the legislation is not designed to completely eliminate judicial discretion. This is so as section 51 of CLAA is itself titled 'Discretionary minimum sentences for certain serious offences'. Thus, section 51 of CLAA clearly calls for the judiciary to exercise their discretion when faced with the question on whether to impose minimum sentence or not. However, it can correctly be argued that the failure of the legislature to define the words 'substantial and compelling' circumstances undermines the CLAA's efforts to promote consistency in sentencing. Consistency in sentencing was one of the reason the Parliament enacted CLAA.[169]

3.7 Conclusion

The interpretation of substantial and compelling circumstances continues to be the subject of debate. Courts are still differing about what factors are to be taken into account when interpreting the words. The problem is exacerbated by the sentencing discretion which itself do not have exact principles governing it. South Africa has alternative opportunities that have the potential to achieve punishment objectives and strike an appropriate balance between judicial discretion and legislative oversight.[170] Chapter four of this paper examines whether the CLAA has achieved its intended objectives to deter violent crime and reduce sentencing disparities. The next chapter five will be discussing the conclusion to the research and recommendations.

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167 Esther Gumboh, 'Examining the application of Deterrence in Sentencing in Malawi' (2017) 20 PER/PELJ <https://www.ajol.infor/index.php/pelj/article/view/165876> accessed 23 January 2023 6.

168 Julia Sloth-Nielsen and Louise Ehlers, 'A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa' [2005] Occasional Paper III 12.

169 Sandra Roth M, 'South African Mandatory Minimum Sentence: Reform Require' (2008) 17 *MINN.J.INT'L.*155 167.

170 Roth, 'South African Mandatory Minimum Sentence: Reform Required' 182.

CHAPTER 4

EXAMINATION OF WHETHER CLAA HAS ACHIEVED ITS INTENDED OBJECTIVES TO DETER VIOLENT CRIME AND REDUCE SENTENCING DISPARITES

4.1 Introduction

The aim of mandatory minimum sentence is said to ensure that 'consistently heavier sentences' are imposed.[171] Severe and longer terms of imprisonment are believed to combat crime and serve as deterrence.[172] My submission is that the objective of the prescribed minimum sentence was to achieve penal consistency through the imposition of tougher sentences with the view to deter prospective offenders.

This chapter seeks to examine whether the CLAA has achieved its intended objectives to deter violent crime and reduce sentencing disparities. The chapter begins by briefly discussing the overview objections on the CLAA. It is important to understand the general impression of how the CLAA was welcomed. Moreover, this chapter seeks to show that the CLAA has failed to increase satisfaction with criminal sentencing. This part of the research argues that the CLAA has not achieved South Africa's sentencing objectives.

4.2 A brief overview of objections on the CLAA

The court in *S v PB*[173] (hereinafter referred to as *PB* case) remarked that criminal behaviour is still on the upsurge in our country in spite of the imposition of prescribed minimum sentences. Commentators are said to have persistently warned since the inception of CLAA that it was not going to have an effect on crime rate.[174] Judge Edwin Cameron assert that the idea of increasing the harshness of punishment in

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171 *S v Dodo* 2001 (1) SACR 594 (CC) [11].

172 Goliath Alphonso, ' A short critique of minimum sentences': Obiter (2022) 43 Port Elizabeth 779-796 available from < http://www.scielo.org.za/scielo.php?script=sci_arttex&pid=S1682-58532022000400008&lng=en&nrm=iso>.accessed 31 October 2023.

173 *S v PB* 2011 (1) SACR 448 (SCA) [10].

