

ARTICLES

The prospect of rehabilitation as a ‘substantial and compelling’ circumstance to avoid imposing life imprisonment in South Africa: A comment on *S v Nkomo*

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ABSTRACT

When the death penalty was declared unconstitutional in South Africa, the government enacted the Criminal Law Amendment Act in 1997 which, amongst other things, stipulated that a person convicted of some of the scheduled offences was to be sentenced to life imprisonment unless there were substantial and compelling circumstances. Many courts interpreted substantial and compelling circumstances in many different, and at times confusing, ways. The Supreme Court of Appeal clarified the meaning of substantial and compelling circumstance in the well-known *Malgas* case in which it held, inter alia, that courts should not lightly depart from imposing severe sentences, since the legislature had singled out the scheduled offences to be punished severely because they are serious offences. One of the criteria the Court set was that courts should not rely on ‘speculative hypotheses favourable to the offender’ to avoid imposing life sentences. However, recently, in the *Nkomo* case, the Court held that the prospect of rehabilitation of the offender is a substantial and compelling circumstance to justify the imposition of a lesser sentence. This article analyses rehabilitation as an objective of punishment and highlights the likely challenges associated with the approach the Court seems to be adopting.

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1. Introduction

When the death penalty was declared unconstitutional in the well-known Constitutional Court decision of *S v Makwanyane*,¹ the government reacted by introducing the Criminal Law Amendment Act (CLA)² which, amongst other things, provided that a person found guilty of some of the scheduled offences, in particular of the offences under Part 1 of Schedule 2, was to be sentenced to imprisonment for life unless there were substantial and compelling circumstances. The CLA did not define what amounted to substantial and compelling circumstances. Various courts gave it differing and confusing interpretations until the matter was 'finally' settled by the Supreme Court of Appeal in *S v Malgas*,³ which was approved by the Constitutional Court in *S v Dodo*.⁴ I put 'finally' in quotation marks because the recent decision of the Supreme Court of Appeal in *S v Nkomo*,⁵ which is the subject matter of this article, attests to the fact that until today, almost seven years since the Supreme Court of Appeal laid down the criteria that courts should follow to determine what amounts to substantial and compelling circumstances, the boundaries seemed to be shifting. It is possible that one could argue that the criteria set in *S v Malgas* are either being disregarded in some respects by the same court that set them or being modified to suit the realities of the situation. This note looks at three issues in relation to the CLA: the impact of the CLA on the South African criminal justice system; the new criterion of the 'prospect of rehabilitation' as a substantial and compelling circumstance; and the challenges facing rehabilitation as an objective of punishment. I argue that if rehabilitation is to be entrenched in South African criminal law jurisprudence, the Supreme Court of Appeal needs to define the standards to be used in determining whether persons are capable of rehabilitation if that is a factor determining the imposition of life imprisonment.

2. CLA and the realities of the situation from the life imprisonment perspective

The history of the CLA has been sufficiently dealt with elsewhere and thus it is beyond the scope of this article.⁶ However, what should be

¹ *S v Makwanyane* 1995 (3) SA 391 (CC).

² Act 105 of 1997.

³ *S v Malgas* 2001 (2) SA 1222 (SCA).

⁴ *S v Dodo* 2001 (1) SACR 594 (CC).

⁵ *S v Nkomo* 2007 (2) SACR 198 (SCA).

⁶ See M O'Donovan and J Redpath *The impact of minimum sentencing in South Africa* (2006) 10-12; NJ Kubista 'Substantial and compelling circumstances: Sentencing of rapists under the Mandatory Minimum Sentencing Scheme' (2005)1 *South African Journal of Criminal Justice* 77-8.

mentioned is that research has proved that the CLA has had some negative effects on the South African criminal justice system, at least from two angles: administration and the prison population. Two recent studies commissioned by the Open Society Foundation of South Africa are used to illustrate this point. In one study, titled *The Impact of Minimum Sentencing in South Africa*,⁷ the researchers illustrate that the CLA has led to overcrowding of prisons; it has led to delays and backlogs, 'some of which are linked to the referral of cases from regional to high courts.'⁸ Furthermore, victimization has also been identified as one of the problems associated with the CLA. Some of the above problems prompted the government to enact the Criminal Law (Sentencing) Amendment Act⁹ which, amongst other things, increases the jurisdiction of the regional courts by empowering them to sentence offenders to life imprisonment¹⁰ and ensures that people sentenced to life imprisonment have an automatic right of appeal to the High Court.¹¹ The Memorandum on the Objects of the Criminal Law (Sentencing) Amendment Bill suggested that the Act's aims in giving the regional courts jurisdiction to impose life sentences are

'to expedite the finalisation of serious criminal cases...and to avoid secondary victimisation of complainants, which, inter alia, occurs when vulnerable witnesses have to repeat their testimony in more than one court.'¹²

Another study, titled *The effect of sentencing on the size of the South African population*,¹³ vividly illustrates, as the title suggests, the effect the CLA has had on the prison population of South Africa and, in particular, on prisoners serving life sentences. The researchers illustrate that by January 1995 South Africa had 443 prisoners serving life sentences, and that by January 2005 the number had increased to 5,745.¹⁴ Thus, between January 1995 and January 2005, there was an increase of 1,197 percent in the number of prisoners serving life sentences.¹⁵ According to the official statistics provided by the Department of Correctional Services, at the end of November 2007 South

⁷ O'Donovan and Redpath op cit (n6) 77-8.

⁸ O'Donovan and Redpath op cit (n6) 83.

⁹ Act 38 of 2007.

¹⁰ Section 1 of the Criminal Law (Sentencing) Act that amended s 51(1)(a) and (b) of the CLA.

¹¹ Section 6 of the Criminal Law (Sentencing) Amendment Act, amending s 309 of the Criminal Procedure Act, 1977.

¹² See the *Memorandum on the objects of the Criminal Law (Sentencing) Amendment Bill*, Object 2.1.

¹³ C Giffard and L Muntingh *The effect of sentencing on the size of South African Prison population* (2006).

¹⁴ Giffard and Munting op cit (n13) 10.

¹⁵ Ibid.

African prisons were home to 7,793 prisoners serving life sentences.¹⁶ What is clear from the *Nkomo* case is that the Supreme Court of Appeal is relaxing the criteria set in the *Malgas* case to ensure that only those who 'deserve' life sentences get them. It has done so by invoking the prospect of rehabilitation as one of the substantial and compelling circumstances.

