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# AN OVERVIEW OF THE SENTENCING REGIME FOR GANG MEMBERS UNDER THE PREVENTION OF ORGANISED CRIME ACT 121/1998 AND THE POTENTIAL FOR RESTORATIVE JUSTICE\*

## SUMMARY

Sec. 10 of the *Prevention of Organised Crime Act* 121 of 1998 creates a sentencing regime for those found in contravention of the substantive gang-related offences under sec. 9. This contribution provides a brief overview of the sentencing options available when found guilty of one of these substantive offences, against the backdrop of the general principles of sentencing in South Africa. The potential role of restorative justice in gang-related cases is also considered.

## 1. INTRODUCTION

Criminal gang activity, typified predominantly by murder, dealing in drugs, and violence using firearms is rampant in the Cape Flats in the Western Cape.<sup>1</sup> In an attempt to combat this, Chapter 4 of the *Prevention of Organised Crime Act*<sup>2</sup> (hereafter, "POCA") was enacted to deal with the gang-related activities that were mostly prevalent in the Western Cape at the time.<sup>3</sup> This legislative intervention

\* This article is based on parts of research conducted for my LLD thesis at Stellenbosch University: *Criminal gang activities: A critical and comparative analysis of the statutory framework under South African criminal law*. The institution has granted permission to publish derivative works from this research.

1 See Western Cape Provincial Committee on Community Safety, Cultural Affairs and Sport "Gang-related violence in Western Cape: Stakeholder engagement", <https://pmg.org.za/committee-meeting/32684/> (accessed on 21 May 2021).

2 *Prevention of Organised Crime Act* 121/1998.

3 See Standing 2005:43. The so-called "gang wars" between local gangs and PAGAD were ubiquitous at the



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has, however, not caused a noticeable reduction in criminal gang activity. In fact, it appears to have increased significantly.<sup>4</sup> *POCA* and its sentencing

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time and became increasingly violent. This is not to mean that gang violence is a problem unique to the Western Cape. The Eastern Cape, KwaZulu-Natal and, to the lesser extent, even the Free State have all been identified to have a gang presence – see Portfolio Committee on Police “Briefing by the Management of SAPS on the Anti-gang Strategy: Western Cape, KwaZulu-Natal and Eastern Cape”, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170823Anti-Gangsterism.pdf> (accessed on 20 May 2021); National Prosecuting Authority 2020:110; *S v Mafahle* (4/2018) [2019] ZAFSHC 266 (5 July 2019); *S v Klaas* (CC16/2020) [2021] ZACPEHC 12 (29 January 2021).