174 Steven Terblanche, 'Sentencing: Annual Survey of South Africa Law' (2011) 1 Juta's Law Journals1186,1198 quoting Stephan Terblanche, 'Mandatory and Minimum Sentencing: Considering s 51 of the Criminal Law Amendment Act 1997' (2003) 1 *Acta Juridica* 194, 218-219.

order to deter crime is 'intellectually appealing', but, regrettably it is not supported by any evidence.[175] In other words, there is no shred of evidence supporting the fact that tougher sentences can combat violent crime. Sentencing experts who have studied the use of minimum sentences around the world have also come to the finding that there is no demonstrable link between crime rates and the length of prison terms.[176] There is a general consensus amongst sentencing experts against minimum sentence legislation.[177] The argument is that they make insignificant impact in reducing violent crime, achieving sentencing consistency and addressing the public opinion that sentences are not adequately severe.[178]

My submission is that it is with no doubt that the CLAA has not produced positive results in preventing violent crime. This is so as it can be noted that judicial officers are also of the view that 'criminality is still on the rise in our country, despite the imposition of the minimum sentences'.[179] However, it can correctly be argued that on the other hand the government cannot be entirely faulted by introducing minimum sentence legislation in order to combat violent crime and reduce sentencing disparities. The government could not have anticipated that the CLAA would be ineffective in combating violent crime. In other words, Parliament could not have deliberately enacted legislation that it knew would be ineffective. This, nonetheless, does not take away the fact that CLAA has failed to deter violent crime and reduce sentencing disparities as it will be demonstrated in 4.3 below.

4.3 CLAA's failure to deter violent crime and reduce sentencing disparities

Supporters of mandatory minimum sentences contend that this type punishment deter crime and prevent people from harming others.[180] This judgment is said to be based on a rational-choice theory which assumes that offenders, before committing

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175 Edwin Cameron, 'Imprisoning the Nation: Minimum Sentence in South Africa' University of Western Cape Faculty of Law Dean's Distinguished Lecture <http://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%Nation19October2017.pdf> accessed 31 October 2023 14.

176 Terblanche, 'Annual Survey of South African Law' 1198.

177 Cameron, Imprisoning the Nation 14.

178 Sloth-Nielsen and Louise Ehlers, 'A Pyrrhic Victory? Mandatory And Minimum Sentence in South Africa' [2005] Occasional Paper III 20.

179 *PB* case [10].

180 Cameron, Imprisoning the Nation 14.

a crime, consider the harshness of punishment and the likelihood of being caught.[181] This perception assumes that just because certain offences carry a heavy sentence that on its own is enough to deter criminals from committing violent crimes. Thus, tougher sentences serve as deterrence. Unfortunately, there is no proof which supports such an assumption as it is already pointed out in Chapter 4 above. Criminals are largely not deterred by severer sentences; it is only the probability that a criminal will be "caught and prosecuted" that deters offenders.[182] In other words, 'it is the certainty of punishment rather than the severity of the sentence that is likely to have the greatest deterrent effect'.[183] This means that if criminals know as a matter of fact that they will be apprehended when they engage in criminal activities that could serve as deterrence and stop them from committing such offences. There is an argument that the latest crime statistics reveal that almost every single crime has increased considerably year on year since 2018.[184] It was also reported that crime statistics for the period October to December 2022 reveal a significant increase in murders compared to the previous quarter.[185] Murder is with no doubt a violent crime. Home robberies are also regarded as violent crime and are reported to have increased.[186] One of the objectives of the CLAA was to deter violent crime and these statistical revelations show that it has failed dismally to combat violent crime. This, I submit that it is concerning and it is an indictment for South African government to seriously consider new sentencing reforms.

The South African Law Commission (SALC) in its research on minimum sentences also concluded that the CLAA has not meaningfully deterred violent crime and

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181 Alphonso, 'A short critique of minimum sentences' [page numbers omitted].

182 Cameron, Imprisoning the Nation at 16 quoting Antony N Doob, Cheryl Webster, and Rosemary Gartner 'Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation', Criminological Highlights, 14 Feb 2014, at A-2 to A-3, available at <http://criminology.utoronto.ca/wp-content/uploads/2013/09/DWG-GGeneralDeterrenceHighlights14Feb2013pdf>

183 Cameron Imprisoning the Nation 15.

184 Andrew Whitfield, 'SA Crime Stats: The 90 Day Bloodbath' (June 2022) available at <http://www.da.org.za/2022/06/sa-crime-stats-the-90-daybloodbath#text=according%20latest%20crime,were%20raped%20every%20single%20day.> accessed 04 November 2023.

