

SOUTH AFRICA / JUDGMENT

S v Jantjies (CC42/20) [2022] ZAWCHC 200 (6 October 2022)

[2022] ZAWCHC 200

COURT

Western Cape High Court, Cape Town

BEFORE

V C Saldanha

CASE / FILE NUMBER

CC42/20

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: CC42/20

In

the matter between:

THE
STATE
Respondent
and
GODFREY
DANVILLE
JANTJIES
Accused

Coram:

Justice V C Saldanha

Heard:

02 September 2022
Delivered
: 6 October 2022

JUDGMENT

SALDANHA J:

[1] The three year old deceased, R[....] G[....], was born into the close-knit community of Moorreesburg, a farming and agri-industrial town situated along the N7, approximately an hour and a half's drive out of Cape Town. It is there where she grew up and endeared herself to many of the local residents. Her mother, Ms

A[....] S[....], remained inconsolable, tearful and visibly traumatised throughout the sentencing proceedings, due to the painful

circumstances surrounding the death of her young child. So, too, was visible the pain and anguish experienced by members of the Moorreesburg community who attended the sentencing proceeding, both young and old, women and men.

[2] The history of the matter dates back to that fateful day of Saturday 23 May 2015, and into the early hours of the following morning, in which the deceased succumbed to various injuries in nothing less than excruciating pain and helplessness. Neither the accused, in whose care she had been left for most of the day, nor her mother, had taken the necessary steps to provide her with the proper medical attention that she so desperately needed and, as Doctor Sherman, the pathologist, testified during the trial, would have prevented her untimely death. It appeared that the initial police investigation into the unnatural and tragic circumstances of the death of the young child ended up in no more than an inquest docket. Thereafter the docket literally remained dormant for several months, awaiting the holding of a formal inquest. Fortuitously, it was picked up by the vigilance and timely intervention of a prosecutor in Moorreesburg, that led to the docket being referred to the office of the Director of Public Prosecutions in Cape Town for consideration of a prosecution. As a result, and almost nine months after the death of the child, charges were proffered against the accused and Ms S[....], for the contravention of section 305 (3) (a), read together with section 305 (6) of the Children's Act 38 of 2005 – Child Abuse or Neglect with an additional second count of murder, read together with various provisions of the Criminal Procedure Act 51 of 1977 and the minimum sentence legislation, were proffered against the accused only. It appeared that Ms S[....] entered into a plea and sentence agreement with the State, as a result of which she was convicted of the neglect of the child, and sentenced, in terms of Section 276 (1) (h)[1] of the Criminal Procedure Act, to correctional supervision, and she was ordered to serve a period of house arrest and perform community service. The accused, charged with murder and the contravention of the Children's Act, for child abuse or deliberate neglect, pleaded not guilty and the matter proceeded to trial on both counts.

[3] When initially arrested, the accused was held in custody for approximately nine months, whereupon he was released on bail. Of the nine months he spent in custody, four were at the Malmesbury Correctional Services Facility awaiting trial section, and the remaining five months at the Pollsmoor Maximum Security Prison. At the outset, this court wishes to

commend the prosecutor who referred the docket to the DPP, and the staff of that office who processed the docket, that led to the arraignment of both the accused and the child's mother. Their timely intervention and foresight

has enabled those responsible for the tragic loss of the minor child to be held accountable.

[4] The accused's trial commenced in the Cape High Court on 15 November

2021. The accused was eventually convicted, on 24 March 2022, of the contravention of the Children's Act, in that he was found to have been deliberately negligent, which resulted in the death of the young child. He was acquitted on the count of murder.

[5] During the entire proceedings of the trial in the Cape High Court, the court noted that there was hardly any attendance by members of the deceased's family (other than when they testified), the

public and, in particular, members from the community of Moorreesburg from which both the deceased and the accused hailed. However,

mostly present during the proceedings was an aunt of the accused, Ms Maria Thys, who resides in Belhar, Cape Town. The circumstances

under which the death of the child occurred, and the account given by various witnesses during the trial of their observations of the deceased literally days and weeks prior to her death, made the absence of the community of Moorreesburg all the more significant and of particular concern to the court. After the conviction of the accused, the court proposed to the State and the defence that consideration be given to the sentencing proceedings being held in Moorreesburg, to provide accessibility to the deceased's

family, the local community, and people from the surrounding areas who had an interest in the proceedings. Both the State and the defence were in agreement, and as a result thereof the court obtained the permission of the Judge President of the Division for the sentencing proceedings to be conducted at the Moorreesburg Magistrates' Court. The Chief Magistrate at the

Moorreesburg Court, Mr Mthimunye, kindly availed his only courtroom for the sentencing proceedings. He also very helpfully placed his support staff at the disposal of the High Court and generously accommodated all of the court officials involved in the matter.

[6] The court heard evidence, in mitigation and in aggravation of sentence, at Moorreesburg on two separate days. On both occasions the court was filled to capacity with local members of the community, with gender and child anti-violence activists and organisations also in attendance. Despite the Covid 19 pandemic and social distancing required in the courtroom, which would normally have accommodated no more than 30 people, it brimmed to capacity, with members of the public also standing outside in the passageway looking through the windows of the courtroom onto the proceedings.

Almost 100 people attended the proceedings on each day. The demographics of the members of the community in attendance ranged from young to old, both women and men, including an elderly woman in a wheelchair, all of whom remained stoically and patiently in attendance during the entire proceedings. Their visible assent to what they agreed to in the evidence of the various witnesses, and their dissent or disapproval with others, was evident in the shaking of their heads and with quiet murmuring and alarmed expressions.

Their attendance in the proceedings was of particular significance, and more so since a High Court had apparently never previously sat in the town of Moorreesburg. Moreover, their presence was a clear demonstration to the court of their interest in, and concern about, the death of the young child, its impact on their community, and for having literally waited several years for accountability for the incident. It was apparent that having been unable to attend the trial proceedings in Cape Town, they, with great enthusiasm and acclaim, embraced the opportunity of attending the sentencing proceedings in Moorreesburg.

