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Compensation orders in criminal proceedings – a fresh perspective

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1. Introduction

South African courts have to deal with the sentencing of convicted accused on a daily basis. While presiding officers are well-trained and experienced in sentencing matters, it seems that compensation orders are not generally invoked as a form of punishment. This article discusses compensation orders as a possible form of punishment that could be used in our courts. It could be one of the factors that may help to reduce an accused's prison sentence and also to compensate victims who have suffered damage or loss resulting from criminal activities.¹

An accused's constitutional right to a fair trial provides that the lightest possible punishment should be imposed upon him.² If a compensation order is indeed a more lenient sentence, it should then be imposed. The actual sentence rests solely in the discretion of the presiding officer. There are various sentencing options available to a presiding officer, of which life imprisonment is the heaviest, and a fine the most lenient. A fine is a form of punishment which requires the accused to pay an amount of money to the state. A compensation order, on the other hand, is a sentencing option that requires the accused to pay a monetary amount, as determined by the court, to the victim. Notably, the court will not grant such an order if the accused does not have the financial means to pay the compensation. Compensation orders may take various forms and are not limited to monetary amounts. Compensation orders are regulated in terms of sections 297 and 300 of the Criminal Procedure Act 51 of 1977 (CPA).³

In sentencing, especially for the commission of violent crimes, severe sentences can be imposed and in those instances no consideration should be given to impose a fine. Yet it is not too outrageous to grant compensation orders, especially if all the parties involved have consented thereto.

Compensation orders form part of restorative justice sentences and are regarded as part

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¹ In this contribution the word *victims* includes complainants as well as their family members.

² See s 35(3)(n) of the Constitution of South Africa, 1996.

³ Act 51 of 1997.

of the reform theory. McCold and Wachtel⁴ define restorative justice as a "process involving the right stakeholders determining how best to repair the harm done by offending behavior". Restorative justice as a legal concept has grown in stature, especially after the establishment of the Truth and Reconciliation Commission (TRC) in South Africa.⁵ Due to the sensitive nature of the transition from apartheid to democracy, the TRC, which is renowned worldwide, is proof that restorative justice does deserve its place in the South African legal system. However, there are those who criticize the principle of restorative justice, particularly the interaction between the theories of restorative justice and retribution.⁶ The imbalance is especially clear in serious cases where courts are reluctant to impose a sentence such as a compensation fine.⁷

This contribution first discusses compensation orders and thereafter focusses on the legislation providing for the issuance of such orders. This is followed by a discussion of how these sentences can be applied within the context of restorative justice. Then the focus shifts to several court decisions where the problems and challenges regarding compensation orders are highlighted. The cases where compensation orders were imposed are analysed to determine whether it is problematic or not. Finally, suggestions regarding compensation orders are made and the way forward for South Africa is discussed.

2. Compensation orders

In criminal cases the courts must consider a number of factors in sentencing an accused, while they have a number of sentencing options to choose from.⁸ The most common sentences are either a fine or direct imprisonment. A fine as a sentence is generally imposed in South African courts. Imprisonment may of course be accompanied by a fine, or a fine may be imposed as a condition of a suspended sentence.⁹

A sentence of a fine involves that the offender must pay a sum of money to the state as punishment for his crime or crimes.¹⁰ In such a case, the complainant or injured person is usually not entitled to such payments. Although courts in general have a wide discretion to impose fines, there are several guidelines that must be followed.¹¹ First, the crimes must not be so severe that imprisonment should be imposed.¹² The offender must also have the financial ability or have access to finance with which the fine can be paid.¹³ Usually fines are imposed for crimes committed for financial gain, if the court decides in that instance to impose a fine. It is not advisable to impose a fine as a penalty if the amount is beyond the capacity of such person.¹⁴ Fines should also not be so small that

⁴ McCold & Wachtel (2002:111).

⁵ The Truth and Reconciliation Commission is incorporated in terms of s 2 of the Promotion of National Unity and Reconciliation Act 34 of 1995.

⁶ See Boutellier (2006:26).

⁷ See *DPP v Thabethe* [2011] ZASCA 186; *Seedat v S* (731/2015) [2016] ZASCA 153.

⁸ See Joubert (2013:326).

⁹ See s 297(1) of the CPA; Steytler (1996:426).

¹⁰ Joubert (2013:342).

¹¹ Joubert (2013:343).

¹² *Ibid.*

¹³ *S v Frans* 1924 TPD 419. See also Joubert (2013:343).

¹⁴ *S v Ncobo* 1988 3 SA 954 (N). See also Joubert (2013:343).

they do not reflect the seriousness of the offence.¹⁵

However, in the case of compensation orders, a sum of money paid by the offender, goes to the disadvantaged and not to the state. The offender pays the amount either directly to the disadvantaged or the clerk of the court for the damage or loss suffered because of the actions of the accused.