- 4 The South African Police Service only started to report gang-related crimes separately from 2015 onwards (see Van der Linde 2018:23). From a reading of the crime statistics, it is clear that the Western Cape is the epicentre of gang violence in South Africa. There has been a steady year-on-year increase (with the exception of the 2020/2021 year of reporting) of gang-related murders in the province since the 2015/2016 year of reporting. During 2015/2016, 13.3 per cent of murders in the province were attributed to the gangs; 2016/2017 showed an increase to 19.3 per cent; 2017/2018 increased to 21.6 per cent; 2018/2019 increased to 23.6 per cent, and 2019/2020 showed a proportional decrease to 20.7 per cent (about 117 less murders) and then quite a significant drop to 16.1 per cent of the provincial murder rate at the end of the 2020/2021 year of reporting. It is postulated that this decrease can be attributed to two main factors, especially the deployment of the SANDF by President Ramaphosa in July 2019 and the outbreak of the COVID-19 pandemic, which caused an overall reduction in crime rates, especially during the period of hard lockdown from 26 March 2020 to 16 April 2020. See South African Police Service *Annual Crime Report 2015/2016: Addendum to the SAPS Annual Report* 11-13; South African Police Service “Addendum to the SAPS Annual Report: Annual Crime Report 2016/2017”, [https://www.saps.gov.za/about/stratframework/annual\\_report/2016\\_2017/gpw\\_crime\\_stats\\_2017.pdf](https://www.saps.gov.za/about/stratframework/annual_report/2016_2017/gpw_crime_stats_2017.pdf) (accessed on 21 September 2021); South African Police Service “Crime Situation In RSA Twelve Months 01 April 2017 to 31 March 2018”, [https://www.saps.gov.za/services/long\\_version\\_presentation\\_april\\_to\\_march\\_2017\\_2018.pdf](https://www.saps.gov.za/services/long_version_presentation_april_to_march_2017_2018.pdf) (accessed on 21 September 2021); South African Police Service “Crime Situation in Republic of South Africa Twelve (12) Months (April to March 2018\_19)”, [https://www.saps.gov.za/services/april\\_to\\_march2018\\_19\\_presentation.pdf](https://www.saps.gov.za/services/april_to_march2018_19_presentation.pdf) (accessed on 21 September 2021); South African Police Service “Crime Situation in Republic of South Africa Twelve (12) Months (April to March 2019\_20)”, [https://www.saps.gov.za/services/april\\_to\\_march\\_2019\\_20\\_presentation.pdf](https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf) (accessed on 21 September 2021); South African Police Service “Crime Situation in Republic of South Africa Three Months (April to June 2020\_21)”, [https://www.saps.gov.za/services/April\\_June%202020\\_2021.pdf](https://www.saps.gov.za/services/April_June%202020_2021.pdf) (accessed on 21 September 2021); South African Police Service “Crime Situation in Republic of South Africa Three Months (July to September 2020\_21)”, [https://www.saps.gov.za/services/july\\_to\\_september\\_2020\\_21\\_crime\\_situation.pdf](https://www.saps.gov.za/services/july_to_september_2020_21_crime_situation.pdf) (accessed on 21 September 2021); South African Police Service “Crime Situation in Republic of South Africa Three Months (October to December 2020\_21)”, [https://www.saps.gov.za/services/october\\_to\\_december\\_2020\\_21\\_crimestats.pdf](https://www.saps.gov.za/services/october_to_december_2020_21_crimestats.pdf) (accessed on 21 September 2021); South African Police Service “Crime Situation in Republic of South Africa Three Months (January to March 2020\_21)”, [https://www.saps.gov.za/services/fourth\\_quarter\\_2020\\_21\\_crimestats.pdf](https://www.saps.gov.za/services/fourth_quarter_2020_21_crimestats.pdf) (accessed on 21 September 2021); A Kriegler “Crime statistics show South Africa’s lockdown ‘crime holiday’ is over”,

regime also appear to be underutilised<sup>5</sup> in gang-related matters. For example, for the period 1 April 2016 to 31 July 2017, roughly 3,892 gang-related arrests were made, yet only resulting in 42 convictions under *POCA*.<sup>6</sup>

In communities where gang activity is rife, often irreparable social harm is done to the relationships of those inhabiting the communities. In 2000, the South African Law Reform Commission already proposed the consideration of restorative justice measures in all cases in addition to traditional penal measures.<sup>7</sup> Considering the arguably underutilised penal measures under *POCA*, measures outside these traditional penal measures should also be considered in sentencing.

The purpose of this note is twofold. First, it will provide an overview of the sentencing regime under sec. 10(1) of *POCA* as well as the aggravating factors under sec. 10(2) and (3) as applied by courts, in light of the general principles of sentencing. Secondly, an overview is provided of the potential for the application of restorative justice measures as an additional measure to address gang activity.

## 2. BASIC STRUCTURE OF CHAPTER 4 OF *POCA*

Chapter 4 of *POCA* established six new offences, namely aiding and abetting a criminal gang;<sup>8</sup> threatening to commit, perform or bring about acts of

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<https://theconversation.com/crime-statistics-show-south-africas-lockdown-crime-holiday-is-over-166785> (accessed on 21 September 2021); Committee on Defence "Election of Co-Chairpersons; Deployment of SANDF members to Western Cape", <https://pmg.org.za/committee-meeting/28649/> (accessed on 21 September 2021).

