CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/04

WILLY AARON SIBIYA	First Applicant
PURPOSE KHUMALO	Second Applicant
JACOBUS PETRUS GELDENHUYS	Third Applicant
DAVID NKUNA	Fourth Applicant
versus	
THE DIRECTOR OF PUBLIC PROSECUTIONS: JOHANNESBURG HIGH COURT	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE MINISTER OF CORRECTIONAL SERVICES	Fourth Respondent

Heard on : 10 March 2005

Decided on : 25 May 2005

JUDGMENT

YACOOB J:

[1] The four applicants, Mr Willy Aaron Sibiya (First Applicant), Mr Purpose Bongani Khumalo (Second Applicant), Mr Jacobus Petrus Geldenhuys (Third

Applicant) and Mr David Nkuna (Fourth Applicant) were all convicted in the early 1990s of certain offences for which the death penalty was competent at the time. They were sentenced to death in various high courts[1] before the death sentence was in effect declared to be inconsistent with the interim Constitution by this Court in *Makwanyane*.[2] Subsequent to *Makwanyane* Parliament enacted legislation to provide a mechanism for the way in which the death sentence imposed upon a person may be replaced by an appropriate alternative sentence.

[2] The applicants secured a High Court order declaring part of this legislation, subsections (1) to (5) of section 1 (the impugned provisions) of the Criminal Law Amendment Act 105 of 1997 (the Act) to be inconsistent with the Constitution.[3] These provisions apply to any person sentenced to death who has "exhausted all the recognised legal procedures pertaining to appeal or review".[4] In essence, the High Court held that the impugned provisions should have complied with certain of the fair trial rights enumerated in section 35 of the Constitution[5] and that they did not.[6] The

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[1] At the time when each of the applicants was sentenced, the high courts were known as provincial or local divisions of the Supreme Court of South Africa. The first applicant, Willy Aaron Sibiya, was sentenced to death in the Transvaal Provincial Division of the Supreme Court of South Africa on 14 June 1991. The second applicant, Purpose Bongani Khumalo, was sentenced to death in the Transvaal Provincial Division on 27 February 1992. The third applicant, Jacobus Petrus Geldenhuys, was sentenced to death in the Witwatersrand Local Division on 26 September 1993. The fourth applicant, David Nkuna, was sentenced to death in the Orange Free State Provincial Division of the Supreme Court of South Africa on 1 December 1992.

[2] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[3] *Sibiya and Others v Director of Public Prosecutions and Others* [2005] 1 All SA 105 (W).

[4] Section 1(1) of Act 105 of 1997.

[5] Section 35(3)(c), (e), (i), and (o).

[6] Above n 3 paras 151-2 and 188.

applicants require confirmation of the High Court order.[7] The respondents[8] oppose confirmation.

Context

[3] The legislation of which the impugned provisions are a part became law after this Court declared the death penalty unconstitutional. The law that is under attack must therefore be considered in the context of the legal procedure that governed capital punishment at the time the decision in *Makwanyane* was made, the impact of that procedure as well as the implications of the decision in *Makwanyane*.

[4] Before July 1990 courts were, except in certain defined circumstances, obliged to impose the death penalty for murder and could impose the death sentence for certain other serious offences including rape. A lesser sentence for murder could be imposed only if the accused demonstrated the existence of extenuating circumstances.[9] A convicted person sentenced to death could appeal against the sentence only with the leave of the trial court or, if the trial court refused, with leave of the Supreme Court of Appeal (SCA).[10]

[7] In terms of section 172(2) of the Constitution.

[8] The Director of Public Prosecutions (Johannesburg High Court), the Minister of Justice and Constitutional Development, the President of the Republic of South Africa and the Minister of Correctional Services.

[9] Section 277 of the Criminal Procedure Act 51 of 1977 before it was amended by section 4 of Act 107 of 1990.

[10] The SCA was known as the Appellate Division of the Supreme Court of South Africa before the Constitution came into effect on 4 February 1997 but will be referred to as the SCA throughout this judgment.

[5] On 27 July 1990 the position changed considerably. Section 277 of the Criminal Procedure Act 51 of 1977 (the CPA) was amended by the Criminal Law Amendment Act 107 of 1990 (the 1990 law). This law gave the trial court a much wider discretion to determine whether capital punishment should be imposed on the accused person concerned. A trial court had to make a finding in relation to aggravating and mitigating circumstances, and could impose the death penalty on the person convicted only if it was "satisfied" that the imposition of that sentence was "proper".[11] In effect, the death sentence could have been imposed only in the most extreme circumstances and only if there was no reasonable prospect of properly achieving the objects of punishment by any other sentence.

[6] The 1990 law also made it easier to appeal against a trial court decision imposing capital punishment. Every person sentenced to death had the right to appeal against the sentence directly to the SCA.[12] Leave to appeal was no longer required. In addition, the SCA could confirm the death sentence only if it was satisfied that the sentence was proper. The SCA was also obliged to consider whether the death sentence had been correctly imposed even in those cases in which the person who had been sentenced to death chose not to contest the decision of the trial court on appeal.[13] The Act provided for the SCA to consider cases of this kind in the light of further argument from counsel.[14] It follows that the death sentence could become final under

[11] Section 277 of the CPA after it was amended by section 4 of the 1990 law.