3. *S v Nkomo*

3.1. Facts

The appellant was convicted in the regional court of rape and kidnapping. The complainant testified that she was at the bar drinking a cold drink, given to her by the appellant, which he had laced with alcohol. The appellant forced her into a hotel room that he had hired, forced her to undress and raped her. The appellant locked her in the room and went back to the bar for more drinks. She attempted to escape from the room by jumping out of a window, fell some ten metres to the ground and injured her leg. Unfortunately, where she fell was where the appellant had been sitting and drinking. He forced her back into the hotel room and raped her four more times during the course of the night. He also forced her to perform oral sex on him and slapped her, pushed her and kicked her. He prevented her from leaving the room again by taking her clothes away. When the complainant managed to escape the following morning, she went straight away to the police station. The appellant was arrested and charged. The regional court sentenced him to a three year sentence on the kidnapping charge and referred him to the High Court for sentence on the charge of rape. The High Court did not find any substantial and compelling circumstances and sentenced the appellant to life imprisonment in terms of s 51(1) of the CLA.¹⁷ The appellant appealed to the Supreme Court of Appeal against the sentence.

3.2 Finding

The Supreme Court of Appeal (the majority) allowed the appellant's appeal and replaced the sentence of life imprisonment with that of 16 years imprisonment. Most importantly, the Court observed that

[t]he factors that weigh in the appellant's favour are that he was relatively young at the time of the rapes [he was 29 when he raped the complainant], he was employed, and that there may have been a chance of rehabilitation.¹⁸

¹⁶ Available at <http://www.dcs.gov.za/WebStatistics/> accessed on 15 February 2008.

¹⁷ Criminal Law Amendment Act 105 of 1997.

¹⁸ *S v Nkomo* supra (n5) at para 13.

Theron AJA dissented and held, amongst other things, that '[t]here is hardly any person of whom it can be said that there is no prospect of rehabilitation.'¹⁹ Theron AJA held further that she could not agree that the prospect of rehabilitation, of which there was no evidence, was a substantial and compelling circumstance 'within the meaning of that expression and [is] truly [a] convincing reason for departing from the minimum sentence ordained by the Legislature.'²⁰ Whereas the majority seemed to think that the prospect of rehabilitation amounted to a substantial and compelling circumstance, the minority did not agree. The question that one asks is: how does one determine what amounts to substantial and compelling circumstances? As mentioned earlier, when the CLA came into force different courts devised different interpretations of what amounted to substantial and compelling circumstances until the Supreme Court of Appeal in the *Malgas* decision laid down the criteria that should be used to determine what constitute substantial and compelling circumstances.

4. The *Malgas* criteria

The Supreme Court of Appeal in the *Malgas* case, in the now famous paragraph 25, set the following as the criteria that should be used by courts in determining whether there are substantial and compelling circumstances.

- 'A Section 51 has limited but not eliminated the courts' 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 flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
- E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the

¹⁹ *S v Nkomo* supra (n5) at para 30.

²⁰ *S v Nkomo* supra (n5) para 31.

- objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
- F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
 - G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial and compelling”) and must be such as 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 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 in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.’

4.1. Analysing *Nkomo* in the light of *Malgas*

The language of the *Malgas* case is very instructive. Courts have to make sure that those who have been found guilty of committing the scheduled offences are punished severely in order to reflect the intention of the legislature in enacting the CLA, unless there are substantial and compelling circumstances. This explains why the Court says that ‘the specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy... are to be excluded’ and that

‘courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment... as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.’

One needs to answer the question whether the prospect of rehabilitation as a substantial and compelling circumstance does not fall within the ambit of what the Supreme Court of Appeal termed ‘speculative hypotheses favourable to the offender’ and ‘undue sympathy.’ To answer this question, I discuss rehabilitation as an objective of punishment.

4.2 Rehabilitation as an objective of punishment

There are three major traditional objectives of punishment: retribution; deterrence; and rehabilitation. There is evidence that reconciliation²¹ and restorative justice²² are also increasingly being mainstreamed as

²¹ It has been argued that if the objective of punishment is reconciliation, then capital punishment cannot be considered to be punishment, because it makes it impossible for the offender and the victim to reconcile. See RA Duff, 'The Intrusion of Mercy' (2007) 4 *Ohio St J Crim L* 382. Drumbl observes that the International Criminal Tribunal for Rwanda to a lesser extent, has considered reconciliation also to be an objective of punishment. See MA Drumbl 'The ICTR and Justice for Rwandan Women' (2005) 12 *New Eng J Int'l & Comp L* 108. After the 1994 genocide in Rwanda the government established *Gacaca* courts with the hope that such courts 'can strike the balance between punishment and reconciliation...' See J Raper 'The Gacaca Experiment: Rwanda's restorative dispute resolution response to the 1994 Genocide' (2005) 5 *Pepp Disp Resol LJ* 36. For the countries where reconciliation has been used, see J Sarkin and E Daly 'Too many questions, too few answers: Reconciliation in transitional societies' (2004) 35 *Colum Hum Rts L Rev* 661-663.

²² A definition and some examples of restorative justice have been given: 'Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by the criminal behavior. It is generally accomplished through cooperative processes that include all stakeholders, hence its possible classification as a form of ADR. Some of the programs and customs typically identified with restorative justice include: victim-offender mediation, conferencing, circles, victim assistance, ex-offender assistance, restitution, and community service.' See J Zeleznikow and A Vincent 'Providing decision support for negotiation: The need for adding notions of fairness to those of interests' (2007) 38 *U Tol L Rev* 1207. It has been demonstrated that restorative justice is one of the important elements in the South African criminal justice system because it embodies important elements, such as an apology and *ubuntu*, which restore the dignity of both the perpetrator and victim. See JL Gibson, 'Truth, justice, and reconciliation: Judging the fairness of amnesty in South Africa' (2002) 46: 3 *AJPS* 542-3. It has been observed that '[a]dvocates of restorative justice (RJ) hypothesize that the diversion of criminal cases to RJ conferences should be more effective in lowering the rate of reoffending than traditional prosecution in court processing because the conferences more effectively engage the psychological mechanisms of reintegrative shaming and procedural justice.' See TR Tyler et al 'Reintegrative shaming, procedural justice, and recidivism: The engagement of offenders' psychological mechanisms in the Canbella rise drinking-and-driving experiment' (2007) 41 *Law & Soc'y Rev* 553. It has been argued that '...victim participation contract[s] some of the basic principles of restorative justice...that is to say, crime victims demand...increased penal sanctions along with other potentially repressive measures such as sexual offender registration, impinging on the rights of criminal offenders.' See V Barker, 'The politics of pain: A political institutionalist analysis of crime victims' moral protests' (2007) 41 *Law & Soc'y Rev* 664. It has been suggested that '[a] recent entry into the field of punishment, restorative justice, emphasizes cooperation between victim and offender in repairing the harm that has occurred to both.' See RR French, 'The Dalai Lama speaks on law' (2007) 55 *Buff L Rev* 667. For the challenges associated with restorative justice, see M Zernova, 'Aspirations of restorative justice proponents and experiences of participants in family group conferences' (2007) 47 *Brit J Criminology* 491-509.