[7] In mitigation of sentence the court heard the evidence of a probation officer, Ms Louise Petersen, a qualified social worker employed by the Western Cape Department of Social Development, at Malmesbury. Ms Inga Silatsha, a Correctional Services officer employed in the Cape Town Community Correction Services Office, also testified with regard to the consideration of correctional supervision as an appropriate sentence for the accused. Their written reports were handed into evidence, with the consent of the State and the defence. The accused tendered the evidence of his paternal aunt, Ms Maria Thys, and he himself also testified in mitigation. In aggravation of sentence, the State handed into evidence various letters from community organisations, and a petition by the local community of Moorreesburg, with regard to an appropriate sentence. The State also led the evidence of a representative of the family and the broader community of Moorreesburg, an elder, Ms Emmalene Mentoer. The State also read into the record victim impact reports, prepared by the prosecution services, in respect of the deceased's mother, Ms A[...] S[...], and the deceased's aunt, Ms Sonetta Esme Agulhas, who also testified during the trial. After the above evidence was dealt with in Moorreesburg, the court adjourned the proceedings back to Cape Town where the evidence of the Correctional Services official Ms Inga Silatsha was led, and in particular with regard to the programmes available in Correctional Services in respect of the rehabilitation of offenders, and the content of the curricula on social life skills training. After Ms Silatsha testified, it was apparent to the court that the interests of justice would be better served by securing the expert testimony of a witness with experience and expertise in the area of Restorative Justice. At the request of the court, a renowned expert in the field, Mr Eldred De Klerk, generously made himself available to testify. Senior officials of Correctional Services, and Ms Silatsha, were invited by the court to attend the proceedings in which Mr De Klerk would testify on the meaning and role of Restorative Justice, its application in a broader context and its impact on the criminal justice system. Eight senior officials of Correctional Services attended the proceedings, including Ms Silatsha, as an instructive exercise and also for their professional interest as members of Correctional Services. The court thereafter heard submissions by both the defence and the State in

respect of an appropriate sentence to be considered by the court.

[8] The proceedings reconvened at the Moorreesburg Magistrates’

Court for the handing down of sentence. Besides the proceedings being accessible to the community of Moorreesburg, an important

development directly related to a restorative process began to emerge in the sentencing proceedings between the accused, the family of the deceased, and the broader community of Moorreesburg that attended the proceedings. In the context of the recommendations of the probation officer, Ms Petersen, and that of the Correctional Services officer, Ms Silatsha, with regard to the sentencing options that the court could consider, the evidence of Mr Eldred De Klerk was all the more significant in assisting the court with an expert perspective on the principals of Restorative Justice and whether it would be a feasible and appropriate option in the sentencing of the accused.

[9] In the consideration of an appropriate sentence the court is guided by the oft-quoted authority and guidelines in *S v Zinn* 1969

(2) SA 537 (A), at 540G, that it has to consider the commonly referred to triad of factors such as the personal circumstances of the offender, the nature and seriousness of the offence, and the interests of society. In the balancing of these considerations the court is also required to achieve the main objectives of punishment, such as that of deterrence, prevention, rehabilitation and retribution. Moreover, the court is required to demonstrate a measure of mercy. Importantly, the court was also faced with an offence involving a minor child, and has to remain astute to its responsibility as upper guardian of all children, and its duty to protect them against the ravages of abuse, neglect and violent crime, in the face of the ever growing prevalence and plague of the assault

of young children that has very often lead to their deaths, not only the province of the Western Cape but throughout the country. The court must also be mindful that where sentences are imposed that fail to properly deal with the seriousness and prevalence of these offences, local communities are spurred on, by utter frustration, to resort to unlawful self-help and violent vigilantism. It is for this reason, and while not having to pander to the demands of communities, that courts must properly and with care consider the broader interests of society in the sentencing process.

[10] In respect of the offence of which the accused has been convicted, the court is also directed and constrained by the penalty provisions in the Children’s Act, which provides in Section 305 (6): ‘A person convicted of an offence in terms of subsection (1), (2), (3),

(4) or (5) is liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.’

[11] The state pointed out that in *S v JR 2015 (2) SACR 162 (GP)* the appellants were similarly charged with the contravention of Section 305 (3) (a) of the Children's Act, and were sentenced to periods of 8 and 5 years' imprisonment respectively, in circumstances that concerned a mother and her boyfriend who, amongst other charges, neglected to attend to the injuries of a thirteen month old child.[2] The child suffered serious injuries, for which they were found to be responsible. Ranchod J (Mngqibisa-Thusi J concurring),

sitting as a court of appeal, made the following remarks:

'[51] A misdirection could also flow from a misapplication or misappreciation of a rule of law, whether arising from our Constitution, a statute, the common law or judicial precedent.

[52] In *S v Kekana* it was held:

"Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely

punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this

country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity."

Olivier JA held in *S v P*:

"The rights of children are all too frequently and brutally trampled over in our society. Abuse of children is sadly an all too common phenomenon. Those guilty of violating the innocence of children must face the wrath of the courts." (Internal footnotes omitted.)

[12] Mr Jantjies, the accused, testified about his personal circumstances, which were also elaborated on by both his paternal aunt, Ms Thys, and Ms Petersen, the probation officer. Ms Petersen conducted an extensive investigative process into the accused's circumstances, interviewed a number of interested parties, including his present partner, Ms Sylvia Gordon, family members of the deceased, the prosecutor and defence counsel in the matter, and considered various of the court's documents.

[13] The accused is 31 years old and, as indicated, was born in Moorreesburg, is single but in a relationship with Ms Gordon, from which two children, aged 2 and 9 months, have been born. The accused completed Grade 9 and was employed, for the past 14 years, at Overberg MKB as a forklift driver, for which he received in-house training. The accused's biological mother died about two months after his birth. He is one of two siblings and has maintained a good relationship with his elder sister, Ms Raynolene Cisse. For the better part of his life, it appears that the accused has been estranged from his biological father, Mr Gert Jantjies. Upon his mother's death the accused and his sister were taken in by their paternal aunt, Ms Sarah Maarman, with whom he resided in Moorreesburg and with whom he has literally spent most of his life. When his father remarried, the accused spent approximately five

years living with them, but it appeared that the relationship between him and his father was strained, as a result of his father's abuse of alcohol and alleged abuse of the accused. The accused apparently also experienced financial hardship while living with his father. He returned to the home of his aunt, from where he attended the local school. Ms Petersen records that the accused perceived his aunt as a positive role model

and that he had experienced stability within her household.

[14] The accused entered into a relationship with Ms A[...] S[...] during 2013, and they lived together until approximately two months after the deceased's passing. It appeared that their relationship originated while they were still teenagers. As indicated, during the course of trial it emerged that the accused had an abusive relationship with Ms S[...], in that both of them claimed that when they were under the influence of alcohol the accused would at times violently assault Ms S[...]. Ms S[...], however, had not proffered any charges against the accused for any assault, nor were any domestic violence proceedings instituted against him. The deceased had been born of a prior relationship between Ms S[...] and a Mr R[...]2 G[...], and Ms S[...] had functioned as the deceased's primary caregiver. The accused assumed the

role of a father figure to the deceased during his relationship with Ms S[...].