The court will, *inter alia*, consider the following circumstances when imposing compensation orders: where physical damage is inflicted upon the person or property of the victim, as well as for emotional damage, pain and suffering.¹⁶

2.1 Compensation orders in the Criminal Procedure Act

2.1.1 Section 300

Compensation orders for damage to the property of a person is governed by section 300 of the Criminal Procedure Act. In terms of this section a compensation order can be granted where there is damage to or loss of any property of the victim. It provides that any convicted offender, who has caused damage to or loss of property of another, can be ordered in certain circumstances to pay. This has the effect of a civil judgment. The Supreme Court has unlimited jurisdiction to grant such orders, but the jurisdiction of the regional and magistrates' courts is limited to R600 000 and R120 000, respectively.¹⁷

However, there are other requirements that must be met before a section 300 payment order may be issued. The court may impose such an order only if the injured party has applied for it,¹⁸ or where the prosecutor brought the application on the instruction of the injured person.¹⁹ These orders are limited to compensation for direct loss or damage.²⁰ Section 300 compensation orders are not recommended for any damages arising out of car accidents, because the determination of such damages is a lengthy process.²¹ It is also an issue that is usually placed in dispute during civil proceedings.

Because section 300 has the effect of a civil judgment, an alternative sentence of imprisonment for non-payment thereof may not be made to enforce payment.²² It is recommended that in the event of default payments, the aggrieved party should utilise execution proceedings in the civil courts as a possible solution.

This kind of sentence can therefore not be imposed if there was no damage to or loss of property. However, several reported decisions indicate that some courts erred by issuing compensation orders which were in no way authorised in terms of the relevant legislation.²³ It is also possible that the intention of the courts was to issue compensation orders, but incorrectly authorised the orders under section 300.²⁴

¹⁵ *S v Bhembe* 1993 1 SASV 164 (T).

¹⁶ See s 297 of the CPA. See also Jordi (2005).

¹⁷ S 92(1)(b) of the Magistrates' Court Act 32 of 1944.

¹⁸ *S v Dhlamini* 1967 4 SA 679 (N).

¹⁹ *S v Vanmali* 1975 1 SA 17 (N).

²⁰ *S v Mokwana* 1969 2 SA 484 (O); *S v Du Plessis* 1969 1 SA 72 (N).

²¹ Joubert (2013:356).

²² *S v Msiza* 1979 4 SA 473 (T).

²³ See *S v Huhu* [2013] ZAFSHC 74; *S v Khoza* 2011 1 SACR 482 (GSJ).

²⁴ *S v Huhu* paras. 3, 5.

2.1.2 Section 297

According to section 297 of the CPA, a court may postpone a sentence for a period of five years, with a suspended condition which includes the payment of a sum of money to the victim or his family.²⁵

Section 297(1) provides as follows:

(1) Where a court convicts a person of any offence, other than an offence in respect of which a law prescribes a minimum punishment, the court may in its discretion:

(a) postpone the passing of the sentence for a period not exceeding five years and release the person concerned -

(i) on one or more conditions, whether as to-

(aa) compensation;

In terms of this section the court may postpone sentencing for a maximum of five years and either release the offender unconditionally or on one or more conditions, including the payment of a sum of money to the victim.²⁶ Section 297(1) excludes offences where a minimum penalty is prescribed by law; but section 297(4) does not exclude offences where minimum sentences are prescribed.

This specific condition differs from the conventional negative conditions usually associated with suspended sentences. The condition is usually negative in nature, namely that a person should not commit similar crimes during the period of suspension.²⁷

Compensation orders can be described as a positive condition. Other positive conditions include community service, correctional supervision, and the requirement to undergo treatment or to attend lectures or complete certain courses. These types of condition aim to rehabilitate the accused and to allow him to make a positive contribution to society.

The accused may also be requested to appear again before the court in the future if he is called upon to do so before the expiry of the period. If the person is not summoned to appear before the court, or if the court finds that the conditions were met, no further sentence will be imposed and the sentence comes down to a warning by the court.²⁸

3. A restorative justice option

Compensation orders is a form of restorative justice which forms an important part of the South African legal system. Overcrowded prisons, coupled with various other factors, have forced the government to consider alternative sentences such as restorative justice.²⁹ Restorative justice is a relatively new concept in South Africa that has not taken off yet - it is only in its third decade.³⁰ Restorative justice regularly finds itself in conflict with the principles of general criminal law which are based on retaliation.

²⁵ See also Joubert (2013:355).

²⁶ See *S v Charlie* 1976 2 SA 596 (A); *S v Edward* 1978 1 SA 317 (NC). See also Joubert (2013:355).

²⁷ *S v Tshali* 1985 3 SA 373 (E).

²⁸ Joubert (2013:352).

²⁹ See Snyman (2014:18).

³⁰ Compare Koen (2007:247).

Due to the high crime rate in South Africa, there is an expectation that the courts will punish offenders and remove them from society.³¹ Restorative justice, to a certain extent, opposes the orthodox criminal principles of retribution. A thief for example, is normally seen through the lens of retaliation, whereas restorative justice considers the person as someone who can be rehabilitated. It is, however, not the purpose of restorative justice to replace the principles of criminal law.³²

Boutellier³³ notes: "Restorative justice is not so much an alternative as another strategy in security politics. It is not a substitution for criminal justice, but a contribution to the ongoing reshaping of social order".