- 5 For a discussion of potential reasons impacting the utilisation of *POCA* in gang prosecutions, including the complexity in proving the substantive offences, as opposed to comparatively straightforward common-law offences, see generally Van der Linde 2020a:273-301.
- 6 Portfolio Committee on Police "Briefing by the Management of SAPS on the Anti-gang Strategy: Western Cape, KwaZulu-Natal and Eastern Cape", <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170823Anti-Gangsterism.pdf> (accessed on 20 May 2021). However, it must be noted that only data of twenty of these convictions were supplied. From a reading of these tables, 32 persons were convicted in the Western Cape during the abovementioned period for gang-related offences. That number includes convictions for non-*POCA* offences such as dealing in drugs and murder. It is unclear why the data for the other 22 convictions were omitted. Although not pertinently referenced as *POCA* convictions, the 2019/2020 Annual Report by the National Prosecuting Authority states that, during the period of review, seven gang-related cases were finalised, with six cases securing a conviction – National Prosecuting Authority 2020:110.
- 7 See South African Law Commission "Project 82: Sentencing (a new sentencing framework)", [https://www.justice.gov.za/salrc/reports/r\\_prj82\\_sentencing%20\\_2000dec.pdf](https://www.justice.gov.za/salrc/reports/r_prj82_sentencing%20_2000dec.pdf) (accessed on 26 October 2021); Cameron 2020:4-10.
- 8 *POCA*:sec. 9(1)(a).

violence or any criminal activity;<sup>9</sup> threatening [acts] of retaliation;<sup>10</sup> bringing about a pattern of criminal gang activity;<sup>11</sup> inducing someone to contribute to gang activities,<sup>12</sup> and engaging in gang recruitment.<sup>13</sup> *POCA* makes provision for several maximum prescribed sentences as well as two instances of two aggravating sentencing provisions. Sec. 10(1) states that persons convicted of an offence contemplated in

- (a) section 9 (1) or (2)(a) shall be liable to a fine, or to imprisonment for a period not exceeding six years;
- (b) section 9 (2)(b) or (c), shall be liable to a fine, or to imprisonment for a period not exceeding three years;
- (c) section 9 (1) or (2)(a) and if the offence was committed under circumstances referred to in subsection (2) shall be liable to a fine, or to imprisonment for a period not exceeding eight years;
- (d) section 9 (2)(b) or (c), and if the offence was committed under circumstances referred to in subsection (2) shall be liable to a fine or to imprisonment for a period not exceeding five years.

This sentencing regime is unique, as it is entirely predicated on the fact that a person has committed other crimes in addition to those of which they have been found guilty under Chapter 4 of *POCA*. The sentences under sec. 10 of *POCA* range between either three or six years. These sentences can be aggravated, depending on whether the substantive offences under sect. 9 are committed on school premises or other educational institutions or within 500 metres of such institutions during their business hours.

If an accused, being a gang member during the time of committing the offence, is convicted of “any offence” (thus, any common-law or statutory offence) other than the offences under Chapter 4, the court may use the fact of such gang membership as an aggravating factor under sec. 10(3) of *POCA*.

To be convicted in terms of one of the substantive offences in terms of sec. 9 of *POCA*, the State must first establish the existence of a “pattern of criminal gang activity” as well as a “criminal gang”.<sup>14</sup> *POCA* defines a “pattern of criminal gang activity” as including

the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed

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9 *POCA*:sec. 9(1)(b).

10 *POCA*:sec. 9(1)(c).

11 *POCA*:sec. 9(2)(a).

12 *POCA*:sec. 9(2)(b).

13 *POCA*:sec. 9(2)(c).