[15] During the course of his testimony the accused indicated that his employer, MKB, would release him from their employment after the sentencing proceedings. Significantly though, was the fact that he had resumed his employment after being released on bail, and even after having been convicted. Counsel for the accused indicated that the employer remained in regular contact with him, had displayed a particular interest in the development in the case, and also displayed a keen interest in the accused and the outcome of the sentencing proceedings. Ms Petersen had also consulted with Mr Handri Crous, the accused's supervisor at his place of employment, who confirmed that the accused maintained a positive intercollegiate relationship with his fellow workers. He was described as a responsible, dedicated and punctual employee, who had not presented with any negative behaviour.

[16] The accused has, since the breakup with Ms S[...], resided with his paternal aunt and his cousins, and remained settled in Moorreesburg, while his partner Ms Gordon and the two minor children reside with her parents. The accused earned a nett income of R5 100, of which he contributed R1 000 towards the maintenance of his minor children with Ms Gordon. She is unemployed and appears to have since applied for a state grant for the two children. In the course of his testimony the court raised with the accused his monthly expenditure, from which he indicated that he contributed to the household of Ms Maarman and had also contributed to the monthly schooling and other expenses for his minor children.

[17] In his testimony he also indicated that he had spent a considerable amount of his earnings on what he referred to as 'duur tekkies' (expensive brand name leisure casual shoes). The court raised its concern about such unnecessary expenditure, in the face of the maintenance of his minor children and his contribution towards the household expenses of his aunt Ms Maarman. Needless to say, this wholly unnecessary expense of brand name 'duur tekkies'

is all too prevalent, where parents and young men and women spend unnecessarily large amounts of money on fashionable apparel at the expense of the livelihood of their families, and the education and desperate needs of dependents. In respect of the social

cultural aspects of the accused, Ms Petersen noted that while he embraced the Christian faith he did not participate in any religious

festivities or church services. She claimed that he consumed alcohol socially, but that he had a history of substance abuse which included cannabis and methamphetamines ("tik"). Ms Petersen claimed that the accused reported to her that he has, since 2019, refrained from using substances. She was, however, unable to confirm that he was free of substance abuse during the investigative process. The accused, for his part, claimed that since this incident he has only consumed alcohol socially, and has significantly cut down since the birth of his children.

[18] In respect of his interpersonal relationships, Ms Petersen noted that the accused had not maintained a healthy attachment with his biological father, as he had not perceived him as a positive role model during his upbringing. Counsel for the accused informed the court that, since the sentencing proceedings, the accused and his father have begun a process of building a relationship; significantly the accused's father also attended the court proceedings in Moorreesburg. The accused's sister, Ms Cisse, experienced him as a caring and a protective parent towards his own children, as well as the deceased. Ms Petersen further reported that none of the accused's family members complained about him and they independently described him as respectful, quiet and a person with whom they all got along.

[19] In her interview with Ms Petersen, Ms S[...] indicated that although she had experienced the accused as occasionally violent, she had not seen the need for police or court intervention. Ms Petersen also reported that the accused does not socialise in clubs or other places of gathering, and preferred to spend time with his family. The accused is not a member of any criminal gang. He also appears to be in good health, with no mental health problems having been reported during the investigation. The accused does not function as a primary caregiver of his two minor children, but it appeared that he has daily contact with them and assists Ms Gordon with their care and supervision. As indicated, he contributes towards their financial wellbeing. In respect of the offence of which the accused had been convicted, Ms Petersen reported that during her consultations with him he denied any physical abuse towards the deceased, but claimed that he realised that he had failed to attend to her medical needs. He verbalised guilt to her, and accepted that he had not acted in the best

interests of the deceased

at the time. He claimed that he had been under the influence of substances while supervising the deceased, which contributed to his negligent behaviour. It appeared to Ms Petersen that the accused was remorseful and had showed insight into the seriousness of the offence. Ms S[...] also indicated that the accused had supported her emotionally after the deceased' death. In her interview with Ms Sonetta Agulhas, Ms Petersen recorded that she recalled an incident where the deceased was allegedly accidentally hit with a kettle, by the accused, approximately two weeks prior to her death. Ms Agulhas claimed that the deceased had presented with fearful behaviour after the incident. Ms Agulhas also indicated that the deceased was always excited to spend time with the accused prior to that incident. Ms Petersen recorded that no pattern of any violent behaviour by the accused towards the deceased could be confirmed during her investigation.

[20] It appeared that for approximately two months after the deceased's death the accused and Ms S[...] persisted in their abusive relationship, as a result of the abuse of alcohol. Ms S[...] had indicated in the course of the trial that she at that stage decided to leave the accused and their relationship thereupon terminated. Ms S[...] indicated to Ms Petersen that she continued to experience trauma as a result of the death of her child and did not support a community based sentence for the accused.

[21] Ms Petersen considered the risk and protective factors with regard to an appropriate sentence for the accused. In this regard she assessed the risk that he posed to the community, his needs, and the nature and seriousness of the crime that he committed. The risk factors were regarded as negative indicators in terms of possible future offending of the same nature, while protective factors were characteristics associated with a likelihood of negative outcomes. In respect of the identified risk factors, the following were considered in respect of the accused: a lack of conflict resolution skills on his part, the prevalence of neighbourhood crime, his history of drug abuse and his history of violent behaviour, in particular towards Ms S[...]. In respect of the protective factors the following were considered as significant: the support he obtains from his family and, in particular, his paternal aunts, he has a stable housing environment, he has access to services and has maintained steady employment for close on to 14 years with the same employer. Ms Petersen noted that the accused was not previously

involved in any social programmes, but that he had indicated a positive attitude towards a submission to such programmes and rules.

The social workers at ACVV Moorreesburg indicated that no reports of domestic violence/abuse and neglect had been made to their offices in relation to the accused. In the consideration of, and the recommendation to the court of, an appropriate sentence, Ms Petersen was of the view that direct imprisonment was not regarded as a suitable option, given that he does not pose a direct threat to the safety of the community and that the punitive element of sentencing could be accomplished by other means. Likewise, a wholly suspended sentence, considering the seriousness of the offence alone, would be an understatement of the offence.

