

Victim Participation in Parole Proceedings in South Africa

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Abstract

South African law provides for circumstances in which victims of crime may participate in the criminal justice system at the investigation, prosecution (trial), sentencing and parole stages. In South Africa, a prison inmate has no right to parole although the courts have held that they have a right to be considered for parole. In some cases, the victims of crime have a right to make submissions to the Parole Board about whether the offender should be released on parole. Section 299A of the Criminal Procedure Act 51 of 1977 provides for the right of victims of crime to participate in parole proceedings. The purpose of this article is to discuss section 299A and illustrate ways in which victims of crime participate in the parole process. The author also recommends ways in which victims' rights in section 299A of the Criminal Procedure Act could be strengthened.

Keywords: victim participation; parole; section 299A, Criminal Procedure Act; South Africa; Correctional Services; inmate; prisoner; right; released

Introduction

South African law provides for circumstances in which victims of crime may participate in the criminal justice system. This participation takes place at the investigation, prosecution (trial), sentencing and parole stages.¹ In some pieces of legislation or government policies, victim participation in the criminal justice system is a right.² This right should be understood broadly as part and parcel of the global human rights movement that champions the right to redress, which has been recognised by regional³ and international human rights bodies.⁴ South African courts have in several decisions recognised the position of victims of crime in the criminal justice system.⁵ It is beyond the scope of this article to discuss the issue of victim participation in the criminal justice system generally. Section 299A of the Criminal Procedure Act⁶ provides, inter alia, for the right of victims of crime to participate in parole proceedings. The purpose of this article is to analyse this section and the relevant case law emanating from South African courts on victim participation in parole proceedings. The author also suggests ways through which the victim's right to participate in parole proceedings may be strengthened. In order to put the discussion in context, the author will also highlight the jurisprudence emanating from South African courts dealing with the issue of the placement of offenders on parole generally.

Victim Participation in Parole Proceedings

Before discussing the issue of a victim's participation in parole proceedings, it is necessary to highlight a few issues that are relevant to parole in South Africa. It is beyond the scope of this article to discuss in detail the law relating to parole in South

¹ See generally Annette van der Merwe, 'A New Role for Crime Victims? An Evaluation of Restorative Justice Procedures in the Child Justice Act 2008' (2013) 46(4) *De Jure* 1022. See also ss 158, 170A and 274 of the Criminal Procedure Act 51 of 1977. For a detailed discussion of ss 158 and 170A of the Criminal Procedure Act and the relevant case law, see PJ Schwikkard and SE van der Merwe, *Principles of Evidence* (4edn Juta 2015) 403–418.

² See, for example, s 299A of the Criminal Procedure Act (which is discussed in this article in detail). See also Service Charter for Victims of Crime in South Africa <<http://www.justice.gov.za/VC/docs/vc/vc-eng.pdf>> (accessed 18 November 2018). In *Phiri & Another v S* (A240/ 2017) [2017] ZAGPPHC 1261 (15 December 2017) para 31, the Court referred to jurisprudence on the rights of victims of crime and observed that '[i]t is high time that we should start to emphasize the rights of the victims more than emphasizing the rights of the perpetrators'.

³ African Commission on Human and Peoples' Rights, General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia.

⁴ Committee against Torture, General Comment No 3 (2012): Implementation of Article 14 by States Parties, CAT/C/GC/3, 13 December 2012.

⁵ See generally Annette van der Merwe, 'Justice "Beyond" the Law in *The Secret in their Eyes*: Rights of Victims and Offenders in the Post-sentencing Phase' in Frans Viljoen (ed), *Beyond the Law: Multi-Disciplinary Perspectives on Human Rights* (Pretoria University Law Press 2012) 235–252.

⁶ Act 51 of 1977.

Africa; this law has been discussed by other scholars elsewhere.⁷ In South African law, an inmate has no right to parole. Although some courts have mentioned that an inmate has such a right⁸ and also a right to apply for parole,⁹ neither the Constitution nor the Correctional Services Act¹⁰ provides for a right to parole. Case law shows that although an inmate does not have a right to parole, they have a right to be considered for parole.¹¹