[12] Section 316A(1) of Act 51 of 1977 as inserted by section 11 of the 1990 law.

[13] Above n 2 para 45.

[14] Above n 12.

this law only after the SCA had confirmed it after due consideration. The amending provisions were also retrospective in effect. Its provisions were made applicable to all people who had been sentenced to death by a high court and who had not yet had their cases considered by the SCA.[15]

[7] At a sitting of the joint houses of Parliament on 2 February 1990, the State President announced a moratorium on the carrying out of death sentences and said that no death penalty had been executed in South Africa since 14 November 1989.[16] The moratorium was extended on 27 March 1992.[17] The moratorium prevented the carrying out of death sentences only, not their imposition. Accordingly, at the time of the decision in *Makwanyane*, many people who had been sentenced to death were being detained in prison.

[8] This was the legal and factual situation at the time this Court considered the validity of the statutory provisions that authorised capital punishment. This Court said in relation to the circumstances in which the death penalty could have been imposed:

> "Mitigating and aggravating factors must be identified by the Court, bearing in mind that the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors which might have influenced the accused person's conduct, and these factors must then be weighed up with the main objects of

[15] Section 20 of the 1990 law.

[16] Hansard, Debates of Parliament, vol 16, 1990, pages 7-8.

[17] Above n 2 paras 23-24 and 118.

> punishment, which have been held to be deterrence, prevention, reformation, and retribution. In this process '(e)very relevant consideration should receive the most scrupulous care and reasoned attention', and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence."[18] (Footnotes omitted.)

[9] All the statutory provisions that authorised the death penalty,[19] save those concerned with treason while the Republic is in a state of war,[20] were declared as being inconsistent with the interim Constitution by this Court in *Makwanyane*. Paragraph 1 of the Court order reads:

> "In terms of s 98(5) of the Constitution, and with effect from the date of this order, the provisions of paras (a), (c), (d), (e) and (f) of s 277(1) of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment which are in force in any part of the national territory in terms of s 229, are declared to be inconsistent with the Constitution and, accordingly, to be invalid."

[10] Some aspects of the judgment and order in *Makwanyane* must be emphasised. The death penalty was not declared invalid with retrospective effect. The order of this Court was to have prospective effect only. It follows that all death sentences imposed before 6 June 1995[21] remained valid sentences. It therefore became necessary for this Court to ensure that death sentences imposed before the date of its order were never executed. The Court accordingly ordered that:

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[18] Above n 2 para 46.

[19] Section 277(1)(a), (c), (d), (e) and (f).

[20] Section 277(1)(b) of the Act was not set aside as appears from paragraph 149 of the judgment.

[21] This is the date of the delivery of the judgment in *Makwanyane*.

> "the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid . . ."[22]

[11] The Court ordered however that all people who had been sentenced to death were to "remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments."[23] This part of the order of this Court, apart from ensuring that the people sentenced to death remained in custody, also pointed to the way in which capital punishment should be replaced by alternative sentences. This had to be done lawfully.

[12] Sentences had to be lawfully replaced in respect of two categories of people. The first category consisted of people whose death sentences had not yet been confirmed by the SCA while the second comprised those cases in which the SCA had confirmed the death sentence either on appeal or in terms of the special review procedure mandated by the 1990 law. The first category included the two applicants before the Court in *Makwanyane* as well as those people whose cases had been postponed by the SCA pending the finalisation of the *Makwanyane* case. The Court said about these cases:

> "The proper sentence to be imposed on the accused is a matter for the Appellate Division and not for us to decide. This, and other capital cases which have been postponed by the Appellate Division pending the decision of this Court on the

[22] Above n 2 para 2(a) of the order.

[23] Above n 2 para 2(b) of the order.

> constitutionality of the death sentence, can now be dealt with in accordance with the order made in this case."

Included in this category were other cases that had still to be heard by the SCA. This Court said nothing about these cases or about those cases in which the SCA had confirmed the death sentences before the decision in *Makwanyane* had been given.

[13] According to the *Makwanyane* judgment, people who had been sentenced to death had been lawfully sentenced and were lawfully in custody under the sentences imposed upon them. They were to remain in custody until the death sentences were lawfully set aside and lawfully replaced by appropriate sentences. The order of this Court did not envisage a whole new sentencing process in relation to cases pending before the SCA. It visualised the lawful substitution of these sentences by the SCA in the course of the consideration of all the cases that were still to be considered by that court, including those that had been adjourned and those cases that had not yet come before the court.

[14] It follows that the order in *Makwanyane* required in effect that a legal mechanism be created to replace the death penalty by appropriate punishment in those cases that had been considered and dismissed by the SCA — in other words, the cases in which the SCA had confirmed the death sentences. The mechanism would therefore be necessary only to cases in which the high court had imposed the death sentence and the SCA had confirmed it. It was not strictly necessary for the mechanism to concern itself with cases pending before the SCA because, on the

Makwanyane judgment, the SCA would have lawfully substituted appropriate punishment in these cases.

[15] This is the context in which the mechanism put in place by the Act was to be understood and the constitutionality of the impugned provisions fell to be considered. At the time the Act came into effect[24] more than three years after *Makwanyane*, two categories of cases may have been outstanding: those cases in which the SCA had confirmed capital punishment on appeal and those still to come before the SCA. The mechanism would have been necessary only in respect of the first category. Indeed, since no death penalty would have been imposed after the *Makwanyane* judgment in 1995, one would have expected there to be no case in the second category.