- [22] Ms Petersen was of the view that a sentence of correctional supervision, in terms of Section 276 (1) (h) of the Criminal Procedure Act, that would provide for house arrest, the completion of community service and other suitable programmes offered by the Department of Community Corrections, Malmesbury, may be an appropriate sentence for consideration by the court. Ms Petersen had also confirmed with a Ms Lottering, at the Malmesbury Community Corrections Centre, that the accused would be a suitable candidate for correctional supervision and that he would benefit from the following programmes: parenting, substance abuse and anger management, and programmes relating to life skills and a victim/offender dialogue and mediation.
- [23] Ms Silatsha, in her report and in her oral testimony, also referred to the accused's personal circumstances, and also considered whether correctional supervision was a viable sentence. She considered the risk factors as referred to by Ms Petersen and, given his overall personal circumstances, supported the recommendation of correctional supervision as an appropriate sentence for consideration by the court. In the course of her evidence she referred to the compulsory programmes available at Correctional Centres. To the court's surprise, no specific provision was made for crimes relating to offences against children, other than that generically dealt with in respect of violence, assault, rape, gender-based violence, and psychological and emotionally related offences. The programmes did, however, specifically relate to offences related to drug and alcohol related offences. Ms Silatsha very helpfully provided the court with a copy of the course content of the various models relating to 'Social Life Skills/Free to Grow', which contained a number of relevant modules that an offender such as the accused could benefit from, including that of the consequences of alcohol and drug abuse, conflict resolution and the effects of criminal behaviour on the lives of persons related to an offender. However, in the course of the court seeking clarity from Ms Silatsha, with regard to the principles and underlying role of Restorative Justice in the community based programmes, it appeared that she had received very little, if any, training thereon. The introduction by the legislature of community based programmes, and in particular that under Sections 276 (1) (h) and (i)[3], appeared to have infused the principles of Restorative Justice into the criminal justice sentencing regime, and in particular where it could be an appropriate sentencing approach in respect of certain offences. See Hiemstra on the Criminal Procedure Act 51 of 1977 page 28-33. It is for that reason that the court sought a clearer exposition on the role of Restorative Justice in the context

of the sentence options recommended by both Ms Petersen and Ms Silatsha. I revert to that evidence later.

- [24] The defence also called the accused's paternal aunt, Ms Maria Thys. In her testimony she confirmed the background information in respect of the accused, his upbringing, and also highlighted the lack of a paternal figure, in the form of the accused's father, in his life. She referred to the breakdown in the relationship between him and his biological father, and the role that her sister, Ms Maarman, had played as the central figure in the accused's

life and in his upbringing. Ms Thys is a qualified teacher and lives in Belhar in Cape Town. The accused had often visited her over weekends, and during vacations had developed a close and fond relationship with her and her children. She extolled the positive features of the family relationship with the accused, and committed herself to providing accommodation and housing to the accused if the court found it appropriate to place him under house arrest in Belhar. The court raised with her, though, that the social circumstances in Belhar, of gangsterism and the widespread abuse of alcohol and drugs, were equally as prevalent to that in Moorreesburg.

- [25] The township in Moorreesburg, as with most townships in the Western Cape and that around the country, is plagued by the social scourges that arise from poverty: unemployment, the abuse of alcohol and the prevalence of drugs, and ever-increasing crime rates.
- [26] This court has already highlighted the nature and seriousness of the offence of which the accused has been convicted. It bears repeating, though, the remarks made by Dr Sherman, that the deceased must have endured considerable pain as a result of the internal injuries that she suffered. No doubt her resilience as a child had mitigated the outward manifestations of her internal injuries. Nonetheless, the deceased had displayed visible signs of pain and illness during the course of the Saturday morning already, whereupon Ms S[...] administered nothing more than pain medication to her. The deceased's repeated vomiting and her inability to hold down food were undoubtedly clear signs that the deceased was not well. Those signs were simply ignored by both the accused and Ms S[...], who as early as the Saturday morning could and should have sought medical attention for her, through an ambulance or the local police station to assist them. Her condition deteriorated throughout the day and well into the night, where she persisted in displaying symptoms of pain, fever and listlessness to the accused. The accused simply failed to pay any heed thereto, but continued to consume alcohol and use drugs with his visiting friends. Regretfully, neither of them intervened when they could quite clearly have observed the deceased's condition, as she repeatedly came into the living room where the accused was to seek his attention and comfort. The bruise marks on the deceased's body were patently visible from the photographs handed into evidence. The blotch marking that resulted from the internal scarring was distinguishable from the bruising that would have emanated from injuries. As stated in the judgment of the court on conviction, there remained a suspicion with regard to the accused's conduct in respect of the injuries sustained by the deceased. However, there was insufficient evidence to sustain a finding of any direct physical assault, on the part of the accused, which may have led to her death. It is important therefore to record that the accused is not being sentenced for any suspicions harboured by either the court or the State, nor, for that matter, suspicions held by members of the community of Moorreesburg. Importantly too, was the admission by the accused during his cross-examination by the State during the trial that, in retrospect, and given the condition that he was in on the night of the incident, he would not have left his own children in his care.

- [27] When considering the interests of the community in the sentencing process, the court had particular regard to the victim impact reports that the State read into the record in respect of both Ms A[....] S[....], and the deceased's maternal aunt Ms Sonetta Agulhas. It was apparent from the report in respect of Ms S[....], the ongoing and deep pain and trauma she continued to experience as a result of the death of her child. She spoke vividly of her tearful state, sleepless nights, recurring questions as to why it was her young child that was the victim and subject of the neglect, both at her own hands and that of the accused and was no doubt burdened with a deep sense of guilt. She also referred to her ideation of suicide, which is a desperate and direct call for urgent psychological and, if necessary, psychiatric intervention and assistance with her trauma. She described with deep pain the loss of the child in her life, that the child would not be there to live the typical milestones of a young girl attending school, living a full life and the role she as a mother would play in the life of her daughter. It appeared that she has strong feelings of self-recrimination in respect of her own conduct that contributed to the death of her child, which compounded both her agony and trauma.
- [28] Also clear was the ongoing trauma, loss and pain experienced by Ms Agulhas and her family, in particular her children, who enjoyed a close and familial relationship with the deceased. She recounts the deceased's lively and loving personality, being well-loved by members of the close-knit community. The deceased was known for her love of posing and childlike modelling for the camera in fun-filled performances, with an exuberance for life and laughter in her engagement with people around her. Ms Agulhas likewise laments her failure to have been more vigilant and alert to what she may have suspected as signs of abuse of the child. It was evident that Ms Agulhas and her family would also have to be part of any process of healing that is needed in the deceased's family.
- [29] As indicated, the State tendered the oral testimony of the community elder, Ms Emmalene Mentoor, affectionately known as 'Aunty Poppie' in the community, who provided the court with a fuller and visceral picture of the deceased, the meaning and love that she brought into the lives of those with whom she was closely associated. Ms Mentoor is a senior family member of the deceased, and described her own relationship with the young child for whom she displayed an immense fondness and passion. The deceased would often and playfully remark to her that she was not 'a flerrie' in an impish tone, and with the mirth that only young children are able to display in their innocence. Ms Mentoor also described and pointed out the social afflictions rampant in the community of Moorreesburg, such as the abuse of alcohol and illicit drugs, and the prevalence of unlawful shebeens and taverns and their impact on the small farming town. She spoke with the wisdom of an elder who had lived through the adversities of a community ravaged by poverty, unemployment and its myriad of dysfunctions. However, she remained positive about a spirit of caring that remained in the community, which harboured a genuine concern for its young children and those vulnerable, especially women. Her views were not that of hopelessness and despair, but pointed firmly to a better future for the community of Moorreesburg, of which she was visibly proud of being a part. The court is grateful to her for having been so honest and open about what the community of

Moorreesburg offers, its challenges and hopes, in particular for its young children.