It can play a significant role in balancing the various sentencing options, while it also provides a way out for some offenders who have lost all hope. Accordingly, the community may also become involved in the process to ensure that an inclusive and just model is created.

The unique realisation of restorative justice is that the accused must accept responsibility for his actions.³⁴ It is also important for the accused to accept that the victim is an individual and should be respected.³⁵ In addition, restorative justice has multiple benefits for victims.³⁶ The disadvantaged person is a central figure in the process of restorative justice.

Koen³⁷ argues: "In the restorative paradigm, victim empowerment is more than just giving the crime victim a role in the criminal justice system. It is really about reconstructing that system in such a way that it cannot function without the co-operation of the crime victim".

Due to the devastating effects of crime, disadvantaged victims are usually in a worse position than before. Despite this, some criminals are of the opinion that their offences did not affect anyone, like a person who evades taxes.³⁸ This is obviously not true, because there is always a victim who is affected by a crime in one way or another. Unlike orthodox criminal law, restorative justice focusses on giving the disadvantaged victim a voice of his own. These days it is almost impossible to think of a legal system without the influence of restorative justice. Frehsee³⁹ argues that "[c]riminal procedure ... is ill-equipped to deal with the emotional trauma the victim suffers as a result of the crime".

Restorative justice fills this gap.⁴⁰ The payment of reparations is a popular form of

³¹ Boutellier (2006:27) states: "The protection of citizens has become the dominant crime policy theme".

³² See Boutellier (2006:26).

³³ *Ibid.*

³⁴ See Hudson (2003:180); Koen (2007:256).

³⁵ Hudson (2003:180).

³⁶ See Achilles & Stutzman-Amstutz (2008:211); Koen (2007:254); Makiwane (2015:84); Naser (2001:85). Abel & Marsh remarked that "Restitutionary systems provide victim-focused law and therefore address the issue of securing liberty for those whose ability to pursue their social options has been damaged by a criminal act". See also Abel & Marsh (1984:160).

³⁷ Koen (2007:255).

³⁸ Hudson (2003:180).

³⁹ Frehsee (1999–2000:236).

⁴⁰ Villa-Vicencio (2008:387) explains "Restorative justice seeks to recover dimensions of justice often lost within the institutional

restorative justice. This mainly occurred after the Second World War when East Germany and West Germany were ordered to pay financial reparations to the Allied forces.⁴¹ The word “reparations” originates from the word “repair”.⁴² The “repair” taking place with the payment of a monetary amount to a victim plays an important role in the recovery of the victim's pain. Although the pain is partially eased, it is still an important step in the reconciliation between the victim and the accused.⁴³

Such compensation fulfils an important role in effectively reforming the criminal. Restorative justice is classified among the different theories of punishment as a reform theory.⁴⁴ The aim of the theory is to reform and rehabilitate the offender.⁴⁵ This theory is diametrically opposed to many other theories of punishment, such as retribution or prevention, which focus more on punishing the offender. Whilst the reform theory also contains an element of punishment, it is the rehabilitation of the offender that is the decisive aspect.⁴⁶ The pain and suffering of victims are also taken into account.

Nevertheless, the reform theory is certainly open to criticism. The following aspects are noteworthy.

First, the principles of the theory are not always in proportion to the degree and seriousness of the offence.⁴⁷ The imposition of a compensation fine instead of a prison sentence in the context of a serious crime will always be questioned. Perhaps one should not only compare the reform issue with the type of offence, but also take into account the victim of the crime. In addition, there is less weight placed on the seriousness of the crime and more attention is given to reform.

Secondly, it is difficult to determine exactly when an offender is finally reformed.⁴⁸ It may take a few months or even several years. Either way, it is important that the offender is afforded an opportunity to rehabilitate.

Thirdly, the theory is not always convincing in the case of older offenders.⁴⁹ Unlike younger offenders, it is difficult to change established habits in older offenders.⁵⁰

Fourthly, statistics indicate that a criminal cannot always be reformed.⁵¹ The reality is that some criminals are incorrigible.⁵²

Notwithstanding the fact that the reform theory is under frequent criticism, it is crucial for the effective functioning of the judicial system. As mentioned above, extremely high

retributive justice process”.

⁴¹ See Danieli (2008:343–54). See also Cunneen (2008:355–68).

⁴² See *English Oxford Living Dictionaries* (2016).

⁴³ See Logan (2013:39–41).

⁴⁴ Snyman (2014:17–8).

⁴⁵ See Snyman (2014:17).

⁴⁶ See Snyman (2014:17–8).

⁴⁷ See Snyman (2014:18). See also *DPP v Thabethe*, where a similar limitation regarding the restorative justice sentence was highlighted.