[16] It was necessary to provide for an appropriate sentence substitution mechanism to cater for circumstances that were truly extraordinary. As explained earlier, no person sentenced to death had been executed since 1989. It was estimated that there were between 300 and 400 people who had been sentenced to death before *Makwanyane*.[25] All these sentences would have to be substituted. The death sentence was no longer the ultimate penalty. All the people whose sentences had to be replaced had already been tried and sentenced. Their sentences of death had been confirmed by the SCA. The situation was unique in that it was unlikely in the extreme that there would ever be a recurrence.

[24] 13 November 1998.

[25] Above n 2 para 6.

The mechanism

[17] The mechanism lawfully to replace the death penalty with an appropriate alternative sentence was introduced by section 1 of the Act under the heading "Substitution of sentence of death." The section concerns itself separately with two procedures:

(a) Subsections (1) to (5) are concerned with the substitution of sentence where the person concerned has "exhausted all the recognised legal procedures pertaining to appeal or review, or no longer has such procedures at his or her disposal"; and

(b) Subsections (7) to (10) relate to people who have been sentenced to death and who have "appealed to the Supreme Court of Appeal against that sentence and not against conviction".[26]

[18] The provisions that have been found to be unconstitutional by the High Court[27] are those described in sub-paragraph (a) of the previous paragraph of this judgment. They read:

> 1. Substitution of sentence of death.—
> (1) The Minister of Justice shall, as soon as practicable after the commencement of this Act, refer the case of every person who has been sentenced to death and has in respect of that sentence exhausted all the recognised legal procedures pertaining to

[26] Subsections (6), (11) and (12) do not concern us. Subsection (6) is about legal aid, subsection (11) talks about the antedating of sentence and subsection (12) preserves some of the provisions of the CPA in a form not amended by the Act.

[27] Above n 3 para 5 of the order in para 196.

> appeal or review, or no longer has such procedures at his or her disposal, to the court in which the sentence of death was imposed.
>
> (2) The court shall consist of the judge who imposed the sentence in question or, if it cannot be so constituted, the Judge President of the court in question shall designate any other judge of that court to deal with the matter in terms of subsection (3).
>
> (3) (a) The court shall be furnished with written argument on behalf of the person sentenced to death and the prosecuting authority.
>
> (b) The court—
>
> (i) shall consider the written arguments and the evidence led at the trial; and
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> (ii) may, if necessary, hear oral argument on such written arguments, and shall advise the President, with full reasons therefor, on the appropriate sentence to be substituted in the place of the sentence of death and, if applicable, on the date to which the sentence shall be antedated.
>
> (4) The President shall set aside the sentence of death and substitute for the sentence of death the punishment advised by the court.
>
> (5) No appeal shall lie in respect of any aspect of the proceedings, finding or advice of the court in terms of subsection (3).

[19] As I have already said, the procedure set out in this part of the section applies to people who have "exhausted all the recognised legal procedures pertaining to appeal or review, or no longer [have] such procedures at his or her disposal". In the context of the procedure prescribed by the 1990 law, the mechanism created by the impugned provisions applies to those cases in which the SCA has confirmed that the death sentence is appropriate. The subsection requires the Minister of Justice to refer these cases "to the court in which the sentence of death was imposed". The Minister is obliged to refer these cases "as soon as practicable after the commencement of this Act".

[20] Subsections (2), (3) and (5) speak to the nature of the proceedings in the court to which the Minister of Justice has referred a particular case. The matter must be considered either by the judge who imposed the sentence or, if the court "cannot be so constituted", by "any other judge" designated by the Judge President of the court concerned. The judge hearing the matter must consider both the written argument "on behalf of the person sentenced to death and the prosecuting authority", as well as "the evidence led at the trial". The judge concerned is empowered, if necessary, to hear oral argument. No judgment ensues at the end of the process before the judge. Instead the high court judge is obliged to advise the President of our country (the President) on the appropriate sentence to be substituted for the death sentence and the date to which the sentence is to be antedated. Any appeal against the finding or advice of the judge is expressly precluded.

[21] It will have been seen that subsections (2) and (3) say nothing about whether new evidence can be adduced before the judge who has to consider what an appropriate alternative sentence must be. The assessors who may have been part of the trial are not involved in the process of determining that sentence. The mechanism does not require the presence of the person who has been sentenced to death. Indeed, if no oral argument is called for, the matter may be finalised by the judge after studying the argument and the evidence at the trial. The proceedings at the court are a far cry from the trial procedures mandated by section 35(3) of the Constitution.[28]

[28] Section 35(3) of the Constitution provides:

> "Every accused person has a right to a fair trial, which includes the right—
> (a) to be informed of the charge with sufficient detail to answer it;

[22] Subsection (4) involves the President in the process. The judge who considers the matter in terms of subsections (3) and (4) is not empowered to set aside the sentence and to impose an alternative sentence. All that judge can do is to advise the President. It is the President who is empowered to set aside the sentence of death and substitute the punishment advised by the court. But the President has no discretion in the exercise of this power. He cannot determine whether the sentence contained in the advice of the judge is appropriate or not. The President must set aside the sentence of death and impose the recommended sentence.