[30] Counsel for the State informed the court that various community organisations had approached the State and provided letters, and a petition, which they wished to be placed before the court. A petition headed 'In Support of Direct Imprisonment of the Accused' was signed by in excess of 380 members of the community, in which they stated that they looked to the court as the upper guardian of children, and in particular the deceased, and also petitioned the court to uphold its constitutional responsibility, as well as its obligations under the Declaration on the Rights of the Child, the African Charter and other instruments relating to the health and rights of children recognised in the Declaration of Human Rights. In this regard they were of the view that the aggravating factors in the case outweighed the personal circumstances of the accused and that a sentence of direct imprisonment was appropriate. The State also handed into evidence a letter from an organisation headed the 'Voice of the Voiceless', in which they sought 'Justice for Robin-Lee'. They noted the ever-increasing violence against women and children, and their sense that the justice system was failing victims. They also pointed out that it was important that the life of the deceased not be silenced forever, and that her memory remain alive in the

community. They claimed that the accused had simply moved on with his life without displaying any remorse. They also sought a sentence of direct imprisonment. The State further handed in a letter from an organisation called 'The Total Shutdown International Women's Movement-My Body-Not Your Crime Scene'. The organisation pointed out that the court needed to send a strong message to the community with regard to violence against children, and that such violence would not be tolerated. They also referred to the declaration by the government of the Republic, in 2019, that gender-based violence and femicide was a national crisis, as was the ongoing perpetration of violent crimes against children. They pointed out that the community of Moorreesburg rejected the recommendations of the probation officer, of correctional supervision, and claimed that a large number of 'child murders are perpetrated by parolees'. They stated that they stood by the community of Moorreesburg in calling for justice for the deceased, R[...]. These letters, and the strong sentiments expressed therein, were entered into evidence and has appropriately weighed as an important consideration by the court in the sentencing process. The State had also proved no previous convictions against the accused.

[31] It is in the very context of the nature and seriousness of the offence of which the accused has been convicted, his own personal circumstances and challenges, the poor choices that he made, his past afflictions of drug and alcohol abuse, and his recognisable strengths, together with the broader interests of society and, more specifically the community of Moorreesburg, including the desperate need for healing by both the mother and biological father of the deceased child, and that of the broader family, that the court had to consider the recommendations of the probation officer as to whether a sentence of correctional supervision under the Criminal Procedure Act was an appropriate and viable sentence for the accused.

[32] Mr De Klerk, a highly acclaimed expert, both here in South Africa and internationally, on policing and criminal justice, provided the court with his deep insights and knowledge in the area of Restorative Justice, its origins, meaning and implications as a sentencing approach for the court to consider. With modesty he placed on record his extensive qualifications and experience as an analyst, facilitator and social conflict specialist. He is a graduate in Social Work from the University of the Western Cape; has extensive post graduate qualifications; a Masters in Comparative Policing and Social Conflict from the University of Leicester, UK; studied at the Austrian Study Centre for Peace and Conflict Resolution; attended

post graduate programmes in Human Rights Monitoring and Protection in Austria and Preventative Diplomacy and Peace Building, amongst

others. He has worked on policing, community conflict, has provided training at the European Centre for Electoral Support, the Ministry of Police, South Africa, the African Centre for Security and Intelligence Praxis, Cape Town, the Austrian Study Centre for Peace and Conflict Resolution, and institutions in West Africa, Ghana and the Centre for Conflict Resolution, Cape Town, the Commonwealth Secretariat, the Maldives and Sri Lanka. He has also conducted extensive research and written on human rights, the rule of law, justice, safety and security, and public participation.

[33] Although he is a graduate social worker, he claimed never to have practiced in that field, but has used the skills required therein in the work that he does. He teaches at various universities, including the Peace University and also in The Hague, has also been attached to the Ministry of Police as an expert, and is generally regarded as an expert in the area of policing techniques and is often quoted both locally in newsprint and on television.

[34] Mr De Klerk described the notion of Restorative Justice, from a policing perspective, as a process of engagement in working with persons who commit offences, listening to voices of communities and, most importantly, that of the victims, that must be taken into account in arriving at a process of 'truth telling'. The process is aimed primarily at the healing of communities and in particular between the victims of crime and their perpetrators. Central to the notion of Restorative Justice, is the critical issue of 'attaining personhood and a realisation on the part of individuals and, in the context of perpetrators, of the part that they play in communities and the impact of their actions in society at large'. He emphasised that the concept of Restorative Justice was based on the foundational principle of the age-old African value system of Ubuntu. Such value system is not peculiar to South Africa but is prevalent throughout the continent, and its philosophy cuts across large linguistic groups, all of who believe that an individual is squarely rooted in the context of a community. In that context the idea of personhood takes form in which good is strived for.

[35] The concept of Ubuntu has been variously described and in this regard significantly by the now retired Justices Mokgoro and Sachs, and other judges of the Constitutional Court, in its jurisprudence. In this regard Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) remarked:

[113] Ubuntu

- botho is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived

at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the

past.[4] In present day terms it has an enduring and creative character, representing the element of human solidarity that binds together

liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively

into and enriches the fundamental rights enshrined in the Constitution. As this Court said in *Port Elizabeth Municipality v Various Occupiers*:^[5] . . .

[114] Ubuntu

- botho is highly consonant with rapidly evolving international notions of restorative justice. Deeply rooted in our society, it links up with worldwide striving to develop restorative systems of justice based on reparative rather than purely punitive principles. The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation.^[6] Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well known to traditional forms of dispute resolution in our country, processes that have long been, and continue to be, underpinned by the philosophy of ubuntu
- botho.

[115] Like the principles of restorative justice, the philosophy of ubuntu

- botho has usually been invoked in relation to criminal law, and especially with reference to child justice. Yet there is no reason why it should be restricted to those areas. It has already influenced our jurisprudence in respect of such widely divergent issues as capital punishment^[7] and the manner in which the courts should deal with persons threatened with eviction from rudimentary shelters on land unlawfully occupied.^[8] Recently it was applied in creative fashion in the High Court to combine a suspended custodial sentence in a homicide case with an apology from a senior representative of the family of the accused, as requested and acknowledged by the mother of the deceased.^[9] (Original text footnotes retained.)