⁴⁸ Snyman (2014:18).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

levels of crime in South Africa mean that the prisons simply cannot handle the high volume of prisoners any longer. Restorative justice offers an ideal solution under these challenging circumstances. It is indeed necessary to make more use of the reform theory to prevent the theory from losing its allure. At the same time, it is important to place more emphasis on the victim's contribution to the process if one is serious about the implementation of restorative justice as a primary sentencing option.

It is here that restorative justice in all its brilliance and glory loses most of its appeal. A primary sentencing option such as compensation orders is rarely considered by the courts in more serious cases. This raises the question whether restorative justice orders, such as compensation orders, could be applied in serious cases or whether it is more appropriate in less serious cases. A discussion of recent case law places this issue under further scrutiny.

4. The courts' approach

In *S v Huhu*⁵³ the Bloemfontein Magistrates' Court imposed a compensation order under section 300. The court convicted the accused of assault with intent to do grievous bodily harm and malicious damage to property. The accused was sentenced to two years imprisonment which was suspended for five years. One of the conditions was that the accused pay an amount of R1 300 in terms of section 300 to the complainant.⁵⁴ The fine was to be paid in monthly instalments on the seventh day of each month.⁵⁵

On review, the High Court ruled that the trial court incorrectly applied section 300 instead of section 297 of the CPA. The court *a quo* therefore had erred in its interpretation of section 300. The review court stated that a compensation penalty under section 300 applies only where an accused has sufficient property or executable assets to compensate the victim, either fully or to a large extent. This position confirmed the rule that was formulated in *S v Khoza*.⁵⁶ As stated above, section 297 provides that an accused, if he or she is employed, may pay the fine in monthly instalments and as a condition of a suspended sentence.⁵⁷ The court found that Huhu was unable to fully compensate the complainant, because he did not have sufficient or viable assets.⁵⁸ In addition, the court amended the judgment and declared that the accused compensate the complainant in terms of section 297(1)(a)(i)(aa) of the CPA to the amount of R1 300.⁵⁹

In *S v Khoza*,⁶⁰ the accused was charged with theft in the Johannesburg Magistrates' Court. The accused was convicted of stealing R35 000 in cash from her employer and was sentenced to a fine of R10 000 or 36 months imprisonment. The sentence was suspended for a period of five years on condition that the accused is not convicted of theft or

⁵³ *S v Huhu* [2013] ZAFSHC 74.

⁵⁴ *S v Huhu* para. 2. The trial court described the compensation order as a sentence as follows: "That the accused compensate the complainant in terms of section 300 of the Criminal Procedure Act 51 of 1977 in the amount of R1 300 (One Thousand Three Hundred Rand). Such amount is payable in monthly instalments of R200 (two hundred) and one instalment of R100 (one hundred rand) at Clerk of the Court, Magistrates' Court Bloemfontein. The first instalment is payable on or before 7 March 2013 with the remaining instalments on or before the 7th day of each succeeding month until such amount is paid in full".

⁵⁵ *S v Huhu* para. 2.

⁵⁶ *S v Khoza* 2011 1 SACR 482 (GSJ).

⁵⁷ *S v Huhu* para. 4; see also *S v Khoza* paras. 9–10.

⁵⁸ *S v Huhu* para. 5.

⁵⁹ *S v Huhu* para. 7.

⁶⁰ *S v Khoza* para. 1.

attempted theft during the period of suspension. The court ruled further that she had to pay a compensation penalty in terms of section 300. She was ordered to pay the amount of R20 000 as follows: R2 000 on the day of judgment, and the balance in instalments of R500 at the end of each month until the balance is paid in full.⁶¹

The agreement between the prosecutor and the defence was that the accused must pay R20 000 to the complainant despite the fact that it was R15 000 less than what the accused originally stole from the complainant.⁶² The case was then referred on special review to the South Gauteng High Court. On review the court confirmed that there were two ways in which a court can make a compensation order where a complainant has suffered as a result of the actions of an accused. One is an order that is part of the suspended conditions in a sentence under section 297. The other is a compensation order in terms of section 300 that has the effect of a civil judgment. The court confirmed that both methods are discretionary and depend on the conviction of an accused for an offence which has caused damage.⁶³

The court ruled further that an order in terms of section 300 would only be appropriate where the accused has sufficient assets or money.⁶⁴ If an accused is unable to fully compensate the complainant, an order under this section shall not be permissible. If an accused is working and able to pay a sum of money in instalments, it would be more appropriate and practical to impose a suspended sentence on condition that the amount be paid in periodic instalments.