⁷ See, for example, Stephan Terblanche, *A Guide to Sentencing in South Africa* (LexisNexis 2007) 227–244 (dealing with the parole and early release of different types of offender); Joey Moses, *Parole in South Africa* (Juta 2012); Jamil Mujuzi, ‘Unpacking the Law and Practice Relating to Parole in South Africa’ (2011) 14(5) Potchefstroom Electronic Law Journal 205–228. Courts may also impose non-parole periods. In *Moyo v The State* (848/18) [2018] ZASCA 157 (23 November 2018) para 11, the Supreme Court of Appeal held that ‘the failure of the trial court to allow the applicant an opportunity to address it before imposing the non-parole period in terms of s 276B(2) [of the Criminal Procedure Act] was a misdirection. The court further misdirected itself by its failure to give reasons for fixing the non-parole period.’ Courts have held that a non-parole period must only be imposed in exceptional circumstances and that an offender has a right to be heard before a court imposes a non-parole period on him or her. See *Williams & Others v S* (AR 548/2018) [2019] ZAKZPHC 57 (12 August 2019); *S P v S* (109/2018) [2019] ZAGPJHC 259 (7 August 2019); *Dowling v S* (A57/2018) [2019] ZAGPJHC 32 (20 February 2019); *Tutton v S* (294/18) [2019] ZASCA 3 (20 February 2019). A court cannot impose a non-parole period which exceeds two-thirds of the offender’s sentence. See *Soutter v S* (60/2018) [2019] ZAGPJHC 255 (2 August 2019); *Makhokha v S* 2019 (7) BCLR 787 (CC); 2019 (2) SACR 198 (CC).

⁸ See *Mafoho v S* 2013 (2) SACR 179 (SCA) para 17, where the Court held that ‘[t]he issue accordingly, is the effect of the amendment of the parole period in s 65(4) of the old Act, upon the appellant’s right to parole. By virtue of the fact that s 65(4) of the old Act, was amended on the same date that the provisions of s 73(6)(a) of the new Act were brought into operation, it is clear that the intention of the legislature was to create equality amongst those prisoners eligible for parole, irrespective of whether they were sentenced before or after the passing of the new Act. The right to parole, whether the prisoner is sentenced to a determinate sentence, or to life imprisonment, is the same regardless of the date the prisoner was sentenced.’ In *Mzizi & Others v The Minister of Correctional Services & Others* (10719/18P) [2019] ZAKZPHC 28 (30 April 2019) para 17, the Court held that ‘[t]he granting of parole is an integral part of the sentence, it is not a mere benefit extended to the offender.’

See also *Wiggil v S* (CA & R 137/2012) [2012] ZAECGHC 90 (21 November 2012).

⁹ *Nyawuza v S* (AR 262/13) [2014] ZAKZPHC 47 (16 September 2014); *Phaahla v Minister of Justice and Correctional Services & Another (Tlhakanye Intervening)* 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC) para 41.

¹⁰ Correctional Services Act 111 of 1998.

¹¹ See, for example, *Du Preez v Minister of Justice and Correctional Services & Others* 2015 (1) SACR 478 (GP) paras 9 and 12; *S v Bull & Another* (221/2000) [2001] ZASCA 105 (26 September 2001) para 28; *Van Gund v Minister of Correctional Services & Others* 2011 (1) SACR 16 (GNP) para 11; *Freddie v Minister of Correctional Services & Others* (19293/2006) [2011] ZAGPPHC 54 (6 April 2011) para 8; *Shebe v Minister of Correctional Services & Others* (2338/2013) [2013] ZAFSHC 154 (19 September 2013) para 7; *Van Vuren v Minister of Correctional Services & Others* 2010 (12) BCLR 1233 (CC); 2012 (1) SACR 103 (CC) para 103; *Makaba v Minister of Correctional Services & Others* (5369/2011) [2012] ZAFSHC 157 (16 August 2012) para 29; *Mtintso v S* (A1038/2013) [2015] ZAGPPHC 213 (21 April 2015) para 3; *Bester v Minister of Correctional Services & Others* (64018/09) [2012] ZAGPPHC 318 (28 November 2012) para 7; *Groenewald v*

In a case where an inmate meets all the requirements for placement on parole and the Parole Board refuses to do so, a Court will review the Parole Board's decision if it is irrational, illegal or unreasonable or based on irrelevant considerations, and order the Parole Board to place the inmate on parole.¹² However, courts do not have the expertise to determine whether or not an inmate is rehabilitated enough for him to qualify for placement on parole.¹³ In some cases, as the discussion below illustrates, victims of crime have a right to make submissions to the Parole Board on whether or not the offender should be released on parole.