14 See *S v Jordaan and Others*:par. 135; *S v Solomon and Others* (CC23/2018) [2020] ZAWCHC 116 (29 September 2020) (“*S v Solomon and Others Trial*”):paras. 902-908.

- (a) on separate occasions;
- (b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang.<sup>15</sup>

#### A “criminal gang” further

includes any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.<sup>16</sup>

A “pattern of criminal gang activity” requires that an accused, or alternatively, other gang members or active participants in the criminal gang<sup>17</sup> have committed at least two offences listed in Schedule 1. These offences under Schedule 1 are also known as predicate offences, as liability under Chapter 4 is predicated on the commission thereof. Schedule 1 lists 38 offences including murder,<sup>18</sup> sexual offences,<sup>19</sup> public violence,<sup>20</sup> breaking and entering with the intent to commit an offence,<sup>21</sup> theft,<sup>22</sup> offences relating to coinage and exchange,<sup>23</sup> dealing in drugs,<sup>24</sup> offences relating to the unlawful possession of ammunition and firearms,<sup>25</sup> as well as offences relating to torture<sup>26</sup> and

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15 POCA:sec. 1(iv).

16 POCA:sec. 1(xii).

17 Personal contribution to the pattern is not required – save perhaps for sec. 9(2)(a) which proscribes acts aimed at “causing, bringing about, promoting or contributing towards a pattern of criminal gang activity”. However, it has been held that personal contribution to a pattern is required to be held liable for other offences, specifically sec. 9(2)(b). This is not required by the statutory text. See *S v Solomon and Others* 2021 (1) SACR 533 (WCC):par. 909.

18 POCA:Item 1 of Schedule 1.

19 POCA:Items 2, 8 and 11 of Schedule 1 and in terms of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32/2007* and the *Sexual Offences Act 23/1957*.

20 POCA:Item 5 of Schedule 1.

21 POCA:Item 15 of Schedule 1.

22 POCA:Item 17 of Schedule 1.

23 POCA:Items 21 and 26 and in terms of *South African Reserve Bank Act 90/1989* and the *Prevention of Counterfeiting of Currency Act 16/1965*.

24 POCA:Item 22 and in terms of sec. 13 of the *Drugs and Drug Trafficking Act 140/1992*.

25 POCA:Items 23 and 24 and in terms of the *Arms and Ammunition Act 75/1969* and the *Firearms Control Act 60/2000*.

26 POCA: Item 34 [read with sec. 4(1) and 4(2) of the *Prevention and Combating of Torture of Persons Act 13/2013*]. This item is not numbered (which appears to be a typographical error), but should be number 34 in the sequence while the last offence should be Item 35.

terrorism.<sup>27</sup> Any conspiracy, attempt, or incitement to commit any of the listed offences will also constitute a predicate offence.<sup>28</sup>

The following section provides a broad overview of sentencing, in general, while focusing on the specific sentencing provisions under *POCA*.

### 3. SENTENCING

#### 3.1 General remarks regarding sentencing in South Africa

A comprehensive discussion regarding sentencing in South Africa falls beyond the scope of this contribution, but certain core points require brief reference in this instance.<sup>29</sup> Judicial officers are generally afforded wide and discretionary sentencing powers. These sentencing powers cannot be exercised arbitrarily but must be exercised reasonably,<sup>30</sup> in accordance with the powers conferred upon the judicial officer by legislation (be it the *Criminal Procedure Act*,<sup>31</sup> the *Child Justice Act*,<sup>32</sup> *POCA*, or any other relevant legislative instrument) as well as established sentencing precedent.<sup>33</sup>

The sentencing powers of the court must also be exercised with due regard to three factors, as described in *S v Zinn* (“*Zinn*”),<sup>34</sup> “consisting of the crime, the offender and the interests of society”. This is colloquially known as the “triad of *Zinn*”. In *S v Solomon and Others* (“*Solomon*”),<sup>35</sup> it was held that the triad of factors “require a court to bear in mind the varying purposes served by criminal punishment, namely deterrence, prevention, retribution and rehabilitation”.<sup>36</sup> This then relates back to the consideration that sentencing must not be arbitrary, as it must serve the underlying function of furthering deterrence, prevention, rehabilitation, and retribution. While the retribution appeared to have previously fallen out of favour in the South African legal

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27 *POCA*: Item 32A and in terms of the *Protection of Constitutional Democracy against Terrorist and Related Activities Act* 33/2004.