[23] The procedure set out in subsections (7) to (10) need only be discussed briefly. Any appeal to the SCA of a person who has been sentenced to death against sentence alone pursuant to the 1990 law must be heard by a competent full bench.[29] The

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(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(o) of appeal to, or review by, a higher court."

[29] Section 1(7) of the Act.

Registrar of the SCA must remit the record of the relevant appeal to the Registrar of the court that will hear it.[30] The full court must set aside the death penalty and impose an appropriate sentence with all the powers that an appeal court may exercise.[31] No appeal is provided for against the sentence imposed by the full court. Appeals against convictions and sentence by a person who has been sentenced to death must be decided by the SCA.[32] These subsections apply to all cases that have not yet been considered by the SCA. They were not strictly necessary to the mechanism because, as I have already said, the cases that they are concerned with could have been decided by the SCA.

The High Court

[24] The High Court proceedings were initially aimed at securing the release of all the applicants from custody on the ground that their detention was unlawful. The application for the release of the applicants was refused[33] and this Court is not concerned with that part of the High Court order. It is therefore unnecessary to traverse the grounds upon which it was claimed that the detention of the applicants was unlawful. The High Court declared the impugned provisions unconstitutional in the following terms:

[30] Section 1(8) of the Act.

[31] Section 1(9) of the Act.

[32] Section 1(10) of the Act.

[33] Para 1 of the order provided that "[t]he application by each applicant for his release is refused."

> "The provisions of subsections (1), (2), (3), (4), (5) of section 1 of Act 105 of 1997 are unconstitutional and invalid."[34]

[25] It was common cause that the death sentences that had been imposed upon the first, third and fourth applicants did not fall to be set aside and substituted in terms of the impugned provisions[35] and that the second applicant[36] was the only person in the case to whom these provisions were applicable. By the time the application was heard in the High Court, a judge had already made a recommendation to the President as to an appropriate sentence. Moreover the President had already made a decision[37] (the President's decision) setting aside the death sentence that had been imposed upon him and substituting a sentence of life imprisonment in accordance with the advice received from the judge who had considered the question. The High Court was ultimately also asked for an order setting aside the President's decision as unconstitutional. This the court did in the following terms:

> "The sentence imposed on the second applicant by the President, pursuant to advice arising from irregular processes purportedly implemented in terms of subsection (1), (2), (3), (4) of section 1 of Act 105 of 1997 is set aside." [38]

In this Court

[34] Para 5 of the order.

[35] This was to be done in terms of the procedure described in paragraph 23 of this judgment.

[36] Above n 1.

[37] In terms of section 1(4) of the Act.

[38] Above n 3 para 2 of the order in para 196.

[26] Four matters were raised in this Court. I will first consider a preliminary matter raised by counsel for the second, third and fourth respondents. He submitted that the constitutionality of the provisions ought not to have been reached by the High Court. The main issue in this Court concerned with the constitutional validity of the impugned provisions will be considered next. There was no application before this Court for the confirmation of the order of the High Court setting aside the President's decision. The third issue that arises therefore is whether this Court should nonetheless concern itself with this part of the High Court order and, if so, to consider the correctness of that order.[39] Finally, attention must be paid to certain concerns raised during the proceedings about the regrettable fact that there were many death sentences that had not yet been substituted even though the judgment in *Makwanyane* was delivered almost ten years ago and the Act came into force more than five years before the date of this judgment.

Should the High Court have considered constitutionality?

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[39] "The following order is made:
1. The application by each applicant for his release is refused.
2. The sentence imposed on the second applicant by the President, pursuant to advice arising from irregular processes purportedly implemented in terms of subsection (1), (2), (3), (4) of section 1 of Act 105 of 1997 is set aside.
3. The respondents are ordered to furnish each applicant with a written warrant for his detention on or before Friday 26 November 2004. A copy of each warrant is to be handed up to the court to be placed in the court file on Tuesday 30 November 2004, this matter to be placed on the unopposed motion roll of the High Court of the Witwatersrand Local Division.
4. The provisions of subsections (7), (8), (9), (10), (11) of section 1 of Act 105 of 1997 are found not to be unconstitutional and the application is dismissed in respect of these subsections.
5. The provisions of subsections (1), (2), (3), (4), (5) of section 1 of Act 105 of 1997 are unconstitutional and invalid.
6. The Registrar of the Witwatersrand Local Division of the High Court is ordered, pursuant to Rule 16 of the Constitutional Court Rules, to lodge a copy of this Order with the Registrar of the Constitutional Court within fifteen (15) days of the date of this Order.
There is no order as to costs."

[27] The argument that the High Court should not have reached the constitutionality of the impugned provisions ran like this. The impugned provisions applied only to the second applicant. The second applicant had succeeded in his application to set aside the President's decision which had been made pursuant to the impugned provisions.[40] As soon as this had happened, the second applicant had succeeded in his application. It was submitted that there was accordingly no need to consider the constitutionality of the impugned provisions.

[28] This contention is unsound. The fact that the President's decision had been set aside cannot by any stretch of the imagination mean that the impugned provisions were no longer applicable to the second applicant. He remained subject to them in the sense that the sentence of death that had been imposed upon him could be set aside only in terms of these provisions. It was important for him to know whether or not they were constitutional.[41] Moreover the issue of the constitutionality of these provisions is also of enormous public importance. The High Court was right to consider it.