185 Khaya Koko, ' Crime Stats: Violence in South Africa is getting worse' *Mail & Guardian* (SA, 17 February 2023) available from <https://mg.co.za/tag/crime-stats/> accessed 22 November 2023.

186 Stats SA, Department: Statistics South Africa 'Republic of South Africa' *Crime in South Africa up in* 2022/2023 available from < https://www.statssa.gov.za/?p=16562 > accessed on 23 November 2023.

reduced sentencing disparities.[187] Criminality has worsened since the inception of CLAA and sentencing inconsistency still infiltrates the South African judicial system.[188] In other words, the introduction of the CLAA has not yielded the desired impact in so far as it relates to combating violent crime and reducing sentencing disparities. Terblanche argues that the CLAA has dominated South Africa's sentencing jurisprudence for the past two decades, but, it has nothing to show for itself.[189] I submit that this assertion paints a grim picture about South Africa's sentencing scheme and it is concerning that there are no interventions or measures taken by the government thus far. There is some truth to the argument that the CLAA was enacted 'hurriedly' to react to the worries of the newly democratic post-apartheid society and the rising crime.[190] In doing so, the South African government failed to conduct proper research on the effectiveness and the impact of mandatory sentences. This is evident as some of the reputable international sentencing expects have argued in the early 1990's in their respective countries that:

> The evidence is clear and weighty, that enactment of mandatory penalty laws has either no deterrent effect or a modest deterrent effect that soon waste away. Equally clear and consistent are findings that mandatory minimum laws provoke judicial and prosecutorial stratagems, usually by accepting guilty pleas to other non-mandatory penalty offences or by diverting offenders from prosecution altogether, that avoid their application.[191]

The recent research finding by Tonry explains that:

> No matter which body of evidence is consulted-the general literature on the deterrent effects of criminal sanctions, work more narrowly focused on the marginal deterrence hypothesis, or the evaluation literature on mandatory penalties-the conclusion is the same. There is little basis that mandatory penalties have any significant effects of on rates of serious crime.[192]

It is my further submission that the above research conclusions demonstrate that South Africa failed to adequately consider other research studies in regard to the impact and the effectiveness of mandatory minimum sentences. One has to further

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187 South African Law Commission, *Discussion paper 91 (Project* 82) (SALC 2000).

188 Sloth-Nielsen and Ehlers, Occasional Paper III 3.

189 Terblanche, 'Mandatory and Minimum Sentencing' 218.

190 Cameron, Imprisoning the Nation 22.

191 Michael Tonry, *Judges and Sentencing Policy-The American Experience in Sentencing*, Judicial Discretion and Training 137, 152 (Colin Munro & Martin Wasik eds., 1992).

192 Terblanche, 'Annual Survey of South African Law' at 1198 quoting Michael Tonry, 'The mostly unintended effects of mandatory penalties: Two centuries of consistent findings' Crime and justice 38 (2009) 1 65,100.

submit that this is why Sandra argues that 'the time has come for South Africa to renovate its sentencing system'.[193] A much more comprehensive sentencing reform initiative is needed and should be a matter of priority in our country.[194] There is also an argument that if South Africans are dissatisfied by the high rate of crime, 'we need to find a sentencing regime that leads to the reduction rather than the exacerbation of crime...'[195] In other words, since the introduction of the CLAA crime has worsened instead of been reduced.