28 *POCA*: Item 35 and in terms of sec. 18 of the *Riotous Assemblies Act* 17/1956. For the typographical error in Schedule 1, see fn. 22.

29 For a comprehensive discussion of sentencing in South Africa, see Terblanche 2016; Joubert 2020:399-442; Theophilopoulos 2020:356-387.

30 See *S v Pieters* 1987 (3) SA 717 (A).

31 *Criminal Procedure Act* 51/1977.

32 *Child Justice Act* 75/2008.

33 See Joubert 2020:409.

34 *S v Zinn* 1969 (2) SA 537 (A). The factors were originally enumerated in *S v Rabie* 1975 (4) SA 855 (A) 862, where it was held that “[p]unishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances”.

35 *S v Solomon and Others* 2021 1 SACR 533 (WCC).

36 *S v Solomon and Others*:par. 16. Rogers J found that Accused 1 and 2 did not display any indication of taking responsibility, which, as the court put it, is “the first step towards rehabilitation”. While not ruling it out, they did not take “the court into their confidence” – *S v Solomon and Others*:par. 9.

discourse, courts have recently pointed to retribution as a legitimate function of criminal sanction.<sup>37</sup>

It is not absolutely certain what the rationale behind the sentencing regime under Chapter 4 for *POCA* is. The parliamentary debates (on *POCA* generally) do not address the topic directly, but Willie Hofmeyr, invoking former President Nelson Mandela's promise to "fight fire with overwhelming fire",<sup>38</sup> points towards a retributive rationale or function. The Constitutional Court has relied on the Preamble to *POCA* to discern the rationale behind the *Act* in general. *POCA* was enacted to supplement the ineffective legislative and common-law measures, which were incapable of dealing with organised crime (in particular, racketeering, money laundering, and criminal gang activity) appropriately and which failed to keep up with international measures.<sup>39</sup> These new measures exist to protect the inhabitants of the country against ongoing threats to their human rights and the disruption of economic stability.<sup>40</sup> The Preamble to *POCA* singles out "the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals" and that, due to "the pervasive presence of criminal gangs in many communities [which] is harmful to the well-being of those communities" [*sic*], the criminalisation of the promotion and participation in gang activity was necessitated. One can, therefore, deduce from the Preamble that the legislature largely had *preventative* and *deterrent* aims, due to the focus on the protection of the rights of the individuals impacted by gang violence.

The *Zinn* triad is, however, not infallible. One could validly question the reliance on the interests of society in the sentencing phase. The Constitutional Court, albeit in the context of the abolishment of the death penalty, held that it could not "allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public".<sup>41</sup> The *Zinn* triad could also be critiqued for its lack of explicit reference to the actual victim of the crime during the sentencing phase. This critique could, however, also be levied generally against the criminal justice system in general, as victims or survivors of crime are often relegated to mere witnesses<sup>42</sup> in a criminal justice process that is predominantly "offender-orientated".<sup>43</sup> Van der Merwe and Skelton point out

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37 See, for example, most notably by the Constitutional Court in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 2 SA 1 (CC);par. 84 and by the Supreme Court of Appeal in *Kubheka and Another v The State* (200/2020) [2021] ZASCA 25 (24 March 2021);par. 9. See also Hoctor 2020:11, where reference is made to "[t]he rebirth of retribution".