Constitutionality

[40] Above n 37.

[41] This Court has considered the question of mootness on several occasions. Ordinarily a matter will not be considered to be moot unless it is shown that it will have no practical effect. See, for example, *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) paras 14-16; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) paras 9-14; and *Uthukela District Municipality and Others v President of Republic of South Africa and Others* 2003 (1) SA 678 (CC); 2002 (11) BCLR 1220 (CC).

[29] The foundation of the reasoning of the High Court that led to the conclusion that the impugned provisions were unconstitutional was the understanding that all sentences of death that had been imposed before the date upon which this Court declared capital punishment constitutionally invalid became unlawful in consequence of the declaration of invalidity. According to the High Court, it followed from this that all people who had been sentenced to death had the right to be sentenced afresh. Since the sentencing process was part of a trial, the High Court reasoned that the right to be sentenced afresh included the right to be "sentenced as part of and in accordance with"[42] the fair trial requirement mandated by section 35 of the Constitution. I have already set out the ways in which the prescribed procedure deviates from the rights enshrined in section 35(3) of the Constitution.[43] The first question that must be answered therefore is whether the finding that the mechanism enacted to substitute death sentences with other appropriate sentences was hit by section 35(3) of the Constitution.

[30] The starting point of the High Court's reasoning is not correct. Sentences of death were not declared to be inconsistent with the Constitution with retrospective effect. The applicants and all other people in their position therefore had their death sentences imposed upon them, in terms of the law as it stood at the time. They had been tried, convicted and sentenced to death by a high court at a time when the Bill of Rights was not in force. The high court had found that the case before it was so

[42] Above n 3 para 167.

[43] Paras 20-21 of this judgment.

exceptional that no sentence other than capital punishment would reasonably fulfil the objects of punishment. The SCA had moreover confirmed the decision of the high court in all these cases. Both courts had decided in all these cases that the ultimate sentence then available was the only proper sentence to be imposed after considering all mitigating and aggravating factors. This Court had not set aside the death sentences but merely ordered that the sentence not be executed, because it was no longer lawful.

[31] Section 35(3) of the Constitution says that "every accused person" has the right to a fair trial. The question we must answer is whether the phrase "every accused person" embraces within its compass every person who fell in the class described in the previous paragraph. I think not. Section 35 is concerned with the trial, sentencing and appeal of a person who is accused of the commission of a crime and whose trial takes place in our new constitutional era. However generous the interpretation of the phrase "every accused person" in section 35 might be, it cannot be construed to include the people in the category with which we are concerned. This does not mean however that there was no constitutional constraint on the procedure for the setting aside of the death sentence and its substitution.

[32] Section 12(1)(a) of the Constitution is to the effect that no-one may "be deprived of freedom arbitrarily or without just cause". This Court has held that section 12 of the Constitution confers a twofold protection: the first provides that a person may not be deprived of freedom unless there is a satisfactory reason for doing

so; and the second provides that a person may not be deprived of freedom by a procedure that is unfair.[44] So people who are deprived of their freedom and who are not entitled to the protection afforded by section 35 of the Constitution are nonetheless entitled to the benefit of section 12. This section constrains the circumstances in which they may be deprived of freedom. This Court has accordingly held that a person being questioned in terms of section 205 of the CPA may not be deprived of their liberty unless the process that results in the deprivation is fair.[45]

[33] Section 12, therefore, operates as a constraint upon the mechanism prescribed by the legislature for the substitution of the death sentence. The mechanism must be fair and the constitutionality of the impugned provisions must be evaluated on this basis. I can find nothing unfair in the impugned provisions. They were enacted to deal with an extraordinary situation. It was necessary that the substitution of sentence occur quickly and efficiently. A protracted involved re-trial in relation to sentence was unlikely to produce new evidence that would have a bearing on the appropriate sentence. The delay and the use of additional scarce resources would accordingly not have been justified.

[34] The reasons that motivated the High Court to conclude that the impugned provisions offend the fair trial rights enshrined in our Constitution are also relevant to

[44] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) paras 22–25.

[45] See *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) which was concerned with the equivalent provisions of the interim Constitution.

an evaluation as to whether the mechanism is fair. These reasons are aptly reflected in the following passage of the High Court judgment:

> "Proceedings do not take place in public, there is chamber consideration of documents and perhaps argument but no trial, the administrative action is performed by a judicial officer who does not purport to constitute a court of law, no evidence may be adduced at all, not even an application in terms of section 316 will be entertained, there is no right to access the reasons or advice formulated as a result of this process and no judgment as resulting from a court of law emerges from this process, there is no appeal against any of these proceedings or advice, sentence is imposed by the President not a court of law."[46]

[35] Much was made both in argument on behalf of the applicants and in the High Court judgment of what was referred to as the "change in the sentencing paradigm" as justification for the proposition that a fresh sentencing procedure akin to that at a trial was appropriate. What had happened was that the ultimate sentence that had been lawfully imposed upon the applicants and others in their position could no longer be enforced. The legislature was entitled to proceed on the basis that the death sentence was appropriate at the time of its imposition. The only reason it had to be set aside and substituted was that it could no longer be enforced in our new constitutional era. In these extraordinary circumstances, it would in my view have been difficult to contend that a parliamentary provision that, for example, substituted all death penalties with life imprisonment was unfair.