[36] Central to our emerging jurisprudence, and in social and academic debate in South Africa, has been the embodiment in our constitutional discourse of the value of Ubuntu.[10] In this regard, the State is obliged to use its resources to fulfil its duties under the Constitution, but at the same time

recognise the role of individuals who exist not for themselves only, but within a broader community. Mr De Klerk pointed out that the values of Restorative Justice require of the State, society at large, and individuals, a shared responsibility to ensure social cohesion, to restore harmony, safety to all communities and to members of society.[11]

[37] Mr De Klerk emphasised that the process of Restorative Justice was singularly dependent on the commitment of the individual, and the voluntariness of the process. No state can ordain or compel a healing process without the complete and fullest commitment of those involved in it. Importantly, he emphasised that a Restorative Justice process does not preclude punishment, and it is not simply an acknowledgment of wrong or simply a question of forgiveness and contrition. It is necessary for a perpetrator to accept responsibility for his or her actions, and in the context of Restorative Justice to demonstrate remorse in a meaningful way, and accept that incarceration may also best serve the interests of a community and society at large as part of the healing process. However, once incarcerated and in the custody of the state, the Department of Correctional Services assumes important responsibilities in providing an environment of rehabilitation and healing. In this regard he was particularly mindful of the limited resources in the Department of Correctional Services, the incessant challenge of overcrowding, and what may at times be perceived as being a lack of commitment. He nonetheless and importantly acknowledged the role of Correctional Services officers in the process, and emphasised the importance of each of them becoming advocates in their own cause and not simply to lament problems and espousing a sense of despair and hopelessness.

[38] Mr De Klerk described what he referred to as the three crucial components of the Restorative Justice process, and the set of skills and competencies that are required to implement the process. He described it with reference to the points on a triangle, the first of which, in the criminal justice system, is referred to as the 'substantive' part. In this context it relates to the investigative processes and the trial proceedings on the merits of a case, with outcomes being substantially fair and just in accordance with the law and the Constitution. The second relates to the 'procedural' aspects of the criminal justice system, that provide for access to courts, proper legal representation and procedurally fair remedies and processes. In this regard, he noted that the community, Correctional Services, prosecutorial services, legal defence and the accessibility of courts all fulfil a very specific role in the procedural aspects, and each carry out discreet functions that enable the voices of all people concerned and affected by the crime to be expressed and heard. The third area (point in the triangle) of the process is what is described as the 'affective' side, which relates to the emotional expression of victims, survivors, communities and also that of perpetrators. It is in this delicate context that healing and the raw end of emotion is given expression to.

[39] In respect of the accused, Mr De Klerk testified that he had considered the various reports and, in particular, that of the probation officer, which he noted had not dealt fully with the social context of the community in Moorreesburg and the criminogenic factors associated therewith, such as the structural and systemic problems in the community, cultures of abusive relationships and obfuscation, fear of reporting violence and abuse, and the stigma attached thereto. In this regard he also noted the lack of a psycho-social investigation and report into the accused, which would have helped the court to appreciate and understand the psychological condition and the impetus of the accused that may have impacted on his conduct and choices. Mr De Klerk was mindful of the situation being that the mother of the deceased had also been held criminally responsible for the death her child, and her own feelings of guilt that required its own context, healing and therapeutic attention.

[40] Mr De Klerk suggested that perpetrators such as the accused may benefit from being removed from the milieu of criminogenic circumstances in which they live, to enable them to reflect on their conduct and its impact in a structured environment, to obtain the necessary counselling and assistance to deal with afflictions such as drug and alcohol abuse, anger management, and to attain a measure of insight into choices and conduct in respect of the offence and its impact on the family of the deceased and the broader community, of which both he and the deceased and her family are integral parts. He also referred to what is regarded as a 'conciliatory phase', that enables not only the accused but also the mother of the deceased

and her family, and the community at large, to emotionally prepare themselves and to arrive at a state in which they are able and ready to engage with one another. In this regard, when expressions of remorse are made too early, they may be regarded as opportunistic, while at the same time if offered too late, could also be regarded with a fair amount of suspicion. This process of conciliation is one supported, moderated and mediated through appropriate support systems, such as within Correctional Services and through counselling that Ms S[...] and her family must receive.

[41] In the course of his testimony the court pointed to what it regarded as a significant moment in the sentencing process that emerged in Moorreesburg. After the accused's evidence was led in chief by his legal representative, the court asked him if there was anything else that he wished to say prior to his cross-examination by the state. He indicated that as a result of this bail conditions he had not as yet had the opportunity of expressing his remorse, and to ask forgiveness from the deceased's mother. Ms S[...] and the deceased's biological father, Mr R[...]2 G[...], were then asked by the court to come forward, whereupon the accused addressed them directly in expressing his regret and asked of

them their forgiveness for what he had done. At the prompting of the court, he thereafter turned to the members of the community of Moorreesburg present in court, and likewise expressed his regret and asked their forgiveness. So, too, did he address his paternal aunts and other family members who were present in court, by apologising to them for the embarrassment and pain that he had caused them and also asked for their forgiveness. It appeared to the court the

expressions by the accused in an open court, were no more than the very first steps by him, the deceased's family and the community, of entering into a process of healing. The accused had also for the very first time, as observed by the court, displayed any visible sign of emotion.

Throughout the proceedings, during the Covid 19 period, he was masked and when masks were eventually removed, the court noted that his face remained inscrutable and expressionless.

When the accused expressed his regret to the deceased's family, the community and his own family, it appeared to the court to be the first time that the accused had displayed any emotion, and he appeared tearful for the very first time in the proceedings. Mr De Klerk commented on the significance of such expressions and agreed that it was no more than the beginning of a lengthy and very difficult process of healing and restoration between the accused and the victims of his crime.

[42] Counsel for the State, in cross-examination of Mr De Klerk, invited him to comment on the State's position that it would suggest to the court that it consider a sentence of correctional supervision under Section 276 (1) (i) of the Criminal Procedure Act, that would require of the accused to serve a period of a custodial sentence, and thereafter and at the discretion of the Commissioner of Correctional Services be considered and released to serve a portion of his sentence under community supervision. Mr De Klerk cautiously noted that it was really a decision for the court to make, but that in the context of the matter it would not be an inappropriate sentence, given the importance of its custodial element, and at the same time would give the accused the opportunity,

if qualified and considered to be released back into the community, to carry out community service on various conditions as part of his sentence.

[43] In questions to Mr De Klerk, counsel for the defence sought clarity with regard to the notion of preparedness for a process of Restorative Justice, to which he answered that a victim and offender interaction can take place at any stage in a continuum of the process, depending, of course, on the preparedness and readiness of the parties to engage with one another. Counsel for the accused also pointed out that at the time of the commission of the offence, the accused had been under the influence of both alcohol and drugs. He had also a history of substance abuse. Mr De Klerk pointed out, and correctly so, that the use of alcohol and substances could hardly be regarded, in the circumstances of the offence, as an excuse. Nonetheless, the accused would have the opportunity of entering into a rehabilitation program for his use and dependency on

alcohol and drugs, but more importantly he himself would have to commit to such a programme and would literally have to commit himself to abstinence for the rest of his life. Counsel for the accused also confirmed that the accused had not been able to approach the deceased's family prior to the court proceedings to offer any verbal expression of remorse and seek their forgiveness, as a result of his bail conditions.