The victim's right to participate in parole proceedings is provided for under section 299A of the Criminal Procedure Act, the relevant parts of which are reproduced below. Section 299A(1) provides expressly that a victim of crime has a right 'to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board'.¹⁴ This means that there are two ways by which a victim may participate in the parole proceedings: (1) to make representations when the placement of the offender on parole is being considered; or (2) to attend any relevant meeting of the Parole Board.¹⁵

Minister of Correctional Services & Others 2011 (1) SACR 231 (GNP) para 16; *Mkhize v S* (A357/2016) [2017] ZAGPPHC 567 (25 August 2017) para 8.

In *Bogoshi v Minister of Correctional Services & Another* (62118/2014) [2016] ZAGPPHC 1068 (13 December 2016) para 14, the Court held that an inmate has a legitimate expectation to be considered for parole after serving the minimum period of their sentence. In *Ugochukwa v Minister of Correctional Services & Others* (4655/06) [2007] ZAGPHC 106 (20 June 2007) para 15, the Court held that '[a] convicted person has no right to be placed on parole, the parole [is] a privilege'. See also *Ricardo v Minister of Correctional Services & Others* (32623/2014) [2016] ZAGPJHC 66 (3 February 2016).

¹² *Walus v Minister of Correctional Services & Others* (41828/2015) [2016] ZAGPPHC 103 (10 March 2016); *Lebotsa & Another v Minister of Correctional Services & Others* 2010 (1) SACR 379 (GNP); *Botha v Minister of Correctional Services & Others* (29765/08) [2009] ZAGPPHC 46 (10 March 2009); *Zondo v Minister of Justice and Correctional Services & Others* (97778/2015) [2016] ZAGPPHC 646 (15 July 2016).

¹³ In *Bogoshi* (n 11) para 14, the Court held that '[t]he question whether the rehabilitation programmes [the applicant] underwent while in prison are sufficient to justify a conclusion by the correctional services personnel that he is ready to be released on parole, can only be made by the experts trained to draw such conclusions. This court, although it would not necessarily be obliged to make a decision as recommended by experts, needs guidance from such experts. In the absence of such evidence and in the light of this court lacking the skills to determine the parole readiness of any prisoner, it has no choice but to defer to the decision of those capable of reaching such a conclusion.'

In *S v Ntozini & Another* 2017 (2) SACR 448 (ECG) para 29, the Court held that '[a] sentencing court simply cannot impose a sentence of direct imprisonment as a means of ensuring that accused persons acquire skills through the rehabilitation programmes run by the Department of Correctional Services'.

¹⁴ This right has been emphasised by the Supreme Court of Appeal in *Minister of Justice and Correctional Services v Walus* [2017] 4 All SA 1 (SCA); 2017 (2) SACR 473 (SCA) para 17.

¹⁵ Section 39(3) provides that 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the

The Parole Board can delay the placement of an offender on parole until it has ‘engaged’ the victim(s) of their crime as required by section 299A; and a Court will not order the Parole Board to place the offender on parole before that engagement.¹⁶ This is so because the Court has to allow the Parole Board to exercise its statutory function of deciding whether or not an offender should be placed on parole before it can intervene to decide whether or not the Parole Board exercised its discretion rationally, legally or reasonably.¹⁷

Directives Regarding Complainant Participation in Correctional Supervision and Parole Boards

Section 299A(4) obliges the Commissioner of Correctional Services to issue directives to give effect to the victim’s right to participate in parole proceedings or to make representations. In 2006, the Commissioner issued the Directives Regarding Complainant Participation in Correctional Supervision and Parole Boards.¹⁸ As mentioned above, section 299A(2) provides that if a victim wants to exercise their right to make representations to the Parole Board or to make submissions before the parole is granted, they have a duty to inform the Commissioner in writing of their intention to do so. Section 299A(3) states that:

The Commissioner of Correctional Services shall inform the parole board in question accordingly and that parole board shall inform the complainant or relative in writing when and to whom he or she may make representations or when and where a meeting will take place.

In other words, different duties are imposed on different people. The victim has a duty to inform the Commissioner that they intend to exercise the right under section 299A. After being informed by the victim, the Commissioner has a duty to inform the Parole Board that the victim would like to exercise their right under section 299A. After that, the Parole Board must inform the victim in writing when and to whom they may make representations or when and where a meeting will take place. However, the Directives Regarding Complainant Participation in Correctional Supervision and Parole Boards seem to be in conflict with section 299A with regard to some of the roles mentioned in it (section 299A). Paragraph 3 of the Directives Regarding Complainant Participation in Correctional Supervision and Parole Boards (Directives) provides that:

extent that they are consistent with the Bill’. It therefore recognises statutory rights such as that under s 299A of the Criminal Procedure Act.