objectives of punishment in some jurisdictions, including South Africa.²³ Researchers in KwaZulu-Natal have indicated that South Africa's Department of Correctional Services' officials are supportive of both reconciliation and restorative justice and they (the officials) propose that if implemented, reconciliation and restorative justice would address the problems of overcrowding and recidivism in South Africa.²⁴ However, Bezuidenhout has argued that much as restorative justice is increasingly being advocated in South Africa, 'there is no consensus amongst scholars regarding' its definition and meaning.²⁵ This is supported by the interviews carried out among magistrates and prosecutors in South Africa. Although they supported restorative justice, the researchers found that 'there were many misconceptions and uncertainties about various points of restorative justice', and thus many of them needed to be 'properly trained about the objectives and effectiveness of restorative justice...'.²⁶ Hargovan has suggested that much as restorative justice may be good for South Africa, and some mechanisms akin to present day models of restorative justice have been implemented by some South African communities for generations, it would be unsuitable for South Africa to just transplant restorative justice models from other parts of the world into the South African criminal justice system because they might not be effective. He therefore proposes that '[m]ore research is necessary into the relevance of various models and practice for South Africa.'²⁷

Simply stated, retribution takes a backward-looking approach to punishment. The offender is punished because he broke the law and he deserves to be punished for that.²⁸ Rabie and Strauss are of the view that retribution is the only justifiable theory of punishment, in

²³ See Department of Correctional Services *White Paper on Corrections in South Africa* (2005) paras 4.4.7; 5.2; and 6.1.2.

²⁴ PJ Potgieter *et al* 'Correctional officers' perception of restorative justice' (2005) 18 *Acta Criminologica* 40-53.

²⁵ C Bezuidenhout 'Restorative justice with an explicit rehabilitative ethos: Is this the resolve to change criminality?' (2007) 20:2 *Acta Criminologica* 43. For his definition of restorative justice see 44.

²⁶ J Prinsloo *et al* 'Views of the Judiciary on Certain Elements of Restorative Justice' (2003) 16 *Acta Criminologica* 64.

²⁷ H Hargovan 'Restorative Justice: Yesterday, Today and Tomorrow — Making Sense of Shifting Perspectives in Crime Control and Criminal Justice in South Africa' (2007) 20 *Acta Criminologica* 88.

²⁸ It has been observed that retribution aims at giving the convicted criminal 'his just deserts proportionate to the harms he inflicted...'. See MA Drumbl 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, The Geneva Conventions, and International Criminal Law' (2007) 75 *Geo Wash L Rev* 1170. It has been suggested that '[t]he proportionality theory of punishment considers retribution or just deserts for the offender.' See A Jayaratnam, 'Prosecuting Stock-Option Backdating: The Ethics of Enforcement Techniques' (2007) 20 *Geo J Legal Ethics* 761.

the sense that a person is punished not for any other reason but for breaking the law.²⁹

Deterrence, on the other hand, suggests that punishment should serve the purpose of deterring both the offender and the general public from committing crimes.³⁰ In other words, it has a forward-looking approach to punishment. Deterrence is generally divided into two branches: specific and general deterrence (the South African Law Commission uses the words 'direct prevention' or 'individual prevention' and 'indirect prevention' or 'general prevention' for specific and general deterrence respectively).³¹ The aim of specific deterrence is to deter 'the offender from committing future crimes' and that of general deterrence is to deter 'others in society from committing future crimes.'³² Specific deterrence is achieved, for example, by incarcerating the offender (incapacitation) and thus preventing him from offending, because he is removed from society during his imprisonment and society is protected against him.³³ On the other hand, the aim of general deterrence is to protect society by severely punishing the offender so that potential criminals 'learn a lesson' and avoid committing crime. Thus crime is prevented and society is protected.³⁴ Both retribution and deterrence have been criticised widely.

²⁹ MA Rabie and SA Strauss *Punishment: An Introduction to Principles* 5ed (1994) 46-53. For the various understandings of retribution by South African courts and authors see SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 165-71.

³⁰ It has been observed that '[p]unishment as deterrence presupposes a prior crime that was punished, to serve as an example of what is in store for criminals...' See J Britana and RA Posner 'Classic Revised: Penal Theory in Paradise Lost' (2007) 105 *Mich L Rev* 1056. It has been argued that in answering the question whether punishment will serve a deterrent objective, one needs to ask two further questions: the first question is, whether punishment will deter the criminal on whom it has been inflicted from committing further crimes; and secondly, whether punishment will deter others, similarly placed as the criminal who has been punished, from committing crime. If the answer to both the questions is 'yes', then such punishment is just. But if the answer is 'no', then punishment is not just and should not be inflicted. See L Goodmark, 'The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?' (2007) 55 *U Kan L Rev* 209-301.

³¹ South African Law Commission, Discussion Paper 91 (Project 82) *Sentencing (A New Sentencing Framework)* (2000) Appendix A, Part 1, Extracts from *Issue Paper on Mandatory Minimum Sentences*, Chapter 2, paras 2.6 and 2.10-2.15.

³² RL Christopher 'Deterring Retributivism: The Injustice of "Just" Punishment' (2002) 96 *Nw U L Rev* 856.