38 Government of the Republic of South Africa 1998:8051.

39 *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* 2007 2 SACR 145 (CC);par. 144.

40 *National Director of Public Prosecutions v Mohamed NO and Others* 2003 4 SA 1 (CC);par. 14.

41 *S v Makwanyane* 1995 3 SA 391 (CC);par. 88.

42 Joubert 2020:14.

43 Theophilopoulos 2020:515.

that victim participation serves a dual purpose as potentially serving as “a source of aggravating factors” and as a source for understanding the nature of the harm that the victim has suffered.<sup>44</sup> The SCA held that “[a]n enlightened and just penal policy” must also be “victim-centred”.<sup>45</sup> Ponnan JA (with Navsa JA and Pillay AJA concurring) holds that victim empowerment is facilitated through restorative justice in South Africa. Restorative justice de-emphasises crime as merely the transgression of normative rules imposed by the state and rather emphasises crime and an injury to the victim or survivor of such crime.<sup>46</sup> The (potential) role of victim participation through restorative justice in the context of gang violence will be discussed below.<sup>47</sup>

Courts imposing sentences for gang-related offences have paid due consideration to the triad. Emphasis has been placed not only on the nature and seriousness of the offence (such as the pervasive nature of the “gang culture” in the Cape Flats)<sup>48</sup> but also on the personal circumstances of the various accused (including their age, educational background, socio-economic status, upbringing and family life, as well as their occupations).<sup>49</sup> Binns-Ward J in *S v Jordaan* (“*Jordaan*”),<sup>50</sup> however, highlighted the difficulty in sentencing gang members, as they are often also victims of their environment.<sup>51</sup> This rang especially true as the vexed incidents in *Jordaan* took place “in the notoriously gang-infested area of Manenberg” where the offenders and victims grew up.<sup>52</sup> Importantly, the court made the following remarks:

I must say at the outset that I am acutely conscious of the very real disadvantages to which young persons like the accused are subject in that environment. The circumstances are such that they and their peers are under significant temptation and enticement to become involved in gang membership and activity. This comes about not only because of pervasive poverty and unemployment, but also because of the prevailing social norms in the area, which seem to accept gang culture as part of the way of life. This is manifest by the way in which the various gangs that operate in the area have carved out territories within the suburb in which one or other of them holds sway and influence. It is also borne out by the evidence that such is the hold of gang culture

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44 Van der Merwe & Skelton 2015:355. See also Müller & Van Der Merwe 2006:647-648, 662-663; Van der Merwe & Mitchell 2020:2-3.

45 *S v Matyityi* 2011 1 SACR 40 (SCA):par. 16.

46 *S v Matyityi*:par. 16.

47 See Part 4 below.

48 *S v Solomon and Others*:paras. 10-11.

49 *S v Solomon and Others*:paras. 2-7; 10-11; *S v Jordaan and Others* (CC20/2017) [2018] ZAWCHC 10 (7 February 2018):paras. 6-9. The accused in *Jordaan* were not found guilty of the charges under sec. 9 of POCA – see *S v Jordaan and Others*. Although the 2018 judgment does not involve sentencing of gang offences under POCA, it still pertains to offences perpetrated by gang members and the remarks regarding the personal circumstances of gangs and the impact on their communities remain germane.

50 *S v Jordaan and Others*.

51 *S v Jordaan and Others*:paras. 3-5.