The case was referred back to the magistrate who convicted the accused so that a thorough investigation could be launched to determine whether section 297 or section 300 was the most appropriate sentence for the purposes of a compensation order.⁶⁵

In *S v Thabethe*⁶⁶ the complainant (the daughter), her mother and the accused, who was also the mother's lover, resided in the same property.⁶⁷ The accused was the breadwinner in the family and a father figure to the girl.⁶⁸ The daughter at the time of the incident was 15 years and 10 months old.⁶⁹ On the day of the incident the girl left without her mother and the accused's consent and did not return, which left them suspicious.⁷⁰ The accused then launched a search for the complainant and found her at the home of one of her boyfriends.⁷¹ The complainant apparently had sexual intercourse with her boyfriend.⁷² To hide the truth from her mother,⁷³ the complainant pleaded with the accused to convey a different version of the event to her mother. The accused consented on condition that the 15-year-old complainant must have sex with him.⁷⁴ The accused and the complainant then

⁶¹ *S v Khoza* para. 4.

⁶² *S v Khoza* para. 5.

⁶³ *S v Khoza* para. 8.

⁶⁴ See also *S v Baloyi* 1981 2 SA 227 (T).

⁶⁵ *S v Khoza* para. 13.

⁶⁶ *DPP v Thabethe* (619/10) [2011] ZASCA 186. See also Songca & Karels (2016:456-62) for a discussion of the case.

⁶⁷ *DPP v Thabethe* para. 5.

⁶⁸ *DPP v Thabethe* paras. 5, 12.

⁶⁹ *DPP v Thabethe* para. 5.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

had sexual intercourse. The next day, the accused surrendered himself to the police and confessed that he had raped the complainant.⁷⁵ The court found the accused guilty of rape. However, the court imposed a very light sentence that included the payment of a compensation fine, namely, that he must contribute 80 percent of his income to the complainant and her family.⁷⁶

One of the main mitigating factors considered during sentencing was that the complainant and the mother admitted that they could not survive without the accused, and admitted that it was their wish that he should not go to jail.⁷⁷ Besides, the complainant further stated that she had forgiven the accused and that they had buried the hatchet.⁷⁸ Accordingly, the court imposed a restorative justice sentence, instead of the minimum sentence of 10 years imprisonment prescribed for the crime of rape of children under the age of 16 years.⁷⁹

However, the Supreme Court of Appeal (SCA) set aside the sentence and the accused was sentenced to 10 years imprisonment. The court declared that the original sentence was not appropriate because of the seriousness of the crime.⁸⁰ The court further stated that courts must guard against imposing restorative justice sentences where an accused is convicted of a serious crime.⁸¹ The court ruled as follows:

I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option. Sentencing officers should be careful not to allow some overzealousness to lead them to impose restorative justice also in cases where it is patently unsuitable. It is trite that one of the key ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public.⁸²

In *Seedat v S*,⁸³ a similar matter was raised before the SCA. In this case, the 63-year-old appellant was convicted in the regional court of rape and sentenced to seven years imprisonment. During an appeal to the High Court against his sentence, the appellant argued that the trial court had erred by failing to consider an alternative sentence of restorative justice. The appeal was upheld and the sentence of seven years imprisonment was set aside and replaced with an order directing that the appellant pay the amount of R100 000 to the complainant.⁸⁴ The Director of Public Prosecutions, however, was not

⁷⁵ *S v Thabethe* 2009 2 SACR 62 (T).

⁷⁶ For a list of the other sentencing conditions, see *DPP v Thabethe* para. 2.

⁷⁷ *DPP v Thabethe* para. 6.

⁷⁸ *Ibid.*

⁷⁹ In terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997, read with part 3 of Schedule II.

⁸⁰ *DPP v Thabethe* para. 19.

⁸¹ *DPP v Thabethe* para. 20. See also Songca & Karels (2016:456).

⁸² *DPP v Thabethe* para. 20.

⁸³ *Seedat v S* (731/2015) [2016] ZASCA 153.

⁸⁴ *Seedat v S* [2015] 3 All SA 93 (GP).

satisfied with the compensation order as a sentence, and further appealed to the SCA to set aside the judgment. He argued that the judgment of the High Court was inappropriate and invalid.⁸⁵

The appellant, a businessman who owned two shops, visited the complainant's home on the specific day to deliver a bed-lamp.⁸⁶ He offered to show her that the lamp was in working condition. The complainant agreed and invited him to the bedroom, where he tested the lamp. According to the complainant, the appellant then had sexual intercourse with her in the room. The complainant requested the court to impose a community-based sentence and an order for financial compensation for the rape and trauma she suffered. She further requested that the appellant pay her R500 000 and buy her a Toyota motor vehicle, but would accept an amount of R100 000.⁸⁷

The SCA ruled that in terms of section 297(1)(a)(i)(aa) a court does not have the power to postpone a sentence for a maximum period of five years when the law prescribes a minimum penalty for such an offence.⁸⁸ However, it found that section 297(4) authorised a court to suspend the operation of any part thereof, subject to certain conditions, where a person is convicted of an offence for which a law prescribes a minimum punishment. The court accepted that the Supreme Court was correct to find that there were substantial and compelling circumstances that justified a substantial deviation from the prescribed minimum sentence.⁸⁹ The SCA found that the fact that the appellant was an elderly man, a first offender, and had not been in good health, justified such a departure.