³³ Rabie and Strauss op cit (n29) refer to specific deterrence as 'individual prevention' and suggest that it can be achieved through the following ways: incapacitation, rehabilitation, and social defence. See 25-36.

³⁴ Rabie and Strauss op cit (n29) refer to general deterrence as 'general prevention', and suggest that it can be achieved in the following ways: general deterrence, socialization, rehabilitation, reform, and moral sustaining. See 36-45.

Retribution has been equated with revenge,³⁵ whereas deterrence has been criticised for justifying the punishing of innocent people.³⁶

It is beyond the scope of this article to give a detailed analysis of restorative justice, deterrence and retribution as objectives of punishment. However, it should be mentioned that the Constitutional Court in the *Makwanyane* case recognised ‘deterrence, prevention, reformation, and retribution’ to be ‘the main objects of punishment.’³⁷ Furthermore, in the defamation case, *David Dikoko v Thupa Zacharia Mokhatla*, the Constitutional Court pointed out that restorative justice was an ‘emerging idea’ in South Africa’s ‘sentencing laws’ founded on ‘deep respect for humanity of one another’, that is, ‘*ubuntu or botho*’,³⁸ and noted that ‘*ubuntu* — *botho* is highly consonant with rapidly evolving international notions of restorative justice.’³⁹ Before embarking on a detailed discussion of rehabilitation, we should remind ourselves of the fact that the *Nkomo* decision was not the first one in which the Supreme Court of Appeal cast doubt on the possibility of prisoners serving life sentences being rehabilitated. In *S v Sikhipha*,⁴⁰ in which the appellant, 31, was sentenced to life imprisonment for raping a 13-year-old girl, the Supreme Court of Appeal, in reducing the sentence to 20 years’ imprisonment, held that one of the factors in mitigation was that the appellant was ‘capable of rehabilitation.’⁴¹ Most importantly, the Court observed that ‘[t]he sentence of life imprisonment required by the Legislature is the most serious

³⁵ It has been suggested that ‘...there is no doubt that retribution is revenge, both historically and conceptually.’ See A Oldenquist, ‘Retribution and the Death Penalty’ (2004) 29 *U Dayton L Rev* 339. It has been observed that ‘[r]etribution is revenge plain and simple. We punish offenders who violate the law because we are angry and want to get even. Retribution is about power. It is about force. It is about repression. Under this theory, the offender’s violation of the law legitimates our vengeful punishment and absolves us of any injustice or transgression we may commit upon her because the offender deserves some suffering for violating the social order.’ See RL Nygaard ‘Crime, Pain, and Punishment’ (1998) 102 *Dick L Rev* 363.

³⁶ It has been mentioned that ‘[i]t is an old move in the debate between consequentialists and deontologists for the latter to point out that the former would find nothing morally wrong with punishing an innocent person under circumstances in which it was clear that the benefits to society would outweigh the costs.’ See CS Steiker ‘No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty’ (2005) 58 *Stan L Rev* 775. It has been suggested further that ‘...for example, in situations where a particular type of crime that is extremely difficult to detect is causing a lot of damage, a well-publicized punishment is considered a reliable device to induce deterrence, and the difficulty of detection is so extreme that no one has been apprehended for the crime, the utilitarian theory may justify punishing an innocent person with an extreme sanction.’ See Y Lee, ‘The Constitutional Right Against Excessive Punishment’ (2005) 91 *Va L Rev* 740.

³⁷ *S v Makwanyane* supra (n1) at para 46. Footnotes omitted.

³⁸ *David Dikoko v Thupa Zacharia Mokhatla* 2007 (1) BCLR 1 (CC) at para 68.

³⁹ *David Dikoko v Thupa Zacharia Mokhatla* supra (n35) at para 114.

⁴⁰ *S v Sikhipha* 2006 (2) SACR 439 (SCA).

⁴¹ *Sikhipha* op cit (n40) at para 18.

that can be imposed. *It effectively denies the appellant the possibility of rehabilitation.*⁴² Perhaps to avoid being criticised for relying on the possibility of rehabilitation as one of the mitigating factors, the Court was quick to add that '...the mitigating factors [including the prospect of rehabilitation] are not speculative and flimsy.'⁴³ Can one say that the prospect of rehabilitation does not fall in the ambit of speculative and flimsy factors?

4.2.1 *The meaning of rehabilitation*

Rehabilitation as an objective of punishment has a long history dating back to the Enlightenment period in Europe.⁴⁴ Rehabilitation has also been part of the South African criminal justice system for decades.⁴⁵ However, a discussion of its history is beyond the scope of this article. Whereas the Supreme Court of Appeal considers the prospect of rehabilitation to be a substantial and compelling circumstance, it does not explain or define what it means by 'rehabilitation.'⁴⁶ Although the word rehabilitation is used at least on one occasion in relation to prisoners in the Correctional Services Act of 1998,⁴⁷ no attempt is made to define it.⁴⁸ Rehabilitation is

⁴² *Sikhipha* supra (n40) at para 19. Emphasis mine.

⁴³ *Sikhipha* supra (n40) at para 19. With regard to other mitigating factors, the Court observed that '[f]actors in mitigation include the fact that the appellant is a first offender; that he has a wife and children dependent upon him; that he has a trade (he is a bricklayer) and makes a living from his work; that he was 31 years old at the time of the trial, and that he is capable of rehabilitation. Moreover, the complainant was not seriously injured.' Paraphrase 18.

⁴⁴ See generally MD Dubber 'The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought' (1998) 16 *LHR* 113-46.

⁴⁵ In 1915, for example, Gardiner J of the Cape Provincial Division emphasized the importance of rehabilitation as the aim of punishment for juvenile offenders. See *Rex v Hlatse* [1915] CPD 1.

⁴⁶ It is the same with the International Criminal Court Statute. It has been suggested that '[a]lthough there is scope for the individual rehabilitation of offenders to be accommodated within the ambit of sentence individualisation permitted under Article 78(1) [of the Rome Statute of the International Criminal Court] by implication, there is no attempt made to define the possible meaning of rehabilitation in the wider context of international trials, or explain the nature of the values and attitudes that underpin it.' See R Henham 'Some Issues for Sentencing in the International Criminal Court' (2003) 52 *ICLQ* 89.

⁴⁷ Act 111 of 1998.