¹⁶ *Shebe v Minister of Correctional Services & Others* (2338/2013) [2013] ZAFSHC 154 (19 September 2013).

¹⁷ *Walus* (n 12); *Lebotsa* (n 12); *Botha* (n 12).

¹⁸ Directives Regarding Complainant Participation in Correctional Supervision and Parole Boards No R 248 of 7 April 2006, published in the *Government Gazette* on 7 April 2006 (GN 28646, *Reg Gaz* 8429. The Directives were tabled in Parliament on 27 September 2005.

(1) Every complainant who desires to be informed about a parole hearing shall ensure that the Parole Board in whose area the offender is being detained is informed in writing of that desire, as well as his or her desire to make representations at such a hearing.

(2) A complainant contemplated in paragraph 3(1) shall notify the Chairperson of the relevant Parole Board in writing of the desire to be involved in Parole Board hearings, and shall clearly state at least (a) the name of the offender; (b) the offence committed; (c) the case number, the date and the name of the court where the offender was convicted; and (d) the physical and postal address of the complainant.

(3) It is a complainant's responsibility to ensure that the Parole Board is informed of any address changes.

(4) A complainant's request as contemplated in paragraph 3(2) shall be recorded and the Parole Board shall inform him or her in writing (a) when and to whom he or she may make representations; (b) of the format and contents that the representations may assume; (c) at least 30 days in advance of when and where a meeting of the Parole Board will take place; (d) of the name and contact particulars of a member of staff who may be contacted for more information; (e) of the decision of a Parole Board hearing; (f) of parole violations by the offender should he or she be released on parole; and (g) of the process to be followed in case the complainant wants to report a parole violation and provide contact details where such a violation can be reported.

(5) A complainant may at any time during an offender's term of imprisonment request to be involved in Parole Board hearings.

There are at least two issues with regard to paragraph 3 of the Directives. First, it imposes a duty on the victim to inform the Parole Board of their desire to participate in the parole proceedings. This is contrary to section 299A(3), which obliges the Commissioner to inform the Parole Board that the victim would like to exercise their right under section 299A. As the Court held in *S v Petersen & Another*,¹⁹ if the victims have decided to exercise their right in terms of section 299A, they must inform the Commissioner of Correctional Services in writing, and once the victims have informed the Commissioner,

the Commissioner will be obliged, in terms of s 299A(3), to inform the Parole Board accordingly and the Parole Board will be obliged to inform you in writing when and to whom you may make representations or when and where any meeting will take place.²⁰

Secondly, the issue is that paragraph 3(4) refers to the victim's notification to the Parole Board as a 'request'. This is contrary to section 299A(1), which expressly states that the victim has a right to make representations or appear before the Parole Board. Referring to victim participation in parole proceedings as a 'request' as opposed to a 'right' means

¹⁹ *S v Petersen & Another* (SS41/16) [2017] ZAWCHC 32 (24 March 2017).

²⁰ *Petersen* (n 19) para 27.

that the Parole Board has the discretion to decide whether to allow a victim of crime to participate in those proceedings. However, if it is a right, the Parole Board has no choice but to make sure that the victim makes representations or participates in the proceedings. As case law and the drafting history of section 299A clearly show, as discussed below, a victim has a right and not a privilege to make representations or make submissions to the Parole Board. That does not mean that their submissions will be the only factors to be considered in placing or not placing the offender on parole. This is a fact expressly recognised in paragraph 8 of the Directives Regarding Complainant Participation in Correctional Supervision and Parole Boards.²¹ In the light of the above inconsistencies between paragraph 3 of the Directives and section 299A of the Criminal Procedure Act, it is recommended that paragraph 3 of the Directives be amended. Otherwise it is invalid.

Victim to Choose One of the Avenues?