The court, however, disagreed with the sentiments of the High Court that the option of a restorative justice sentence in this case was correct.⁹⁰ According to the court, the victim's alleged belief that it would be more appropriate for the appellant to compensate her, is not the only factor that should be taken into account.⁹¹ The court emphasised that rape is a plague in our society and that the courts have a duty to send a clear message, not only to the accused but also to other potential perpetrators, to show that society will not tolerate it. It was further decided that criminal proceedings are supposed to instil public confidence in the criminal justice system, and that the public should be concerned when the courts are prepared to impose a suspended sentence along with a monetary compensation order in rape cases.⁹²

Despite the advanced age of the appellant and the state of his health, the court determined that the imposition of a compensation order alone, was not appropriate.⁹³ The court referred to *Hewitt v S*,⁹⁴ also decided by it. In *Hewitt*, the appellant, an elderly man of 75 years, was sentenced to serve a term of imprisonment despite the fact that his health had seriously deteriorated. It is crucial to highlight a certain point in the *Hewitt* case

⁸⁵ *Seedat v S* 731/2015) [2016] ZASCA 153) para. 19.

⁸⁶ *Seedat v S* para. 2.

⁸⁷ *Seedat v S* para. 12.

⁸⁸ *Seedat v S* para. 33.

⁸⁹ *Seedat v S* paras. 34, 37.

⁹⁰ *Seedat v S* para. 38. The SCA referred to its previous decision in *DPP v Thabethe* [2011] ZASCA 186; 2011 2 SACR 569 (SCA).

⁹¹ *Seedat v S* para. 39.

⁹² *Seedat v S* para. 40.

⁹³ *Seedat v S* para. 41.

⁹⁴ *Hewitt v S* [2016] ZASCA 100.

regarding his age. Although Hewitt was a sickly man of 75 and Seedat at 63-year-old, relatively younger and healthier, Hewitt was given a heavier sentence than Seedat. The SCA replaced the sentence imposed by the High Court in *Seedat* with a sentence of four years direct imprisonment.

Compensation orders are not regularly imposed in our courts.⁹⁵ The matters referred to in this contribution have highlighted several problems and shortcomings with regard to compensation orders. It seems that the principle of restorative justice is largely untapped in compensation orders in criminal cases because of the great emphasis that the principles of criminal law place on retribution, focussing more on the accused and on the interests of the community.⁹⁶

Some courts have imposed compensation orders, but erred in that the incorrect sections of the CPA were utilised.⁹⁷ It may also be a reflection that the courts are not often faced with these types of sentences.

In both *Thabethe* and *Seedat* it is clear that the SCA is strongly opposed to solely impose compensation orders in serious cases such as rape and is therefore not in favour of this type of restorative justice sentence. Yet it seems that the High Courts are more inclined to impose such orders. This is an indication that the criminal justice system can indeed deviate from the retribution theory in serious cases. But more importantly, it proves that courts have a wide range of sentencing options available to them. The criminal justice system cannot stagnate and must be adaptable and developed in accordance with the changes in the common law and the Bill of Rights.⁹⁸

Fattah⁹⁹ makes the following critical comment:

I find it rather puzzling that despite enormous social evolution and vast intellectual progress in the last two centuries, our criminal justice system remains frozen in the era of retaliation. It continues to be fixated on the notion of retribution and the need to inflict pain and suffering on the offender by way of making him pay for the injury and harm that he has done.

5. A new perspective

It is trite law that, in imposing sentences, courts should consider a number of factors.¹⁰⁰ These are the nature and seriousness of the offence, the personal circumstances of the offender and the interests of the community.¹⁰¹ The intention should always be to seek to impose a balanced sentence, which should not have the effect that any factors is under- or over-emphasised.¹⁰² Of course we have to look at the offender as an individual. Clemency should also be shown to the offender. It is true that sentences are not readily available and cannot be taken off a shelf in a shop at regular intervals like items in a store and just

⁹⁵ *S v Khoza* para. 10.

⁹⁶ See *DPP v Thabethe* par. 19; *Seedat v S* para. 38.

⁹⁷ See *S v Huhu* para.3; *DPP v Thabethe* para. 29.

⁹⁸ See Neethling (2015:408).

⁹⁹ Fattah (2007:211).

¹⁰⁰ Joubert (2013:325–7).

¹⁰¹ See *S v Rabie* 1975 4 SA 855 (A). See further Joubert (2013:326).

¹⁰² Joubert (2013:325).

handed out. They require careful consideration and deliberation and should not be done haphazardly. In contrast, officials must also ensure that the sentence is appropriate and in line with the various theories of punishment, namely deterrence, rehabilitation, retribution and prevention.¹⁰³ Therefore, a compensation order should not be imposed lightly as a means of punishment. However, if it is appropriate after considering all of the above factors, courts should not shy away from it.