⁴⁸ Under s 18(1) of the Correctional Services Act 111 of 1998, '[e]very prisoner must be allowed access to available reading material of his or her choice, unless such material constitutes a security risk or is not conducive for his or her rehabilitation.' Rehabilitation was also not defined in the 1959 Correctional Services Act (which was repealed by the 1998 Correctional Services Act). See GJ Lidovho 'An Assessment of the Feasibility and Efficacy of Rehabilitation of Offenders Sentenced to Imprisonment as Laid Down in the Correctional Services Act 8 of 1959' (2003) 3 *Stell LR* 417.

probably easier to describe than to define.⁴⁹ This is exactly what the 2005 White Paper on Corrections in South Africa does. It states that:

'Rehabilitation is the result of a process that combines the correction of offending behaviour, human development and the promotion of social responsibility and values. It is a desired outcome of processes that involve both departmental responsibilities of Government and social responsibilities of the nation. Rehabilitation should be viewed not merely as a strategy to preventing crime, but rather as a holistic phenomenon incorporating and encouraging: social responsibility; social justice; active participation in domestic activities; empowering with life-skills and other skills; and a contribution to making South Africa a better place to live in. Rehabilitation is achieved through the delivery of key services to offenders, including both correction of the offending behaviour and the development of the human being involved. The correction of offending behaviour and development are two separate, but linked responsibilities. Rehabilitation is achieved through interventions to change attitudes, behaviour and social circumstances. The desired outcome is rehabilitation and the promotion of social values and responsibility.'⁵⁰

From the above description we can extract the following as the features of rehabilitation: rehabilitation is the initiative(s) taken by the prison authorities to model the offender's life during his time in prison in such a way that when he is released from prison, either on parole or after serving his full sentence, he has been reformed to such an extent that he is not likely to re-offend; and that the said initiatives could include various programmes that are implemented in a manner which ensures that the prisoner is reformed holistically.⁵¹ Thus, the Correctional Services Act indirectly recognises this point by providing, in s 36, that '...the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially

⁴⁹ It has been illustrated in the United States that '[w]hile most juvenile court practitioners agree the purpose of the system is rehabilitative, there is lack of consensus on the meaning of rehabilitation.' See VI Vieth 'When the Child Abuser is a Child: Investigating, Prosecuting and Treating Juvenile Sex Offenders in the New Millennium' (2001) 25 *Hamline L Rev* 49.

⁵⁰ Department of Correctional Services op cit (n23) paras 4.2.1-.3.

⁵¹ For the rehabilitation programmes being implemented in prisons and corrections see *Department of Correctional Services Annual Report for the 2006/2007 Financial Year* 16-23. It has been suggested that '[t]he essence of rehabilitation is to bring about positive change in offenders and their fundamental behaviour. This means that the disposition, attitude and behaviour of the individual must be changed.' See C Cilliers and J Smit 'Offender Rehabilitation in the South African Correctional System: Myth or Reality?' (2007) 20 *Acta Criminologica* 84.

responsible and crime-free life in the future.⁵² The White Paper on Corrections recognises that

'rehabilitation is best facilitated through a holistic sentence planning process that engages the offenders at all levels – social, moral, spiritual, physical, work, educational/intellectual and mental. It is premised on the approach that every human being is capable of change and transformation if offered the opportunity and resources.'⁵³

It thus makes it compulsory for prisoners to participate in rehabilitation programmes.⁵⁴

The Correctional Services Act enumerates the manner in which the above objectives will be achieved by requiring a sentenced prisoner to participate in various programmes and activities.⁵⁵ The Act also provides for the custody of prisoners under humane conditions, and this could be interpreted to mean that such a step is meant to ensure that prisoners are detained in conditions that facilitate their rehabilitation.⁵⁶ Community corrections are also implemented to facilitate the rehabilitation and re-integration of the offenders.⁵⁷ So are the parole

⁵² It has been stated that '[s]ection 36 of the Correctional Services Act defines the purpose of imprisonment: after having due regard that the deprivation of liberty serves the purposes of punishment, the purpose of a term of imprisonment is to enable the sentenced prisoner "to lead a socially responsible and crime-free-life in the future". It is in this formulation that the *constitutional justification for the rights limitations imposed* on sentenced prisoners is found.' See L Muntingh, *Prisons in South Africa's Constitutional Democracy* (Centre for the Study of Violence and Reconciliation, Criminal Justice Programme) (2007) 8 available at <http://www.csvr.org.za/docs/correctional/prisonsinsa.pdf>, accessed on 15 February 2008. Emphasis in original. Footnotes omitted.

⁵³ Department of Correctional Services op cit (n23) at para 4.2.4. The White Paper lists various government departments that the Department of Correctional Services has to work with to holistically rehabilitate offenders. At paras 6.2.3 and 6.2.4.

⁵⁴ Department of Correctional Services op cit (n23) at para 4.4.1. This is probably done to avoid the happening in South Africa of the situation, with regard to which one scholar has observed that '[u]nlike mandatory programs in the early penitentiary system, participation [in rehabilitation programs] is usually optional; indeed, in many prisons, education, drug treatment, job training, and work are privileges for which prisoners must seek approval. Like "good time," participation in rehabilitation programs is conceived of as an optional benefit conferred upon offenders rather than an obligation that offenders owe their victims, families, communities, or society at large.' See D Braman 'Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America' (2006) 53 *UCLA L Rev* 1180.

⁵⁵ Section 37 of the Correctional Services Act 111 of 1998.

⁵⁶ Chapter III of the Correctional Services Act 111 of 1998. Cilliers and Smit op cit (n51) 86, agree that rehabilitation cannot take place 'without first providing inmates with conditions that are consistent with human dignity.'

⁵⁷ Chapter VI of the Correctional Services Act. Rabie and Strauss op cit (n29) 31, are of the view that 'successful rehabilitation can take place only within the community and not in isolation thereof.'

procedures and conditions.⁵⁸ After describing what rehabilitation is in the South African context, one needs to look at the problems associated with it so as to highlight the likely challenges if its prospect were to be mainstreamed as one of the substantial and compelling circumstances enabling courts to depart from imposing life sentences.