In *S v Stander*,²² the Supreme Court of Appeal held that a victim of crime ‘has the right in terms of s 299A of the Act to attend the meeting of the Correctional Supervision and Parole Board and make representations when the parole of the perpetrator is considered.’²³ In *S v Khathi*,²⁴ the High Court held that:

In terms of section 299A of the Criminal Procedure Act 51 of 1977, the court, in open court, informed the widow of the deceased and immediate family that they have the right to make representations when the placement of the accused on parole, on day parole or under correctional supervision is considered and to attend any relevant meetings of the Parole Board in that regard.²⁵

It is argued that in the light of the fact that the word ‘or’ is used instead of ‘and’, the victim has to choose between the two rights: either to make representations to the Parole Board, in which case they do not have to appear before the parole board or to attend the relevant meetings of the Parole Board. In this case the victim appears before the Parole Board and makes submissions or a presentation before the Parole Board on whether or not the offender should be granted parole. In *S v Petersen & Another*,²⁶ the Court makes

²¹ Paragraph 8 provides that:

‘(1) A complainant who has made representations shall be informed by the Parole Board that it is not only his or her representations that will have an influence on the Board, but that the balance of the representations and the following factors will direct a decision by the Board: (a) the offender's response to development and treatment programmes associated with rehabilitation; (b) the existence and quality of support systems in the community; (c) the probability of reoffending; (d) the risk that the offender may pose to the community at large; and (e) the risk to the complainant.

(2) A complainant does not have a vote on the decision of the Parole Board but may be present for the duration of the hearing of the specific offender's case.’

²² *S v Stander* 2012 (1) SACR 537 (SCA).

²³ *Stander* (n 22) para 12.

²⁴ *S v Khathi* [2008] JOL 21947 (W).

²⁵ *Khathi* (n 24) para 10.5.

²⁶ *S v Petersen & Another* (SS41/16) [2017] ZAWCHC 32 (24 March 2017).

it very clear that the victims have to choose one of the two avenues. After sentencing the offenders to life imprisonment for murder, the Court invoked section 299A and informed the victims, who were present in court, that ‘the parole board will be obliged to inform you in writing when and to whom you may make representations or when and where any meeting will take place’.²⁷ It is argued that the availability of two avenues through which the victim may convey their views to the Parole Board increases the possibility of allowing as many victims as possible to participate in the proceedings. This is so because a victim who, for example, does not want to confront the offender or does not have the means to appear before the Parole Board, may also participate in the proceedings by sending their written submissions to the Parole Board. A victim who has no reason not to appear before the Parole Board in person is also accommodated.

Is Section 299A Applicable Only When the Victim is Present in Court?

One important question is whether section 299A is applicable only when the victim is in court at the time when the Court is imposing a sentence on the offender. Section 299A(1) provides that a Court is obliged to inform the victim of crime

if he or she is present that he or she has a right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.

In *Derby-Lewis v The Minister of Correctional Services & Others*,²⁸ one of the issues was whether section 299A was applicable when at the time the sentence was imposed on the offender the victim’s relatives were not in court and the section also had not been enacted.²⁹ The Court observed that:

Section 299A was inserted in Act 51 of 1977 by section 6 of the Judicial Matters Second Amendment Act 55 of 2003, subsequent to the applicant’s trial and subsequent to the date when his sentence of death was commuted to one of life imprisonment. It was, therefore, submitted on behalf of the applicant, and accepted on behalf of the [deceased’s wife], that section 299A of Act 51 of 1977 is not applicable to the [deceased’s wife]. I do not agree. The section refers to the sentencing court informing the relative of his or her right to make representations. In my judgment it does not mean that if a court does not inform the relative of his or her right, that that relative’s right falls away. The right of a relative to make representations and to attend board meetings is acknowledged in section 75(4) of the 1998 Act.³⁰

²⁷ *Petersen* (n 26) para 27.

²⁸ *Derby-Lewis v The Minister of Correctional Services & Others* [2009] 3 All SA 55 (GNP).

²⁹ *Derby-Lewis* (n 28) 65.

³⁰ *Derby-Lewis* (n 28) 65.

The Court also referred to the Victim’s Charter and held that ‘the Charter provides that a victim may attend a parole hearing and submit written inputs’.³¹ It should be recalled that section 75(4) of the Correctional Services Act provides that:

Where a complainant or relative is entitled in terms of the Criminal Procedure Act, to make representations or wishes to attend a meeting of a Board, the National Commissioner must inform the Board in question accordingly and that Board must inform the complainant or relative in writing when and to whom he or she may make representations and when and where a meeting will take place.