5.1 Reform or retribution?

In the *Thabethe* case, the principles of the reform theory and the retribution theory were repeatedly contrasted.¹⁰⁴ Although the complainant and her mother were in favour of the reform theory, the court nonetheless ruled that the perpetrator could not be reformed. It appears that the court only took into account that the law provides for a minimum sentence of imprisonment for a specific crime.¹⁰⁵ Songca and Karels¹⁰⁶ supported the court's view, but argue that restorative justice should be considered as a "parallel mechanism" that can support the retribution approach. It is therefore of great importance that the theories function together and complement each other.

The accused was sentenced to direct imprisonment despite the fact that he apparently was not regarded as a future danger to the complainant, her family or society.¹⁰⁷ He was also enrolled for a sexual offence prevention programme and was the breadwinner of his family.¹⁰⁸

It seems that the SCA in *Seedat*¹⁰⁹ want to say that in all serious cases such as rape and murder there should always be direct imprisonment. However, the Supreme Courts in both *Seedat*¹¹⁰ and *Thabete*¹¹¹ ruled that the accused should not only receive a prison sentence but should also have a sentence of restorative justice because of the unique circumstances and facts of the cases. In both cases the complainants were inconvenienced, while the appellants' greatest dissatisfaction with the sentences imposed was the fact that the courts did not consider the restorative sentence option as an alternative mechanism. The requests of both complainants were dismissed.

It is suggested that compensation orders together with other restorative justice conditions could be imposed in certain circumstances. Just because an offender is convicted of rape, does not mean that he always deserves a harsh sentence such as imprisonment.¹¹² This should especially be the case where the victims have requested and emphasised that their economic survival depends on the accused.¹¹³

¹⁰³ Joubert (2013:327).

¹⁰⁴ *DPP v Thabethe* paras. 10, 12, 14–5, 19–20, 22.

¹⁰⁵ *DPP v Thabethe* para. 29.

¹⁰⁶ Songca & Karels (2016:466).

¹⁰⁷ *DPP v Thabethe* para. 11.

¹⁰⁸ *DPP v Thabethe* para. 2.

¹⁰⁹ *Seedat v S* [2016] ZASCA 153 para. 38.

¹¹⁰ *Seedat v S* [2015] 3 All SA 93 (GP) paras. 49–50.

¹¹¹ *S v Thabete* paras. 40–1.

¹¹² See in general Watney (2015).

¹¹³ *S v Thabete* para. 20.

Compensation orders are generally not imposed because the courts are more focussed on retribution and the rights of the accused. In this context, it is argued that the Constitution is more in favour of accused persons than victims. Section 35 of the Constitution contains a number of stipulated rights which confirm and entrench the rights of an accused.¹¹⁴ There are no separate clauses that specifically deal with the rights of victims. Nevertheless, it is conceded that the Constitutional Court in *Carmichele v Minister of Safety and Security*, in referring to the Bill of Rights in the Constitution, articulated the rights of victims and protected them.¹¹⁵ However, *Carmichele* was the exception to the rule. The victim had to institute a civil claim and did not receive any help from the criminal court, where she was the complainant. Maybe it is time for a paradigm shift in our courts to not only consider the accused's position, but also the position of the victim. Victims ought to receive protection from the criminal courts and should not have to institute civil proceedings at their own expense, as was the case in *Carmichele*.

5.2 Interests of the community against the interests of the victim

One of the factors to be considered in punishment is the interests of the community. However, it is mostly the case that the interests of the broader community take precedence over those of the individual victim. If compensation orders were more frequently imposed, it might encourage reluctant witnesses to come forward and testify in court so that criminals could be brought to book. Such orders would also satisfy more victims, because a mere term of imprisonment does not place bread on the table of the victims, while the imposition of a compensation order may well have this effect. The money goes to the victims or their families, and not into the state coffers.

In both *Thabete*¹¹⁶ and *Seedat*¹¹⁷ the SCA highlighted that the broader community will not be satisfied if only fines were imposed in rape cases. It indicated that the views of the public at large, as well as the absolute repulsiveness of the crimes, take precedence over the views of the victims. There will of course be those who will argue that you cannot impose a monetary payment on a person convicted of rape. The question will be: What message does it sent out to the broader community?

In *Seedat*,¹¹⁸ the victim requested a cash payment and a motor vehicle; in *Thabete*¹¹⁹ the complainant and her mother asked that the accused should maintain them. The effect of the court's judgments was that the victims again were on the receiving end. First, they were inconvenienced by the actions of the accused, and secondly, by the judgments of the court. The court sentenced both accused bearing in mind the interests of the community, while also wanting to send a message to future offenders in order to deter them.

Maybe the time has come for our courts to become more complainant/victim-conscious instead of simply being accused-conscious. The focus must shift to determine what is also in the best interest of the complainants/victims. This will create more satisfied

¹¹⁴ S 35 of the Constitution, 1996.

¹¹⁵ See *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 4 SA 938 (CC).

¹¹⁶ *S v Thabete* para. 17.

¹¹⁷ *Seedat v S* [2015] 3 All SA 93 (GP) para. 39.

¹¹⁸ *Seedat v S* [2015] 3 All SA 93 (GP) paras. 31, 38.