4.2.2 Challenges

Rehabilitation is influenced largely by speculation that the offender, after undergoing the various training and attending the relevant courses in prison, will lead a crime-free life.⁵⁹ This is clear in the language of the White Paper on Corrections when it uses phrases such as ‘rehabilitation is achieved through interventions to change attitudes, behaviour and social circumstances’. Thus, for the Supreme Court of Appeal to invoke the prospect of rehabilitation as a substantial and compelling circumstance, it is stipulating that the offender will be rehabilitated by serving a shorter prison term other than life imprisonment. The Court is also invoking ‘undue sympathy’ towards the offender in the sense that it thinks that life imprisonment may be a very severe punishment for him, and that is why it opts to impose a lesser sentence.

Related to the above are the following two issues: funding for the rehabilitation programmes that do exist in prisons; and, the achievements that the Department of Correctional Services has registered over time with regard to rehabilitation. Whereas the Department of Correctional Services has a huge budget for the years 2007-2010,⁶⁰ it has been illustrated that this budget has been declining in real and relative values over the past few years, and that the Department has also been unable to meet its rehabilitation targets.⁶¹ These two factors have affected the

⁵⁸ Chapter VII of the Correctional Services Act 111 of 1998. It has been observed in relation to the United States that ‘[t]he relationship between rehabilitation and parole is deeply imbedded in the law...In its opinion in *Campbell County*, the Supreme Court said that rehabilitation programs are “intrinsicly beneficial and extrinsicly essential to parole considerations”.’ See RG Lawson ‘Turning Jails into Prisons — Collateral Damage from Kentucky’s “War on Crime” (2006-2007) 95 *Ky LJ* 42. Footnotes omitted.

⁵⁹ It has been rightly put that ‘the theory of rehabilitation implies that we know how to rehabilitate offenders and that facilities exist for the treatment of offenders.’ See Rabie and Strauss *op cit* (n29) 30.

⁶⁰ Approximately R10.7 billion. See *Budget 2007-National Medium Term Expenditure Estimates* Vote 19 (Correctional Services) 375, available at <http://www.treasury.gov.za/> accessed on 24 October 2007.

⁶¹ L Muntingh, ‘Correctional Services Budget 2007/08 to 2009/10’ *Civil Society Prison Reform Initiative Newsletter*, No. 21, March 2007, available at <http://www.communitylawcentre.org.za/Projects/Civil-Society-Prison-Reform/newsletter/cspri-newsletter/archive-of-cspri-newsletter/CSPRI%20Newsletter%2021> accessed on 22 October 2007.

Department as a whole including its rehabilitation programmes,⁶² and thus strengthens the argument that the prospect of rehabilitation remains a speculative hypothesis. As Muntingh states succinctly:

Indicative of the difficulties in spending on rehabilitation and reintegration is the fact that the DCS planned in 2005/6 to have 23% of all offenders assessed in respect of their risk profile, a prerequisite for the development of a sentence plan that would assist in their rehabilitation. This target was not met and risk profiling will now begin in 2007/8 after the necessary tools have been approved. Similarly the Department set itself a target of 30 000 inside work opportunities for sentenced prisoners in 2005/6, but only 3400 opportunities were realised. The challenge emerging from this is not one of lack of funds, but rather of how to effect spending on the rehabilitation and reintegration of prisoners. The Corrections Programme budget makes specific mention of the new programmes developed and planned in line with the White Paper but the amounts involved are small and comprise less than 3% of the programme budget. One is therefore left with the impression that allocations aimed at implementing rehabilitation and reintegration are not strongly articulated in the budget vote.⁶³

The question that arises is whether the Supreme Court of Appeal will ensure that those people it has sent to prison to be rehabilitated indeed get rehabilitated despite the declining financial status of the Department and its failure to meet its rehabilitation targets. If the Court is of the view that the Department has the capacity to rehabilitate offenders when they are in a prison serving sentences other than life imprisonment, why does it hold the view that the Department does not have the capacity to rehabilitate prisoners serving life sentences? This could be attributed to the fact that the Department lacks rehabilitation programmes specifically designed for people serving life sentences irrespective of the fact that the number in that category of prisoners is growing rapidly.⁶⁴

⁶² This problem is not unique to South Africa. It has been observed in relation to the United States that '[p]rison rehabilitation programs, where they even exist, are often under-funded and given low priority, frequently resulting in ineffective treatments for inmates...' See SM LeBlanc 'Cruelty to the Mentally Ill: An Eighth Amendment Challenge to the Abolition of the Insanity Defense' (2007) 56 *Am U L Rev* 1319. In California, recently, the Governor 'announced his intention to cut \$95 million worth of inmate rehabilitation programs...' but proposed adding new employees and increased spending on corrections. See C Fiebig 'Legislating from the Bench: Judicial Activism in California and its Increasing Impact on Adult Prison Reform' (2007) 3 *Stan J Civ Rts & Civ Liberties* 152.

⁶³ Muntingh op cit (n 61).

⁶⁴ Personal interview with senior Department of Correctional Services officials, 4 September 2007 (National Parliament, Old Chambers Assembly, Cape Town, at public hearings on the Correctional Services Amendment Bill). In its *2006/2007 Annual Report*, the Judicial Inspectorate of Prisons indicates that most prisons in South Africa lack rehabilitation programmes, and as a result most prisoners spend 23 hours a day in their cells. See 21-22.

As pointed out earlier, Theron AJA observed in her dissenting judgement in *Nkomo* that there is no person of whom it can be said that he is incapable of rehabilitation. This view, as already mentioned, is also supported by the White Paper on Corrections which states that 'every human being is capable of change and transformation if offered the opportunity and resources.'⁶⁵ However, judges of the Supreme Court of Appeal have adopted the position that some offenders are incapable of rehabilitation.⁶⁶ This position has support from certain academic circles.⁶⁷ What this means is that the Supreme Court of Appeal appears to reason that offenders who are capable of rehabilitation should not be sentenced to life imprisonment, and, by implication, that life imprisonment should be reserved for those incapable of rehabilitation. By suggesting that some prisoners cannot be rehabilitated, the Supreme Court of Appeal is not only casting doubt on the ability of the Department of Correctional Services to rehabilitate all prisoners, but it also indirectly suggesting that the prison environment in South Africa is not conducive to rehabilitating offenders. The Court is probably taking cognisance of the fact that, as illustrated by the two studies referred to above, the number of prisoners serving life imprisonment is skyrocketing, and that many prisons are overcrowded and not conducive for rehabilitation purposes, especially for prisoners serving life sentences.⁶⁸ The Court could also be aware that many South African prisons, as the Judicial Inspectorate of Prisons pointed out, are characterised by

⁶⁵ Department of Correctional Services op cit (n23) para 4.2.4.