[44] The officials from the Department of Correctional Services present in court were invited by the court (rather unconventionally) to engage with Mr De Klerk on any questions of clarity or comments that they wished to put to him. Two members availed themselves of the opportunity. Ms Bernadette Kent, a senior officer, re-emphasised the importance of the underlying processes of Restorative Justice being entirely voluntary, and the need for an unqualified commitment by a perpetrator to the healing process. Mr Gerrit Fielies, the Regional Co-ordinator for Social Reintegration, under whom the Restorative Justice Programme falls and under who correctional supervisors work, pointed to the challenges of over-crowding in the various prisons in the Western Cape, and its impact of their ability to provide full rehabilitative services. They were nonetheless mindful of the case of the accused, and that he had already made contact with the relevant Correctional Services supervisor at the Malmesbury Centre, who was fully prepared to provide the necessary correctional supervision processes should the court consider making such an order in terms of the Criminal Procedure Act.

[46] The State and the defence thereupon addressed the court with regard to an appropriate sentence. Of particular significance in their address was that both the defence and the State were in full agreement that a custodial sentence for the accused would be appropriate in the circumstances of the offence. They were also in agreement that court may consider, as an appropriate sentence, that of correctional supervision in terms of Section 276 (1) (i) of the Criminal Procedure Act, in which the accused should serve a portion of the sentence in custody and only be released on the recommendation of the Commissioner of Correctional Services to serve a period of correctional supervision in the community. The State was also of the view that the court should consider adding a further suspended sentence, coupled with that of the correctional supervision, as a further deterrent upon the accused. The court is mindful, though, of *S v Slabbert* 1998 (1) SACR 646 (SCA), at 648E-F, per Schutz JA, where it was held that a court cannot impose a suspended sentence in addition to a sentence under Section 276 (1) (i) that would cumulatively exceed a period of 5 years' imprisonment, contrary to the provisions of Section 276A

(2) (b).

[47] The court has given thorough consideration to all of the evidence presented, both in mitigation and in aggravation of sentence. While the court is mindful of the suggestions by the probation officer Ms Petersen, and that of Ms Inga Silatsha of Correctional Services, the court considers a sentence of correctional supervision under Section 276 (1) (h) as not an appropriate, sentence given the nature and seriousness of the offence, in which a young child aged three lost her life while in the care of the accused. The court need not repeat the circumstances in which the offence occurred, save to reiterate that the life of the child could and should have been saved by the accused and her mother, Ms S[....]. The court has also

carefully considered the expert testimony of Mr Eldred De Klerk. There are important considerations raised in this matter of the appropriateness of a sentence that involves a Restorative Justice process. It is apparent that there is a desperate need for healing in the lives of

all the persons affected by the tragic death of the deceased. In that process, not only the parents and family of the deceased, the accused and his family, but also the broader community of Moorreesburg should be involved. Needless to say the various community based organisations in Moorreesburg, some of whom were present in the sentencing process and participated in it, through letters to the court and in organising the petition, could in close consultation with the deceased's family consider devising community based programmes and events to assist with the process of healing and in remembering the deceased.

[48] For all of the reasons as set out in the evidence of this matter, I am persuaded that the appropriate sentence would be one that begins to restore the accused, not only to the deceased's family, but also to the broader community, and which would provide him with an opportunity for reflection, to obtain a deeper insight into his conduct, choices and actions. The sentence must also vindicate the life of a young child that was lost in circumstances that were absolutely unnecessary. The young men and women of Moorreesburg should also suffer no illusions about their responsibilities as young parents, and the impact of the choices that they make on a daily basis, which this tragic case so vividly demonstrates. The use of alcohol and drugs remains no excuse for such choices, especially in conduct that leads to injury and the death of anybody in the community, and more particularly those in vulnerable circumstances such as young children and women. This case demonstrates all too clearly the sordid realities that exist in very many of the communities in not only the Western Cape, but throughout this country. This case and its tragic story, however, presents the community, the deceased's family and the accused with an opportunity for all, in a structured and in community based processes, of working towards a healing of relationships and the building of a personhood, that Mr De Klerk so articulately highlighted in his evidence, in the process of accountability. Far too many years have already elapsed since the deceased's death and it was visibly clear to the court that the community desperately

needed to be engaged in a process of healing for the loss of the young child, who had meant so much to all of them, and no less each and every other young child in the community of Moorreesburg. This case also provided an opportunity for reflection on the part of the community and, more importantly, by each individual on how they can and must intervene when necessary to save the lives of those living in vulnerable circumstances and in abusive relationships wherever that is evident, and in particular those in desperate need of a voice and in need of social and preventative measures. The community can no longer be silent in the face of abuse or blind to tell-tale signs of violence, nor for that matter to the scourge of illicit sales of drugs and alcohol. The community is duty bound to use the processes of law enforcement, social services and, where necessary, the courts, to assist it in protecting itself and, more importantly, its children and the young people who succumb to the consequence of abuse.

[49] I have already indicated that it is necessary that Ms A[....] S[....] receive the necessary psychological and, if necessary, psychiatric counselling. Counsel for the State is therefore directed to ensure that such services are provided to Ms S[....], and those members of her immediate family affected by the death of the child, and on a regular basis to monitor its

provision. By way of conclusion, the court notes that this has been a long trial and an equally lengthy sentencing process. It is incumbent on this court to express its appreciation, firstly, to the Chief Magistrate of Moorreesburg, Mr Mthimunye, who has provided the High Court access to the people of Moorreesburg. The court also wishes to express its thanks and appreciation to every member of the community who attended these proceedings, and who with extreme discipline and patience listened to all of the evidence presented. Equally, the court wishes to express its appreciation to the legal representatives, the counsel for the defence who made the necessary arrangements with the Department of Correctional Services and Social Services for the provision of the reports, and the attendance by the officials of Correctional Services at the hearings in Cape Town. In

particular, the court also wishes to thank counsel for the State for all of the arrangements that he has made with regard to the court being able to sit in Moorreesburg, and his constant and constructive liaising with the community and interest groups of Moorreesburg. He has facilitated their participation in these proceedings in a most effective way. The court also wishes to commend the investigating officer in the matter, the support team of police officials, the emergency services of Moorreesburg, and the

pathologist, Dr Sherman, the probation officer Ms Petersen, and Ms Silatsha, and the Correctional Service officers and, in particular,

Mr Eldred De Klerk, for his insightful expertise and generosity in assisting the court, and all others for their kind helpfulness and hospitality to the court. Lastly, the court wishes to note with appreciation, the conduct of the accused throughout the trial, his assiduous compliance with his bail conditions of reporting on a regular basis at the police station, and more importantly the court wishes him well as he confronts the sentence of this court and its impact on his life.