[46] Above n 3 para 188.

[36] But the legislature takes a more careful route. It gives every person sentenced to death the right to have their cases considered by a judge who must have regard to written argument on behalf of the person concerned placed before her for that purpose. The judge may also call for oral argument on behalf of the person concerned.

[37] In these special circumstances the fact that the person concerned is not expressly given the right to lead evidence does not render the procedure unfair. All the evidence relevant to the determination of an appropriate alternative sentence would also have been germane to a finding by the trial court and the SCA of mitigating and aggravating circumstances and a decision whether the death penalty is proper. There is no reason to suppose that all this evidence was not led at the trial. I have also had due regard to the circumstance that the proceedings are not held in public in an ordinary court and that there is no appeal procedure. The people with whom we are concerned have already had a trial in public. The absence of an appeal procedure may well have been bothersome if there were no recourse against the decision of the President. This is not so. The decision of the President is subject to judicial control and review. The process is sufficiently fair to cater for the exceptional circumstances of the case.

[38] Considerable argument concerning the separation of powers was based on the contention that the process by which the new sentence is to be imposed was not judicial in character but administrative. I am not sure that the procedure can rightly be described as wholly administrative. It is a complex process that arguably has both

judicial and administrative elements. Unsurprisingly therefore, the process attracted two separation of powers criticisms:

(a) it requires a judge to perform an administrative function; and

(b) it contemplates that the President will ultimately impose the sentence and thereby perform a judicial function.

Each argument is considered in turn.

[39] There is no absolute bar to judges performing administrative tasks.[47] The question in each case is whether the administrative task is so far from the judicial function and so closely wound up with the executive function that it is incompatible with judicial office.[48] Answering this question will turn on the facts of each case. As Chaskalson CJ said:

> "Ultimately the question is one calling for a judgment to be made as to whether or not the functions that the Judge is expected to perform are incompatible with the judicial office and, if they are, whether there are countervailing factors that suggest that the performance of such functions by a Judge will not be harmful to the institution of the Judiciary, or materially breach the line that has to be kept between the Judiciary and the other branches of government in order to maintain the independence of the Judiciary."[49]

The task of assessing a record to determine an appropriate sentence in the light of the record and argument is a task that is peculiarly judicial in nature. It cannot be said

[47] See *President of the Republic of South Africa and Others* v *South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 141.

[48] See *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) paras 27ff; see also *De Lange v Smuts NO and Others*, above n 44 paras 60–61.

[49] *South African Association of Personal Injury Lawyers* id para 31.

that performing this task, even within the overall framework of this procedure, is incompatible with judicial office or breaches the line that needs to be maintained between the judiciary and the other branches of government. This argument cannot be sustained.

[40] Finally it was submitted that the legislative mechanism involves the imposition of sentence by the President, a member of the executive and therefore offends the separation of powers doctrine. It is said that the imposition of a sentence is a judicial function. The respondents contend that the section may look like it trenches upon the principle but it does not really do so because the President is obliged to impose the sentence that is presented in the advice given by the judge. The applicants emphasise, however, that we must have regard to the fact that the death sentence is set aside and the new sentence imposed by the President.

[41] The President does not determine the sentence but merely imposes it. The essence of the judicial function is the determination of a sentence. The process requires this to be done by a judge. The President substitutes the sentence recommended by the judge in a situation where the person whose sentence is substituted has already been tried, convicted and sentenced; a person in respect of whom the judicial process is over. The judiciary would ordinarily have nothing more to do with the case and the trial and appeal judges respectively are indeed precluded from altering either the conviction or the sentence. The executive can ordinarily alter the sentence of any convicted person after the judicial process has been completed.

The Constitution expressly empowers the President to pardon or reprieve offenders and to remit any fine, penalty or forfeiture.[50] There are provisions of legislation which empower the President to remit any sentence and to place people on parole and to unconditionally release convicted people from prison.[51] The CPA itself empowered the President, at the time when the death penalty could be imposed, to commute the death sentence and replace it with another punishment.[52] There could have been no separation of powers difficulty had the President commuted the death sentence of a person who had already been convicted and sentenced to death and replaced it with another punishment. This without taking any judicial advice. The fact that the President takes judicial advice cannot in itself result in the crossing of the line into judicial territory.

[42] The order of the High Court declaring the impugned provisions to be unconstitutional cannot therefore be confirmed.

The validity of the conduct of the President

[43] I have already pointed out that the High Court declared unconstitutional the decision of the President setting aside the death sentence of the second applicant and replacing it with the sentence of life imprisonment in accordance with the advice received from a judge of the Pretoria High Court. The President's decision was made

[50] Section 84(2)(j).

[51] Section 82 of the Correctional Services Act 111 of 1998.

[52] Section 326 of the CPA.

pursuant to section 1(4) of the Act. Section 172(2) of the Constitution requires confirmation by this Court of any high court or SCA order of constitutional invalidity of the conduct of the President before that declaration can be of any force and effect. The issues in *SARFU 1*[53] were adjudicated on the basis that a decision by the President to appoint a commission of enquiry is "conduct" within the meaning of section 172(2). There can also be no doubt that the decision of the President that has been found to be unconstitutional by the High Court in this case is also presidential conduct envisaged in section 172(2) of the Constitution. The High Court order declaring the President's decision to be inconsistent with the Constitution has to be confirmed before it can have any force or effect.