⁶⁶ In *Boy v S* [1999] JOL 5392 (A) in which the accuseds, who were prisoners serving life sentences, killed their fellow inmate by strangulation, the Supreme Court of Appeal in sentencing them to life imprisonment held that they were 'irretrievably beyond any possibility of rehabilitation.'

⁶⁷ Parker, for example, is of the view that '[i]t would be silly to suggest that all offenders are capable of reform, but does this mean we should conclude that no criminal offenders are capable of it?...[the] penal system should promote rehabilitation and give the criminal offenders the opportunity while incarcerated to make their own efforts to reform, which can then ultimately lead to renewal.' See L Parker 'Penal Reform and the Necessity for Therapeutic Jurisprudence' (2007) 20 *Geo J Legal Ethics* 874.

⁶⁸ It has been reported that '[d]espite the overall reduction in prison numbers, there are numerous prisons that are still badly overcrowded. While 74 prisons [of the 240 prisons in South Africa] had less than 100% occupation, 161 exceeded 100% with 72 having more than 150% including 38 with more than 175%.' See *Annual Report of the Judicial Inspectorate of Prisons 2005-2006* at para 7.2. In its *2006/2007 Annual Report*, the Department of Correctional Services also notes that overcrowding is a serious problem in prisons, see op cit (n51) 40. For the latest challenges resulting from overcrowding also see *Annual Report of the Office of the Judicial Inspectorate of Prisons 2006/2007* op cit (n64) 11.

gangs whose activities are not favourable to rehabilitation activities.⁶⁹ Peacock and Theron concluded that '[g]ang activities permeate almost every sphere of prison life in South Africa.'⁷⁰ One could also argue that, by sentencing offenders to life imprisonment, the Supreme Court of Appeal believes that because of the offences they have committed, their personal characteristics and the circumstances under which they committed the offences, it would take them time to be rehabilitated, and that that is why they should be kept in prison for longer. If this were the view, one would have to assess it in light of what the Constitutional Court said in the *Dodo* case: that it would be a violation of the offender's right to human dignity were he to be sentenced to a lengthy period of time in prison for reformatory purposes.⁷¹

By ruling that offenders should not be sentenced to life imprisonment because life imprisonment will deny them the opportunity to be rehabilitated, the Supreme Court of Appeal appears to be adopting an understanding of the purpose of prison sentences that is different from that stipulated in the White Paper on Corrections (the separation of powers issue that may arise here is discussed below). The White Paper provides that 'rehabilitation needs to be understood in the courts, by those sentenced and by the correctional officials as the key reason for sentencing.'⁷² This should ordinarily include life sentences.

One important issue that requires discussion, however briefly, relates to the question of separation of powers. In addressing this issue we need to ask ourselves one question and answer it honestly and directly: should courts be reasonably expected to look at the White Paper on Corrections to inform their understanding of rehabilitation? Put differently, would not the principle of separation of powers be violated

⁶⁹ 'It is common cause that many prisoners do not accept the authority of correctional officials nor do they necessarily obey lawful instructions. The best examples of these are the involvement of many prisoners in prison gangs, gang assaults, and the smuggling of contraband. Based on our observations and the reports of Independent Prisons Visitors (IPVs), these acts of defiance are common to most prisons...The JIOP receives daily reports and complaints from prisoners and their families of assaults and intimidation by ...prison gangs.' *Annual Report of the Judicial Inspectorate of Prisons 2006/2007* op cit (64) 15.

⁷⁰ R Peacock and A Theron 'Identity Development of the Incarcerated Adolescent with Particular Reference to Prison Gang Membership' (2007) 20 *Acta Criminologica* 63. For a discussion of how some gangs formed in prison affect communities outside prison see, BE van Wyk and WH Theron 'Fighting Gangsterism in South Africa: A Contextual Review of Gang and Anti-Gang Movements in the Western Cape' (2005) 18 *Acta Criminologica* 51- 60.

⁷¹ *Dodo* supra (n4) para 38. It has been stated that '[South Africa's] traditional prisons are not...ideally suited to the task of rehabilitation, although valuable work is done there by *inter alia* social workers, clinical psychiatrists, educationists and clergymen' See Rabie and Strauss op cit (n29) 30-1.

⁷² Department of Correctional Services op cit (n23) para 4.4.1.

if courts were expected to refer to a document of the Executive or a government policy, in this case the White Paper on Corrections, to establish what does or does not amount to rehabilitation? That is not an easy question to answer. It needs an understanding of what is meant by the principle of separation of powers in the South African context.

The principle of separation of powers is expressly provided for as Constitutional Principle VI, which requires that there shall be separation of powers between the three arms of government, that is, the executive, the judiciary and the legislature, but that there have to be 'appropriate checks and balances to ensure accountability, responsiveness and openness.'⁷³ The Constitutional Court held in the *Dodo* case that '[t]here is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislature and the executive on the other',⁷⁴ and that '[w]hen the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so.'⁷⁵ It thus follows, that when courts impose sentences, they should do so in a manner that does not seek to eliminate the role of the executive in the sentencing process and outcome unless it is clear that by so doing, that is by accommodating the role of the executive, courts will be violating the Constitution. The Constitutional Court adds that the executive and legislature 'have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment',⁷⁶ rehabilitation being one of them.

The extent to which the judiciary should allow the executive or the legislature to influence its sentencing policy, but within the ambit of the Constitution, is 'incapable of comprehensive abstract formulation, but must be decided as specific challenges arise.'⁷⁷ The specific challenge which has arisen, and needs to be dealt with, relates to the extent to which courts can rely on the definition or description of rehabilitation in the White Paper on Corrections to inform their approach with respect to rehabilitation. In the light of the above discussion, the author argues that it would not amount to a violation of the principle of separation of powers if courts referred to the White Paper on Corrections for guidance on what amounts to rehabilitation in the South African context. This is because it is through the White Paper on Corrections that the Executive communicates to the judiciary what it thinks rehabilitation should mean, and unless

⁷³ *Dodo* supra (n4) at para 14.