The CLAA was also expected to reduce or eliminate sentencing disparities. Critics argue that the chance to depart from mandatory minimums where "substantial and compelling circumstances" exist has exacerbated the disparities and inconsistencies.[196] This means that instead of reducing sentencing disparities as intended, the CLAA has made the situation worse. It is argued that the failure to reduce sentencing disparities is occasioned by the ambiguous 'substantial and compelling circumstances' standard and the failure of the legislature to define the words.[197] This is evident as it is demonstrated in chapter 3 above that judicial officers are still unsure of what factors to take into account to determine whether substantial and compelling circumstances exist or not. The South African Criminal justice system appears to be no closer to achieving consistency in sentencing than in 1997.[198] My submission is that the country can only be closer to achieving sentencing consistencies if urgent reforms are implemented.

4.4 Dissatisfaction with criminal sentencing

There is an argument that the South African community as well as the South African judiciary have not entirely accepted the CLAA.[199] This is despite the fact that one of the reasons that convinced Parliament to implement CLAA was the public worries

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193 Sandra Roth M, 'South African Mandatory Minimum Sentence: Reform Require' (2008) 17 *MINN.J.INT'L.*155 163.

194 Julia Sloth-Nielsen and Louise Ehlers, 'Assessing the impact: 'Mandatory and Minimum Sentences in South Africa' (2005) 14 SA Crime Quarterly 20.

195 Alphonso, 'A short critique of minimum sentences' [page numbers omitted].

196 Sloth-Nielsen and Ehlers, Occasional Paper III 12.

197 Sloth-Nielsen and Ehlers, Occasional Paper III 12.

198 Sloth-Nielsen and Ehlers, 'Mandatory and Minimum Sentence' 20.

199 Sloth-Nielsen and Ehlers, Occasional Paper III 3.

regarding lenient sentencing practices.[200] This means that there is a general objection to the mandatory minimum sentence provision as provided for by the CLAA. Supporters of mandatory minimum sentences are said to be also not satisfied with how the judiciary interpret the words 'substantial and compelling circumstances'.[201] I opine that this is concerning as it is apparent that the CLAA basically do not enjoy any support, yet, nothing has been done about that. Some writers argue that although it is difficult to determine whether the government has addressed the issue of how the public view sentences, the studies reveal that the public fear of crime which is linked to how the public views the legislature has increased considerably over the years.[202]

4.5 Conclusion

The CLAA was enacted to deal with the rising violent crime and to reduce sentencing disparities in South Africa. It is apparent from the above discussion that there has been an escalation of violent crime and sentencing inconsistencies still persist. The CLAA has failed to achieve its intended objectives. The countries criminal justice system does not differ much from what it was before the enactment of CLAA.[203] Chapter five of this paper will be discussing the conclusion to the research and recommendations.

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200 Roth, 'South African Mandatory Minimum Sentence: Reform Required' 171.
201 Roth, 'South African Mandatory Minimum Sentence: Reform Required' 171.
202 Sloth-Nielsen and Ehlers, 'Mandatory and Minimum Sentence' 20.
203 Roth, 'South African Mandatory Minimum Sentence: Reform Required' 181.

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

As previously mentioned in Chapter 1, the aim of this research is to critically evaluate the impact of the minimum sentence on judicial discretion and also to examine whether the CLAA has achieved its objectives to deter violent crime and reduce sentencing disparities. Moreover, this paper intends to show that the introduction of CLAA has not achieved its intended sentencing objectives. It is necessary to show that the CLAA has not achieved its sentencing goals in order to demonstrate that there is a need for clear sentencing guidelines that can ensure consistency in sentencing.

5.2 Research findings

The dissertation looked to answer the following questions:

(a) Does CLAA limit sentencing discretion?
(b) How has the CLAA impacted on judicial discretion?
(c) How does the interpretation of substantial and compelling circumstances affect sentencing discretion?
(d) What is judicial discretion?
(e) Has the CLAA achieved its objectives to deter violent crime and reduce sentencing disparities?