¹¹⁹ *S v Thabete* para. 20.

complainants/victims who will walk out of our courts with an increased perception that the criminal justice system is not only for the benefit of the accused. It is not advocated that the vested rights of the accused should be diluted, but rather that the rights of complainants/victims should receive more prominence in criminal justice proceedings and especially during the imposition of sentence. During parole hearings the opinions of complainants/victims are already used to determine whether prisoners can be released on parole.¹²⁰ There is a great opportunity to make more use of complainants and victims during sentencing. There is no reason why a compensation order together with direct imprisonment cannot be an appropriate sentence in some cases.

Although the SCA in *Seedat* ruled that a compensation penalty is not appropriate, but that direct imprisonment must be imposed, the effect is that the judgment of the court is a combination of a compensation order and direct imprisonment. The accused had already paid R15 000 to the complainant.¹²¹ It was indicated in the appeal hearing that she could not repay this amount. One could argue that *Seedat* would not reclaim the amount, because it was considered in the imposition of his four-year period of imprisonment by the court. Thus, *Seedat*'s sentence equates to: a period of four years direct imprisonment plus a compensation payment of R15 000.¹²²

However, no consideration were given to the people who were the most inconvenienced, who experienced the humiliation of being physically violated and who were deprived of their human dignity. A middle way, for example, to grant them compensation and to punish the offender, would have been more appropriate.¹²³ A court must, after all, make a balanced judgment and take all factors into account. Only direct imprisonment in such cases is precisely an over-emphasis of the nature and the seriousness of the offence and ignores the interests of the victim. The focus is too reliant on what is an appropriate sentence for the offender. The *Seedat* case is distinguishable from the *Hewitt* case.¹²⁴ The media and the public pressure played a greater role in the sentencing of Hewitt than of *Seedat*. Hewitt was also charged with more than one offence, while *Seedat* was only charged with one count of rape. In *Seedat*, the victim emphasised that she was satisfied with the imposition of a compensation payment, which was not the case in *Hewitt*.¹²⁵

It is conceded that compensation orders cannot and should not be considered in serious crimes such as rape and murder, and where it is not requested by the family of the victim or the deceased. But where it is asked for by the victim, there is no reason why it cannot be considered. In fact during parole hearings victims are asked for their views.¹²⁶ During parole hearings the opinions of a group of people are taken into account, but the same does not take place in relation to sentencing.

6. Conclusion

The CPA¹²⁷ specifically provides for compensation orders. The application of these orders

¹²⁰ S 75(4) of the Correctional Services Act 11 of 1998; s 299A of the CPA.

¹²¹ *Seedat v S* para. 42.

¹²² *Seedat v S* paras. 42–3.

¹²³ *S v Zinn* 1969 2 SA 537 (A).

¹²⁴ *Seedat v S* [2015] 3 All SA 93 (GP) para. 50; *Hewitt v S* para. 10.

¹²⁵ *Seedat v S* [2015] 3 All SA 93 (GP) para. 31; *Hewitt v S* paras. 11–3.

¹²⁶ S 75(4) of the Correctional Services Act 11 of 1998; s 299A of the CPA.

¹²⁷ Ss 297, 300 of the CPA.

has however, until now been, somewhat unsatisfactory. It is suggested that the stereotypical view regarding criminals - the general view that they are a danger to society - will have to change before we can speak of a greater role for restorative justice practices in the criminal context.

Fattah¹²⁸ puts it briefly as follows: "Another faulty premise underlying the use of penal sanctions is the mistaken belief that criminals are radically different from law-abiding citizens, a belief that leads to the creation of a false dichotomy between criminals and non-criminals".

To ensure that restorative justice gets its rightful place in any functional justice system, consideration must be given to all parties affected by the crime, including the offender and the victim.

Compensation orders present several challenges. It is acknowledged that it will not always be financially possible for an accused to pay compensation.¹²⁹ Also, the fact that a large percentage of offenders probably are living below the poverty line, does not mean that compensation orders should be ruled out immediately. Once an offender earns an income, he will be able to pay. The postponement of penalties is regularly allowed by the courts.

In the judgments which were discussed in this contribution, the SCA held that compensation orders were not appropriate; yet a golden opportunity was missed to offer potential guidance to other courts as to when these orders should be considered. South African courts should in appropriate cases consider all possible options of restorative justice before heavier sentences are imposed. It is not an impossible task, but should be approached with caution.

With South Africa being plagued by a high crime rate and associated overcrowded prisons, the time has come to rather focus more on alternative punishments such as compensation orders as opposed to the more conventional criminal remedies. Such orders could have a twofold benefit: fewer prisoners in overcrowded prisons and a definite positive contribution to the victims of crimes who will receive compensation for the harm or loss they suffered. This will result in an increased volume of satisfied victims in criminal cases, while people who are reluctant to give evidence in a court will be encouraged to come forward and play a role in building a safer society.

¹²⁸ Fattah (2007:214).

¹²⁹ See Buck (2005:149).

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