[44] There is no application for confirmation of this part of the order before us. Nor is there any appeal against that decision. The question therefore arises whether this Court should consider the correctness of the High Court order concerning the President's decision. The order is inchoate. It is a valid order but has no effect. However, the declaration of the High Court has given rise to doubt concerning the authenticity and effectiveness of the President's decision. This is not a case in which the issue of constitutional validity has become moot.[54] It is not appropriate for a declaration of constitutional invalidity of this kind to be left in limbo. The uncertainty created by that approach is undesirable. In the circumstances, this Court must consider the issue.

[53] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) para 28.

[54] See for example *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC); 2005 (3) BCLR 199 (CC) paras 72-78.

[45] The President's decision at issue was concerned with the sentence imposed upon the second applicant. The second applicant was entitled to have his case considered by a court consisting of the judge who imposed the sentence. If the court could not have been constituted by the judge who imposed sentence, the second applicant's case should have been considered by any other judge designated by the Judge President of the court concerned. Furthermore, section 1(3) of the Act is to the effect that the court hearing the second applicant's case must be furnished with written argument on his behalf. The difficulties on which the High Court focused were

(a) that the issue of sentence was considered by a judge other than the judge who had sentenced the second applicant,[55] and

(b) that it had not been established that argument had been furnished "on behalf of the" second applicant to the judge who advised the President.[56]

[46] It was common cause that the second applicant's sentence had been determined by a judge other than the judge who had initially sentenced him. The High Court was of the view that there was no indication why the trial judge had not heard the case. Some reliance was placed on the fact that there was no evidence that the trial judge had not been a judge in the High Court at the time that the second applicant's matter had been referred to a different judge. Section 1(2) requires the Judge President to designate another judge if the court cannot be "constituted" by the trial judge. It is the

[55] Above n 3 para 48.

[56] Above n 3 para 49.

Judge President who decides whether the court can be constituted by the trial judge or not and whether the matter should be allocated to another judge.

[47] There is no reason to doubt that the Judge President of the High Court considered the matter, and came to the conclusion that the court could not be constituted by the judge who heard the trial and that another judge had to be designated. The reason why the trial judge was not available is irrelevant to the issue. The only inference to be drawn from all the circumstances is that the Judge President constituted the court after concluding that it could not be constituted by the trial judge. In any event, the criticism entails an attack on the correctness of the decision of the Judge President of the High Court and could not legitimately have been sustained without hearing him.

[48] The second basis for holding the presidential conduct to be invalid was the statement by the second applicant that he had instructed no-one to submit any argument on his behalf. The High Court was for some reason sceptical about the correctness of the statement made by the judge who considered the case of the second applicant for the purpose of rendering advice to the President that he (the judge) had considered written argument on behalf of the second applicant. The High Court speculated that this written statement by the judge in the document submitted to the President could have been a mistake.[57]

[57] Above n 3 para 56.

[49] There is no basis for this doubt and conjecture. It seems probable on the papers that argument on behalf of the second applicant was indeed considered. At best for the second applicant there was a conflict of fact between his version and the contents of the advice about whether argument had been submitted on his behalf. That issue could not be determined without hearing evidence. It is also relevant that the correctness of the conduct of the judge who advised the President about the alternative sentence to be imposed on the second applicant was really in issue. That conduct ought ordinarily not to have been declared to be unlawful without the judge concerned having been joined.

[50] In the circumstances, the order by the High Court declaring the conduct of the President to be unconstitutional cannot be confirmed.

Concerns about death sentences not yet substituted

[51] Grave concerns were expressed in the course of the hearing before this Court that the sentences of many people sentenced to death before 1995 had not yet been substituted by other appropriate sentences. Concern was also expressed about the unsatisfactory way in which the cases of the applicants have been processed. The substitution of lawful sentences for the death sentence was rendered necessary by the order of this Court in *Makwanyane*. That order envisaged a fair mechanism that was implemented within a reasonable time. Implementation was said to be unsatisfactory both in relation to particular applicants as well as in general. I will consider the position of the applicants first.

[52] The case of the first applicant came to be considered by the full bench of the Pretoria High Court[58] more than ten years after the applicant had been sentenced, six years after the date of the decision in *Makwanyane* and three years after the Act came into force. This is regrettable.

[53] The judgment of the full court replacing the death sentence for the first applicant makes it plain that its jurisdiction was being exercised in terms of sections 1(7) and 1(9) of the Act.[59] This in effect means that there had been an appeal before the SCA, and that the full bench had become seized of the matter on account of sections 1(7) and 1(9) of the Act. The first applicant himself says that he authorised no appeal to be lodged on his behalf. On this basis, the High Court expressed considerable doubt about whether the appeal could have been determined in terms of section 1 of the Act because, so it was reasoned, section 1 required that there had to be an appeal to the SCA and that the SCA "appears never to have been involved".[60]

[54] There is no justification for this approach. The 1990 law was in operation when the first applicant was sentenced. The first applicant therefore had a right to appeal. The full court would in all probability have had information before it showing how the

[58] On 5 September 2001.