[50] The court directs that a copy of the judgment and sentence be made available to the Department of Correctional Services, Malmesbury (or any other facility) in whose custody the accused will resort to in the sentence. More so, to enable the Commissioner of Correctional Services to be fully appraised of the nature and seriousness of the offence of which the accused has been convicted, the circumstances in which it was committed and the considerations which the court has taken into account in arriving at the sentence.

[51] In the result the following sentence is imposed on the accused:

- (i) The accused is sentenced in terms of Section 276 (1) (i) to a term of imprisonment of 5 years.
- (iii) The accused is found unsuitable to work with children in terms of Section 120 (1) (b) of the Children's Act 38 of 2005.

(iv) The Registrar of this Court must, in terms of Section 122 (1) of the Children's Act 38 of 2005, notify the Director-General, Department of Social Development, in writing of the findings of this court made in terms of Section 120 of the Children's Act and that the accused is unsuitable to work with children and the Director-General is to enter the name of the accused, as contemplated in Section 122, in Part B of the register.

VC SALDANHA

JUDGE OF THE HIGH COURT

[1] '276 Nature of punishments (1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely- (a) . . . (h) correctional supervision; . . .'

[1] '276 Nature of punishments

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-

(a) . . .

(h) correctional supervision; . . .'

[2] The appellants had also been charged with and convicted of two further counts, (i) assault with the intent to do grievous bodily

harm, and (ii) the rape of the child, in contravention section 3 of Act 32 of 2007.

[3] 'imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board'.

[4] 'See the Epilogue to the interim Constitution, extensively discussed in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others

[1996] ZACC 16; 1996 (4) SA 671 (CC) (1996 (8) BCLR 1015) at para [48].'

[5] '2005 (1) SA 217 (CC) (2004 (12) BCLR 1268).'

[6] 'See the discussion by Skelton The Influence of the Theory and Practice of Restorative Justice in South Africa, with Special Reference to Child Justice (unpublished doctoral thesis, Pretoria University, 2006) at 18-21.'

[7] 'S v Makwanyane and Another

[1995] ZACC 3; 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665). See Langa J at para [227] in which he held that: "It was against a background of the loss of respect for human life and the inherent dignity which attaches to every person that a spontaneous call has arisen among sections of the community for a return to ubuntu. A number of references to ubuntu have already been made in various texts, but largely without explanation of the concept. It has, however, always been mentioned in the context of it being something to

be desired, a commendable attribute which the nation should strive for.” See Madala J at para [237] in which he held that: “The concept of ubuntu appears for the first time in the post-amble, but it is a concept that permeates the Constitution generally, and more particularly ch 3, which embodies the entrenched fundamental human rights. The concept carries in it the ideas of humaneness, social justice and fairness.” See Mahomed J at para [263] in which he held that: “‘The need for ubuntu’ expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognising their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.” See Mokgoro J at para [308] in which she held that: “Generally, ubuntu translates as ‘humaneness’. In its most fundamental sense it translates as ‘personhood’ and ‘morality’. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa ubuntu has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of ‘humanity’ and ‘menswaardigheid’, are also highly prized. It is values like these that s 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.” And see Sachs J at para [374].’

[7] ‘S v Makwanyane and Another

[1995] ZACC 3; 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665). See Langa J at para [227] in which he held that:

“It was against a background of the loss of respect for human life and the inherent dignity which attaches to every person that a spontaneous call has arisen among sections of the community for a return to ubuntu. A number of references to ubuntu have already been made in various texts, but largely without explanation of the concept. It has, however, always been mentioned in the context of it being something to be desired, a commendable attribute which the nation should strive for.”

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And see Sachs J at para [374].’

[8] ‘Port Elizabeth Municipality v Various Occupiers above n 2 [2005 (1) SA 217 (CC) (2004 (12) BCLR 1268)].’

[9] ‘See S v Joyce Maluleke and Others (TPD case No 83/04, 13 June 2006) as yet unreported. Stressing the need for circumspection in this area, Bertelsmann J in a judgment on sentencing discusses the advantages of drawing upon traditional African legal processes so as to achieve reconciliation

and closure, showing how they fit in with developing notions of restorative justice in various international jurisdictions. He cites Bosielo J (Shongwe J concurring) as calling for innovative and proactive presiding officers to seek alternatives to imprisonment that are based on restorative justice principles (S v Shilubane

[2005] JOL 15671 (T)).’

[10] For a wider reading on the debates and principles of Restorative Justice and the principles of Ubuntu, see the following useful articles and contributions: (i) Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation, Just Ideas - Transformative Ideals of Justice in Ethical and Political Thought, Series Editors Cornell & Berkowitz, Fordham

University Press, New York, 2014; (ii) The South African Constitutional Court's restorative justice jurisprudence, Ann Skelton, University of Pretoria, 2013; (iii) W(h)ither Restorative justice in South Africa, An Updated Status Review, Mike Batley and Ann Skelton, Restorative Justice Centre, University of Pretoria, 2019; (iv) Restorative Justice: Principles and Practice, Prison Fellowship International, Jonathan Derby; (v) Social justice and retributive justice, Lucy Allais, Social Dynamics - A journal of African studies, Vol 34, 2008; (vi) The unfinished business of the TRC, Tymon, New Frame, 16 November 2020.

[11] The very connotation of 'Restorative' is likewise the subject of a very interesting debate, with some commentators

expressing the view that the connotation of 'Transformative Justice' may be a more appropriate conception of the process that essentially seeks to facilitate the healing, truth telling and reconciliation of the persons involved both individually and collectively. By way of background, and for the edification of the members of the Department of Correctional Services who graciously attended the sentencing proceedings, Mr De Klerk referred to the national policy document, The National Framework on Restorative Justice, and the cross-cutting involvement of various state departments such as Social Development, Justice, Correctional

Services, Police and the National Prosecutorial Services. He commented that none of these departments are separately able to achieve the objectives of the framework, but must do so coherently in dealing with the complex challenges of crime, violence,

restitution and punishment in a broader social and legal context. He emphasised what he regarded as the lack of coherence across various state departments, and their commitment to achieving the objectives of the Framework, which required proper attention.

He noted, though, that very often such lack of coherence was not only as a result of a lack of resources, but also a lack of skills and capabilities in the persons charged with the responsibility of implementing the Framework. In this regard he referred to the ever increasing loss of skills that the democratic state was confronted with, and the challenges for the future in building the capacity to deal with the challenges of the Restorative Justice commitments.

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-jantjies-unknown-topic-awchc-2022>

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