It has been established in this research that section 51 of the CLAA is titled 'Discretionary minimum sentences for certain serious offences'.[204] This means that this section is itself calling for the judiciary to exercise their discretion when imposing the sentence. However, it is important to note that section 51 of the CLAA prescribe minimum sentence that can only be deviated from if 'substantial and compelling circumstances exist which justify the imposition of a lesser sentence'.[205] In other words, the courts are obliged to impose the prescribed minimum sentence if substantial and compelling circumstances cannot be found in a given case. The only instance where the court may impose discretionary sentence is when it deviates from

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[204] Section 51 of Criminal Law Amendment Act 105 of 1997.
[205] Section 51 (3) (a) of the CLAA.

the prescribed sentence owing to the existence of substantial and compelling circumstances in its assessment of the facts. It has already been submitted elsewhere in this paper that this limits the courts sentencing discretion. This aspect was also confirmed in a seminal judgement of *S v Malgas*[206] (hereinafter *Malgas* case) where the court remarked that section 51 of the CLAA has limited but not eliminated the court's discretion. For instance, a convicted offender for pre-meditated murder in terms of the CLAA has to be sentenced to life imprisonment.[207] This means that the legislature has already prescribed on how the offender concerned is to be sentenced. What is left, it is for the judiciary to make an assessment on whether there are substantial circumstances which could justify the imposition of a lesser sentence. In other words, the prescribed minimum sentence is the starting point as soon as the offender is convicted. My submission is that, that on its own limits sentencing discretion.

The words substantial and compelling circumstances in section 51 (3) (a) of the CLAA have impacted the exercise of judicial discretion in so far as it relates to the imposition of the sentence. This is so in the light of the fact that if there are no substantial circumstances which justify the imposition of a lesser sentence in a given case, the courts have no discretion but to impose the prescribed sentence as I have already mentioned above. This is true although it is the court that also exercises its discretion to determine whether substantial circumstances exist or not. The impact of minimum sentence on judicial discretion was acknowledged by the retired Judge Edwin Cameron where he remarked that the existence of the words 'substantial and compelling circumstances' in the CLAA have strictly reduced the power of the judiciary to determine the length of prison term for offenders.[208] The main problem is that there is no certainty of what constitute substantial and compelling circumstances.[209]

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206 *S v Malgas* 2001 (1) SACR 469 (SCA) [25 a].

207 Section 51 (1) of the CLAA.

208 Edwin Cameron, 'Imprisoning the Nation: Minimum Sentence in South Africa' University of Western Cape Faculty of Law Dean's Distinguished Lecture <http://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%Nation19October2017.pdf> accessed 25 November 2023.

209 See Chapter 1 and 3 of this paper.

The uncertainty of what amounts to substantial and compelling circumstances has also affected the courts sentencing discretion as the court are still unsure of what factors are to be taken into account to determine the existence or non-existence of substantial circumstances.[210] The court in *Malgas*[211] case attempted to enunciate guidelines on how to determine the presence or absence of substantial circumstances. This judgement was delivered in 2001; yet, the courts are still grappling on what exactly are substantial and compelling circumstances. It is with no doubt that the Malgas guidelines are failing to assist the courts in order to achieve consistency. This problem is exacerbated by the concept of judicial discretion which itself do not have exact principles governing it. Discretionary principles are not clearly defined and there is an argument that sentencing discretion exists in order to allow the judicial officers to do as they considers fit.[212] I submit that as long as there is no definition of what are substantial and compelling circumstances, sentencing disparities will continue to exist perpetually.

This research has also established that the CLAA has failed to deter violent crime and reduce sentencing disparities. The latest crime statistics as discussed in 4.3 above clearly reveal that violent crime has increased contrary to the objectives of the CLAA to reduce it. Writers have also commented that violent crime has increased since the inception of the CLAA.[213] It is important to note that the CLAA was enacted in 1997 with the view to deter violent crime. It is concerning that in 2023 violent crime is still on the upsurge as revealed by the crime statistics discussed above. Once again, this is a dismal failure on the part of CLAA in so far as it related to combating violent crime. The sentencing disparities are also persisting in our courts.[214] Some commentators argue that sentencing disparities and inconsistencies have worsened in relations to the offences targeted by the CLAA.[215] This is also a failure on the part of the CLAA as this was one of its objectives to reduce sentencing disparities.