[59] These provisions are described in paragraph 23 of this judgment.

[60] Above n 3 para 41.

case came to be there. In the circumstances, the only possible reasonable inference is that there had been an appeal to the SCA.

[55] The judgment of the full court is to the effect that argument by counsel on behalf of the first applicant was available to it. The first applicant says that he instructed no-one to file any argument on his behalf. Again, the statement in the judgment of the full bench must prevail.[61] As far as the first applicant is concerned therefore, the only cause for legitimate concern is the delay referred to earlier.

[56] The second applicant also experienced considerable delay. His case came before the judge designated in terms of section 1(1) of the Act after the application in the High Court started and almost five years after the Act came into force.

[57] The third applicant's case appears not to have been finalised. It appears from the papers that the case should have been heard by the SCA in 1996. The state should cause the appropriate enquiries to be made, determine what happened and take the necessary action.

[58] The fourth applicant's case appears to be in progress. The death sentence imposed upon him was lawfully set aside by the SCA before the Act came into force. The High Court seems to hold the view that section 1 is applicable to this applicant,[62]

[61] The only way in which that statement may be overturned is by appeal or review.

[62] Above n 3 para 102 (iv).

but this cannot be. Section 1 of the Act is applicable only to those people in relation to whom the death sentence was still in force when the Act came into operation. The fact that another sentence has not yet been imposed upon him by the trial court to which the case has been referred by the SCA needs some attention however.

[59] The process of the substitution of sentences generally is not satisfactory. At the time of the decision in *Makwanyane* it was estimated that between 300 and 400 people were on death row in our country.[63] By the time the papers were filed in the High Court the number of cases in which people who had been sentenced to death still required attention was estimated at 134. When the case was argued before us we were informed by counsel for three of the respondents that there were 62 people whose sentences had not yet been substituted. We were also told that every effort was being made to ensure that all outstanding cases would be appropriately dealt with before the end of June.

[60] The process of the substitution of sentences has taken far too long. It is important that all outstanding death sentences be set aside and substituted as soon as it is possible.

[61] Counsel for the second, third and fourth respondents was inclined to concede that the substitution process should be completed quickly. I accept his statement to the effect that the relevant authorities envisage that the process of the substitution of

[63] Above n 2 para 6.

sentences will be completed by the end of June. However, the process has taken so long that it will be inadvisable for this Court to assume that the death sentences will be substituted as envisaged.

[62] This Court has the jurisdiction to issue a mandamus in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order.[64] It is appropriate in this case for this to be done. The question of a supervisory order was raised with counsel at the hearing of the case. None raised any objection to a supervisory order.

Costs

[63] We are grateful to Mr Snyckers who in the best traditions of the Bar generously presented the applicants' case with application and vigour at the request of this Court without charge. The applicants have incurred no costs and there need be no order in this regard.

Order

[64] The following order is made:

(1) The orders of the Johannesburg High Court in the case of *Sibiya and Others v Director of Public Prosecutions and Others* [2005] 1 All SA 105 (W) declaring subsections (1) to (5) of section 1 of the Criminal Law Amendment Act 105 of 1997 (the Act) to be inconsistent with the

[64] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC); 2002 (10) BCLR 1075 (CC) paras 104-7.

Constitution and setting aside the sentence imposed by the President in terms of section 1(4) of the Act are not confirmed.

(2) The respondents are directed to take all the steps that are necessary to ensure that all sentences of death imposed before the 5 June 1995 are set aside and replaced by an appropriate alternative sentence in terms of section 1 of the Act as soon as possible.

(3) The respondents are required to report to this Court concerning all the steps taken to comply with paragraph (2) of this order by not later than 15 August 2005.

(4) The report must include the following information:

(a) the name of every person who was being detained under a sentence of death as at 5 June 1995;

(b) the name of every person in respect of whom the death sentence has been set aside and replaced by an appropriate alternative sentence, particulars as to whether the alternative sentence was determined and imposed in terms of subsections (1) to (5) or subsections (7) to (10) of section 1 of the Act, particulars of the judge who advised the President, or the court of appeal that imposed the new sentence as the case may be, the date on which the new sentence was imposed and particulars of the sentence; and

(c) the names of all people who are still being detained pursuant to the sentences of death imposed upon them together with particulars as to the date on which the sentence of death was imposed, the case

number and the court that imposed the death sentence, whether a record of the proceedings before that court are available, all the steps that have been taken to ensure the setting aside of the death sentence and the imposition of a new sentence in each case.

(5) The respondents are directed to ensure that an appropriate affidavit or affidavits are filed with the Registrar of this Court not later than 15 August 2005:

(a) setting out in full the reasons why each death sentence has not yet been set aside, the steps that will be taken to ensure that the death sentence will be set aside and replaced by an appropriate alternative sentence; and

(b) motivating fully any order that might be required of this Court to facilitate the setting aside of the death sentence concerned and replacing it with an appropriate alternative punishment.

(6) This Court will issue further directions in relation to supervision of the execution of paragraph (2) of this order as circumstances may require.

Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Yacoob J.

For the applicants:	F Snyckers.
For the first respondent:	P Schutte instructed by the Director of Public Prosecutions (Johannesburg High Court).
For the second, third and fourth respondents:	V Soni SC and T Machaba instructed by the State Attorney, Johannesburg.