It is submitted that the Court’s holding that section 299A is applicable to cases which were decided before it came into operation and also to cases where the victim of crime was not present in court at the time the sentence was imposed is debatable for two reasons. The first reason is that the section is very clear that the duty is only imposed on the Court when the victim is in court. South African law on statutory interpretation is clear that words must be given their natural or ordinary meaning unless doing so would create an absurdity or defeat the objective of the legislation.³² This submission is also supported by the drafting history of section 299A, which makes it clear that the legislature was of the view that the section will be applicable only when the victim is present in court at the time of sentencing.³³ However, in at least one case a Court invoked section 299A even though there was no indication that the victims were in court at the time of sentencing.³⁴ There is also evidence that section 299A has been invoked by the Court when the victims were present in court.³⁵ In one case, ‘the sentencing of the accused was delayed because no arrangement was made by the State to have the victims present at the sentencing phase’ and the Court could only impose the sentence on the day the victims were in court to be ‘informed of their s 299A rights’.³⁶ The fact

³¹ *Derby-Lewis* (n 28) 65.

³² See, for example, *S v Toms*; *S v Bruce* (139/89, 289/89) [1990] ZASCA 38; 1990 (2) SA 802 (AD); [1990] 2 All SA 248 (A) (30 March 1990); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) (25 July 2008).

³³ Debates of the National Assembly (*Hansard*), 12 November 2003, cols 7844–7869.

³⁴ See *S v Mdluli* 2013 JDR 1068 (GSJ), where the accused was convicted of, inter alia, murder. At sentencing the Court held:

‘The immediate relatives of the deceased persons are hereby informed, in terms of section 299A of the Criminal Procedure Act 51 of 1977, that they have the right, subject to the directives of the Commissioner of Correctional Services, to make representations when placement of the accused on parole, on day parole or under correctional supervision is considered, or to attend any relevant meeting of the parole board’ (see para 9).

³⁵ See *S v Khathi* [2008] JOL 21947 (W) para 10.5:

In terms of section 299A of the Criminal Procedure Act 51 of 1977, the court, in open court, informed the widow of the deceased and immediate family that they have the right to make representations when the placement of the accused on parole, on day parole or under correctional supervision is considered and to attend any relevant meetings of the Parole Board in that regard.’

³⁶ *S v Nxumalo* (CCD6/2017) [2018] ZAKZDHC 48 (22 October 2018) para 6.

that the victim has to be in court for section 299A to be applicable was emphasised by the High Court in *S v Nxumalo*,³⁷ where it was held that:

Section 299A of the Criminal Procedure Act 51 of 1977 underlines the philosophy of restoring the rights of victims and clearly recognises that victims have the right to be informed of an offender's parole consideration. More importantly, they have the right to make representations with regard to an offender's parole decision. Despite this statutory recognition, these rights remain hollow and non-existent unless the prosecution service ensures that victims are present at court when an accused is sentenced to imprisonment on one of the categories of crime as per s 299A(1)(a) to (g).³⁸

The second and last reason is that there is no ground to conclude that section 299A is applicable to cases that were decided before it was enacted.³⁹ Where the legislature has intended legislation to apply retrospectively, it has stated so expressly.⁴⁰ In the light of the above, it is argued that the applicable section – in this case was section 75(4) of the Correctional Services Act – and the relevant provisions of the Victim's Charter are applicable.

Adequacy of the Explanation Under Section 299A

Section 299A provides that the Court has a duty to inform the victim that they have a right to make representations or to make submissions to the Parole Board. In *CV v Minister of Correctional Services & Others*,⁴¹ the Court, in setting aside the Parole

³⁷ *Nxumalo* (n 36).

³⁸ *Nxumalo* (n 36) para 3.

³⁹ In *Bogoshi* (n 11), the applicant was convicted of, inter alia, robbery with aggravating circumstances, kidnapping, murder, and attempted murder and sentenced to life imprisonment on 8 July 1999 (see para 2). In holding that the minister had rationally exercised his decision not to place the applicant on parole, the Court held, inter alia, that 'In considering whether a prisoner should be placed on parole, the relevant information, including, inter alia, whether the prisoner has rehabilitated and will not re-offend are taken into account. In terms of section 299A of the Criminal Procedure Act ... when a court sentences a person to imprisonment for, inter alia, murder, it shall inform any immediate relative of the deceased, if he or she is present, that he or she has a right to make representations when placement of the prisoner on parole is considered. According to the NCCS, there is a need for [the applicant] to go through the restorative justice process as part of his rehabilitation. I am of the view that the restorative justice process may assist [the applicant] in accepting responsibility for offences he has committed. This process could also bring some form of healing to his victims and/or relatives. [The applicant's] assertion that the process would not help as the victims live in an area other than that which he would live, is of no consequence.'