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210 See Chapter 3 para 3.5 of this paper.

211 *Malgas* [25 a-j].

212 Stephan Terblanche, *A Guide to Sentencing in South Africa* (3rd edn, LexisNexis Durban 2016) 132-135.

213 Sloth-Nielsen and Louise Ehlers, 'A Pyrrhic Victory? Mandatory And Minimum Sentence in South Africa' [2005] Occasional Paper III 3.

214 Sloth-Nielsen and Ehlers, Occasional Paper III 3.

215 Sandra Roth M, 'South African Mandatory Minimum Sentence: Reform Require' (2008) 17 *MINN.J.INT'L.*155 167.

Moreover, the South African law Commission (hereinafter SALC) also conceded in its research on minimum sentence that the CLAA has not deterred violent crime or considerably reduce sentencing disparities.[216] The CLAA has failed to achieve its intended objectives to deter violent crime and reduce sentencing disparities.

5.3 Recommendations

The SALC has investigated South Africa's sentencing system and accepts that there is substance to the criticism of the CLAA.[217] One of the research findings was that there were significant inconsistencies in sentencing for serious offences and that this situation continues even after the coming into effect of the CLAA.[218] The argument that the good starting point for new sentencing reform in South Africa would be the review of the report by the SALC[219] needs to be supported. The SALC's report has proposals which can assist our courts to achieve sentencing consistency.

The following is therefore recommended:

1. A sentencing framework that will ensure partnership between the State and the public particularly the victims of the crime.[220] This will entail active participation of the victim of crime by testifying during sentencing stage in order to ventilate on how the offence committed has impacted them. Thus, ensuring a legislated victim impact statement. Moreover, the State should actively educate the nation about the consequences of engaging in criminal activities. In other words, the citizen should generally have certainty about applicable sentence for a particular offence. In addition, the State must have the political will and ensure that all law enforcement agencies are adequately trained and fit for the purpose to enforcing the law. My submission is that this will ensure that prospective offenders will have certainty of the applicable sentence for a particular offence and also appreciate that they will be caught should they engage in criminal activities. Effectively, prospective offenders will be deterred from committing crime.

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216 South African Law Commission, *Discussion paper 91 (Project* 82) (SALC 2000).
217 SALC *Discussion Paper* 91 20.
218 SALC *Discussion Paper* 91 10.
219 Alphonso, 'A short critique of minimum sentences'.
220 SALC *Discussion Paper* 91 22.

2. There must be clear legislated sentencing principles and guidelines which will assist the courts to achieve consistency. Writers have correctly commented that the absence of sentencing guidelines permits the sentencing discretion of the courts to be exercised in an inconstant way.[221] My submission is that this can enable the court to have a clear reference on what factors are to be taken into account when interpreting substantial and compelling circumstances.

3. There is also an argument for the establishment of the independent sentencing council where the judiciary should play a large role in the development of sentencing guidelines.[222] My submission is that it is not necessary for the establishment of such a council. This is so as the judiciary would now be involved in policy making which in turn they are also expected to apply in court.[223] In other words, the judiciary would participate in the development of the guidelines and also be the participants in the implementation of the guidelines in courts.

5.4 Conclusion

It is my submission that after critically analysing and taking into consideration the relevant sources of law consulted, the CLAA has failed to achieve its intended objectives to deter violent crime and reduce sentencing discretion. Moreover, this research has also established that there is a need for legislated sentencing principles and guidelines which can assist the courts to achieve consistency.

Word count: 16 568

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221 Vimbai Chikoko, 'The Interpretation of 'Substantial And Compelling' By South African Courts And Comparison with Minnesota Sentencing Guidelines' *(*LLM Thesis, University of KwaZulu-Natal 2016) at 145; also see SALC *Discussion Paper* 91 21.

222 SALC *Discussion Paper* 91 21.

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