⁷⁴ *Dodo* supra (n4) at para 22.

⁷⁵ *Ibid.*

⁷⁶ *Dodo* supra (n4) at para 23. Footnotes omitted.

⁷⁷ *Dodo* supra (n4) at para 26.

by adopting that understanding of rehabilitation the courts will be violating the Constitution, there is no reason why they should not do so. Otherwise courts could develop an understanding of rehabilitation which is not in line with the executive's, and the result would be, as happened in the *Nkomo* case, that the court will consider the role of punishment (in this case rehabilitation) in a manner opposed to that of the executive.

We have to recall that there are at least two occasions when the Constitutional Court referred to White Papers in its decisions, which supports our view that courts can refer to the White Paper on Corrections. In *Die Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole Dimakatso Ann Nkiane v Die Premier van die Provinsie Vrystaat* the White Paper on Education was referred to in a case where the applicants challenged the Province's policy of 'terminating bursaries and transport subsidies for pupils attending what were known as "state-aided-schools"'.⁷⁸ Recently, and most importantly, in *M v S (Centre for Child Law Amicus Curiae)*, the Constitutional Court expressly relied on the White Paper for Social Welfare, which emphasises the importance of the family in society and in the upbringing of children, to hold that 'the importance of maintaining the integrity of family care' is one of the factors that must be considered by the sentencing court, especially where the convicted person is the primary caregiver.⁷⁹

5. Philosophy challenged by human rights in the rehabilitation debate

From a philosophical point of view, one of the criticisms of rehabilitation is that it is based on the assumption that 'offenders are "sick" and in need of treatment to cure their sickness.'⁸⁰ Rabie and Strauss point out that rehabilitation regards the offender 'as a social malfunctioner who should be "treated", rather than blamed.'⁸¹ This means, the argument goes, that the judge, the parole board, and the prison authorities are justified to detain the offender as long as it takes for him to be cured of his sickness. Hence rehabilitation has supported indeterminate incarceration.⁸² One could argue that in South Africa detaining a person indefinitely until he is rehabilitated is impossible because, as I have illustrated above, the Constitutional Court held in

⁷⁸ *Die Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole Dimakatso Ann Nkiane v Die Premier van die Provinsie Vrystaat* 1998 (3) SA 692 at para 1.

⁷⁹ *M v S (Centre for Child Law Amicus Curiae)* 2007(12) BCLR 1312(CC) at para 38.

⁸⁰ J Brooks 'Addressing Recidivism: Legal Education in Correctional Settings' (1992) 44 *Rutgers L Rev* 712.

⁸¹ Rabie and Strauss op cit (n29) 29.

⁸² Brooks op cit (n80) 712-3.

Dodo that a sentence of imprisonment, which would require a prisoner to be detained for a lengthy period for rehabilitative purposes without taking into consideration the gravity of the offence committed, is unconstitutional in that it violates his right to human dignity. The Supreme Court of Appeal has also held that prisoners should have the prospect of being released, otherwise a punishment that would require a prisoner to spend the rest of his life in prison is cruel, inhuman and degrading.⁸³ The White Paper on Corrections also stipulates that one of the purposes of rehabilitation is 'to make offenders aware of what society anticipates them to learn through the rehabilitation process and to put back into society once they have completed their sentence.'⁸⁴ In addition, the philosophical argument that rehabilitation programmes are adopted because the authorities think that the offender is sick and also in need of treatment, appears to have no basis in South Africa. This is so because the White Paper on Corrections looks at rehabilitation not as treatment, but rather as correction and development.⁸⁵

6. Conclusion

Unless a comprehensive study were carried out to evaluate the effectiveness on prisoners of the rehabilitation programmes being implemented by the Department of Correctional Services,⁸⁶ the prospect of rehabilitation remains highly speculative, and there is indeed no guarantee that some of the prisoners sentenced to prison terms other than life imprisonment will be rehabilitated. The White Paper acknowledges that

'to achieve rehabilitation, serious study is needed into the ...rehabilitative effects of various alternative sentences in order to develop, as an integrated justice system, guidelines to assist the judiciary in sentencing convicted individuals.'⁸⁷

The United States example is illustrative. It has been observed in the United States, in relation to rehabilitation programmes for men who have been found guilty of domestic-violence-related offences, that, in the hope of rehabilitating them, initiatives such as

⁸³ *Nkosi v State* [2002] JOL 10209 (SCA).

⁸⁴ Department of Correctional Services op cit (n23) para 4.2.5.

⁸⁵ Department of Correctional Services op cit (n23) para 6.1.4.

⁸⁶ In the United States, it has been pointed out that '...a comprehensive 1998 report to Congress funded by the National Institute of Justice reviewed all of the relevant research conducted since the mid-1980s, and concluded that rehabilitation programs can indeed effectively change offenders.' See RK Warren 'Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism' (2007) 82 *Ind LJ* 1308.

⁸⁷ Department of Correctional Services op cit (n23) para 6.1.4.

'attitude change and improved behavioral skills such as anger management [have been adopted. However, the problem is that] Despite the prevalence of these initiatives, insufficient research has assessed their effectiveness and findings are inconclusive. Some studies have found no differences in attitudes toward domestic violence and recidivism rates between men in treatment programs and those on probation. Other research finds lower recidivism among men who completed the treatment program. However, the significance of these results is often compromised by high drop-out rates and non-random assignment systems that screen out men with low motivation.'⁸⁸

The Supreme Court of Appeal will need to set the record straight by either explaining what it meant for the prospect of rehabilitation to be one of the substantial and compelling circumstances, or to revisit its ruling in the *Malgas* case and explain what it meant by speculative hypotheses and undue sympathy to the offender as factors that should be excluded from the composite yardstick of what amounts to substantial and compelling circumstances. The Court will also need to develop criteria that should be used to gauge whether a particular offender is capable of rehabilitation or not, so that the lower courts can be able to follow the Court's reasoning without much confusion. Otherwise, one is left with no option but to conclude that the majority ruling in the *Nkomo* case has paved the way for future confusing interpretations of what amounts to substantial and compelling circumstances, which we had hoped had been 'finally' settled in *Malgas*.

⁸⁸ DL Rhode 'Social Research and Social Change: Meeting the Challenges of Gender Inequality and Sexual Abuse' (2007) 30 *Harv J L & Gender* 20-21.