It is not clear why the Court invoked s 299A when the facts of the case show none of the parties to the case referred to that section. In the light of the fact that the applicant was sentenced in 1999, that is, before s 299A was inserted in the Criminal Procedure Act, this section was not applicable to this parole application.

⁴⁰ *Trustees for the time being of the Biowatch Trust v Registrar Genetic Resources & Others* (23005/2002) [2005] ZAGPHC 135 (23 February 2005).

⁴¹ *CV v Minister of Correctional Services & Others* (48967/2012) [2012] ZAGPPHC 324 (30 November 2012).

Board's decision not to recommend to the Court to convert the appellant's sentence into correctional supervision referred to section 299A of the Criminal Procedure Act and section 75(4) of the Correctional Services Act, and held that the duty of the Commissioner of Correctional Services to inform the victim of crime that the offender was being considered for placement on parole:

[i]s dependent on whether during the sentencing the victims or relatives were informed of their right, and have indicated their wish to the commissioner to exercise that right. There is some debate in the present case as to the adequacy of the explanation by the court during the sentencing stage. In the end, nothing turns on this aspect as it is now clear that the victims wish to exercise that right and they were not informed of the sitting of the parole board.⁴²

The facts of the case are silent on the submissions made to it on whether or not at the time of sentencing the victims were informed of their right to make representations or make submissions before the offenders were considered for parole. However, what is clear is that the Court is of the view that whether or not the victims were adequately informed by the court at the time of sentencing of their right under section 299A is immaterial at the time of deciding to grant the offender parole or place them on correctional supervision. What is important is that at the time when parole is being considered the victims have expressed their wish to exercise their right. Once the victims have indicated that they wish to exercise that right, they must be informed of the sitting of the Parole Board, otherwise the proceedings of the Parole Board would not have been conducted legally. This is because the views of the victims 'need to be considered'.

Can the Court Order the Commissioner of the Department of Correctional Services to Inform the Victims of the Place and Time of the Parole Hearing?

Section 299A(2) provides that

[i]f the complainant or a relative intends to exercise the right contemplated in subsection (1) by making representations to or attending a meeting of the parole board, he or she has a duty— (i) to inform the Commissioner of Correctional Services thereof in writing; (ii) to provide the said Commissioner with his or her postal and physical address in writing; and (iii) to inform the said Commissioner in writing of any change of address.

In *S v Madonsela*,⁴³ the magistrate convicted the appellant of, inter alia, robbery, and sentenced him to 20 years' imprisonment. The magistrate

also made an order under the guise of section 299A ..., apparently ordering the Commissioner of Correctional Services to contact the complainants and their children

⁴² CV (n 41) para 11.

⁴³ *S v Madonsela* 2014 JDR 2646 (GP).

to make representations to the Parole Board if and when the appellant intends applying for parole.⁴⁴

In setting aside the magistrate's order, the High Court held that:

[i]t is this Court's finding that the Court *a quo* does not have the authority to order the Commissioner of Correctional Services to inform the complainants or their family of parole proceedings pertaining to the appellant. The provisions of section 299A of Act 51 of 1977 do not make provision for such an order. The Court is merely obliged to inform the complainant that the complainant has a right to make representations to the Commissioner of Correctional Services when the prisoner is to be considered for parole. If the complainant intends to exercise that right, it is the complainant who is obliged to inform the Commissioner of Correctional Services of his/her intentions as provided for by the further provisions contained in section 299A.⁴⁵

In this author's opinion, the High Court's decision is in accordance with section 299A. The section does not empower a Court to order the Commissioner of Correctional Services to contact the victims and inform them of the time and place of the parole hearing. What the Commissioner is required to do is to ensure that the necessary information is available to the victim on how to exercise their right.

Conclusion

There are ways in which victims of crime participate in the criminal justice system in South Africa. Their participation is provided for at the investigation, prosecution, sentencing and parole stages of the criminal process. In this article, the author has highlighted section 299A of the Criminal Procedure Act, which deals with the right of victims to participate in parole proceedings. Emphasis has been placed on some of the challenges faced in implementing section 299A of the Criminal Procedure Act, and ways in which such challenges could be overcome have been suggested. Some of the case law discussed above shows that although section 299A requires the presence of the victim in court at the time of sentencing for the Court to inform them of the right to participate in parole proceedings, some judges have held that section 299A is applicable even in a case where the victim was not in court at the time of sentencing. Although, as argued above, this conclusion is not supported by section 299A, it is submitted that there may be a need for section 299A to be amended to cater for circumstances in which the right to participate in parole proceedings may also be extended to the victims of crime who were not in court at the time of sentencing. For reasons beyond their control, a victim of crime may not be able to be present in court at the time of sentencing but may wish to participate in the parole proceedings. Accommodating such victims would be a

⁴⁴ *Madonsela* (n 43) para 14.