52 *S v Jordaan and Others*:par. 3.



in the area that there is little respect for the forces of law and order. The police are openly defied and disregarded on occasion. It is a place where life is treated cheaply, and killings and revenge killings are the order of the day. It is clear from the evidence that the unlawful possession of firearms and ammunition is commonplace in the area and that such munitions are regularly used to lethal effect.<sup>53</sup>

These conflicting realities give rise to a form of cognitive dissonance. Courts (and society) can recognise that, although gang members have contributed to the violence in the communities of the Western Cape, in particular, one can also recognise that “the odds have been stacked from the outset”, which is “an indictment of our far from perfect society”.<sup>54</sup> Being cognisant of the tragic lived realities of even the very gang members who perpetrate these violent offences does entitle courts to “an attitude of maudlin sympathy”.<sup>55</sup> A balance must be struck between the personal circumstances of the offenders and the interests of the specific communities inflicted by gang violence – as well as society generally.<sup>56</sup> Human rights (such as the right to life<sup>57</sup> and the right to be free from violence<sup>58</sup>) will continuously be disregarded in the absence of some form of punishment – especially those offences perpetrated routinely by gangs such as murder and offences relating to the unlawful possession of firearms and ammunition.<sup>59</sup>

### 3.2 The option of a fine

The maximum periods of imprisonment (ranging between three and eight years) contained in sec. 10 are also known as prescribed sentences.<sup>60</sup> Joubert *et al.*, however, point out that courts’ imposing a fine is the most common form of sentencing in South Africa.<sup>61</sup> It is, therefore, not odd to note the option of a fine in a penalty clause of a statute. However, fines are usually reserved for less serious offences<sup>62</sup> and are normally congruent with the seriousness of such offences.<sup>63</sup> The underlying rationale for imposing a fine is multifaceted but at the very least it serves as punishment for the offence and also as deterrent,<sup>64</sup>

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53 *S v Jordaan and Others*:par. 3.

54 *S v Jordaan and Others*:par. 4.

55 *S v Jordaan and Others*:par. 4.

56 *S v Jordaan and Others*:par. 5.

57 In terms sec. 11 of the *Constitution of the Republic of South Africa, 1996*.

58 In terms of sec. 12(1)(c) of the *Constitution*.

59 *S v Jordaan and Others*:par. 5.

60 See Terblanche 2016:36 where the author references to *Nkgadimeng v S* 1998 1 SACR 274 (T). There, Kirk-Cohen J questions the discrepancy in the sentencing of the thief and the recipient of stolen goods, despite the prescribed sentence under the *Stock Theft Act* 57/1959.

61 Joubert 2020:427; Terblanche 2016:297.

62 Joubert 2020:427.

63 Terblanche 2016:297-298.

64 Terblanche 2016:298.

although the effectiveness of a fine as deterrent has been questioned.<sup>65</sup> As mentioned earlier,<sup>66</sup> an accused, or other members of the criminal gang, must at least have committed two predicate acts listed in Schedule 1 of *POCA* for them to fall within the ambit of *POCA*. Accordingly, even before a court can make a finding on the substantive offences of *POCA*, the accused *has already committed* at least two other predicate offences. The offences under Schedule 1 are varied and include relatively tame and non-violent offences such as those relating to exchange and coinage, with the most egregious being violent, and pervasive crimes such as murder, rape, drug offences, unlawful possession of firearms, and terrorism. As will be demonstrated below, the underlying predicate acts are predominantly serious offences such as murder, attempted murder, dealing in drugs, and firearm offences.

The court in *S v Scheepers*<sup>67</sup> stressed that imprisonment has a severe impact on the life of a convicted person, including depriving him or her of his or her liberty and attaching to him or her a severe social stigma.<sup>68</sup> The Appellate Division held that punishment other than imprisonment should be preferred where the objectives of the criminalisation of the specific conduct and the promotion of the interests of society can still be achieved through alternative means of punishment.<sup>69</sup> The option of a fine would likely only be appropriate in instances where the underlying conduct involved non-violent acts such as coinage or exchange offences, perjury and suborning of perjury, theft, or malicious injury to property.<sup>70</sup> At the time of writing this contribution, the author is not aware of any cases where gang members have been charged with these offences in the commission of a pattern of criminal gang activity.