⁴⁵ *Madonsela* (n 43) para 60.

step in the right direction in ensuring that as many victims of crime as possible participate in parole proceedings.

Another issue highlighted above is that although section 299A does not empower a Court to order the Commissioner of Correctional Services to contact victims of crime in case the offender is about to be considered for parole, in one case the magistrate held that the Commissioner has a duty to inform such victims. Although on appeal the High Court correctly held that under section 299A of the Criminal Procedure Act the magistrate did not have the power to order the Commissioner to contact victims of crime, this judgement shows that there may be a need for section 299A to be amended to provide for circumstances in which the Commissioner may be obliged to inform victims of crime that an offender is about to be placed on parole. This is so in the light of the fact that some victims of crime may not be familiar with the parole legislation and processes and some may not even know where the offender is being incarcerated.⁴⁶

It has been argued that the Directives ‘impose an undue burden on the victims’ as they require victims to follow various steps before they can participate in the parole proceedings.⁴⁷ It has been discussed above that section 299A is applicable only when the victims of crime are present in court at the time of sentencing. However, section 299A does not compel prosecutors to ensure the presence of victims in court at the time of sentencing. It is recommended that the National Prosecuting Authority may have to put in place measures to ensure that prosecutors do their best to enable victims of crime to be present in court at sentencing when offenders have been convicted of the offences contemplated in section 299A. Such measures could be included in the Prosecution Policy.⁴⁸

⁴⁶ Julia Sloth-Nielsen, ‘Parole Pandemonium’ (November 2005, Civil Society Prison Reform Initiative Newsletter, Issue 14) <<https://acjr.org.za/resource-centre/14%20-%20November%202005.pdf> > (accessed 18 November 2018).

⁴⁷ Hema Hargovan, ‘Violence, Victimisation and Parole: Reconciling Restorative Justice and Victim Participation’ (December 2015) 54 SA Crime Quarterly 55–64, 60. For a discussion of different models of victim participation in parole proceedings, see Francois Louw, ‘The Parole Process from a South African Perspective’ (Master’s of Penology dissertation, Unisa 2008) 103–108 <<http://uir.unisa.ac.za/bitstream/handle/10500/1320/dissertation.pdf;jsessionid=FAA9ABF71E1A560AB4F1D33B46BAA187?sequence=1>> accessed 18 November 2018.

⁴⁸ Although the National Prosecuting Authority’s Prosecution Policy (November 2014) provides for circumstances in which prosecutors may involve victims of crime in the criminal justice system, it is silent on how such victims could be involved in sentencing and in particular parole proceedings. On the issue of sentencing, the Prosecution Policy provides (at 11) that ‘Prosecutors must also make appropriate recommendations with a view to realizing the general purposes of sentence. These include the need for retribution, the deterrence of further criminal conduct, the protection of the public from dangerous criminals and the rehabilitation of offenders.’ A recommendation along the lines suggested here was made by the High Court in *S v Nxumalo* (n 36) paras 5–6, where the Court held that ‘[5]... [S]ection [299A] recognises formally that victims have fundamental rights that should be upheld throughout the criminal justice process. Courts are obliged to inform the victims of these

categorised crimes of this right. As much as courts are compelled to inform victims of their right to make representations, the implementation of this section causes a practical problem, since presiding officers are not in control of the victims' details that testified before them. It is the office of the DPP that has such details and who should give meaning to the rights of the victims listed in s 299A and who has a duty to develop a policy that gives effect to the legislation. In my view, the National Prosecuting Authority's Code of Conduct, s 2(c) requires of prosecutors to: "consider the views, legitimate interests and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and endeavour to ensure that victims and witnesses are informed of their rights, especially with reference to the possibility if any of victim compensation and witness protection."

[6] It is therefore of paramount importance that the office of the DPP, without delay, develop a policy that would enable prosecutors not only to comply with the obligations and duties listed in the Code of Conduct but also to give effect to s 299A of the Act, which is aimed at serving the interests of victims of crime. In this matter, the sentencing of the accused was delayed because no arrangement was made by the State to have the victims present at the sentencing phase. Both the victims were present at the next date of sentencing and have been informed of their s 299A rights.'

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