### 3.3 Section 10(1)(a) and (b) of *POCA*

The penalties for gang-related offences are set out in sec. 10 of *POCA*. A person who is found in contravention of any offence under sec. 9(1) (that is, aiding and abetting a criminal gang; threatening to commit, bring about or perform any act of violence or any criminal activity, and threatening retaliation) and/or sec. 9(2)(a) (that is, bringing about a pattern of criminal gang activity) will be liable either for a fine or imprisonment for a maximum of six years.<sup>71</sup> Accused 1 and 2 in *Solomon* were convicted under sec. 9(2)(a) of *POCA*. The predicate acts underlying this conviction related to convictions of murder and

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65 See *S v Seoela* 1996 2 SACR 616 (O):619, where the court, on review, pointed out the court *a quo*'s remarks regarding the effectiveness of fines, asserting that marijuana dealers will not be deterred by the imposition of fines.

66 See Part 2 above.

67 *S v Scheepers* [1977] 1 All SA 136 (A).

68 *S v Scheepers* [1977] 1 All SA 136 (A):140.

69 *S v Scheepers*:140.

70 In terms of sec. 287(1) of the *CPA*, where a convicted person defaults on the payment of a fine (even where the court did not impose other forms of direct or alternative punishment), a court may impose a sentence of imprisonment.

71 *POCA*:sec. 10(1)(a).

attempted murder,<sup>72</sup> as well as dealing in drugs.<sup>73</sup> Accused 1 and 2 did not physically perpetrate the murder, but the court found that this did not reduce their culpability and that the accused were senior figures within the Terrible Josters (TJs) who had ordered the assassinations. Therefore, the court found that “their culpability is at least as great as that of the shooters”.<sup>74</sup> Their drug convictions related to dealing in a “substantial” amount of methaqualone (“mandrax”).<sup>75</sup> Considering the fact that Accused 1 and 2 received a separate sanction (which was aggravated by sec. 10(3))<sup>76</sup> for the crimes underlying sec. 9(2)(a), Rogers J held that the punishment for sec. 9(2)(a) “should be modest”.<sup>77</sup> As the court is vested with a certain degree of discretion but may not impose imprisonment exceeding six years, and in light of its observations relating to the separate punishment for the underlying predicate offences, the court only imposed three years’ imprisonment, which was to run concurrently with the life sentence for the murder.<sup>78</sup>

Accused 1 in *S v Thomas*,<sup>79</sup> the leader of the 28s gang, gave orders to at least five subordinate gang members to commit dozens of criminal acts that brought about a pattern of criminal gang activity.<sup>80</sup> These offences included murder,<sup>81</sup> attempted murder,<sup>82</sup> incitement to commit murder,<sup>83</sup> conspiracy to commit murder,<sup>84</sup> extortion,<sup>85</sup> intimidation under the *Intimidation Act*,<sup>86</sup> and

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72 Rogers J also found that the murder was premeditated and committed pursuant to a common purpose. This, therefore, already brought the commission of the murder within the ambit of the prescribed minimum life sentence provision in terms of sec. 51(1) of the *Criminal Law Amendment Act 105/1997* (hereafter, *CLAA*). See *S v Solomon and Others*:par. 12.

73 *S v Solomon and Others*:par. 39.

74 *S v Solomon and Others*:par. 19.

75 *S v Solomon and Others*:paras. 32, 34. The quantity of the drugs were listed in the court *a quo*:

(a) 160 units of tablet pieces, individually wrapped in foil, with an estimated mass of 176 grams;

(b) 401 units of tablet pieces, individually wrapped in foil, with an estimated mass of 653.63 grams;

(c) an estimated 308 tablets, or 463.3 grams, contained in a plastic bag;

(d) 2.3 grams of tablet pieces and powder;

(e) 86.62 grams of tablet pieces, packed into plastic bags;

(f) 44.46 grams of tablet pieces and powder;

(g) one tablet.

See *S v Solomon and Others Trial*:par. 205.

76 See 3.4 below.

77 *S v Solomon and Others*:par. 40.

78 *S v Solomon and Others*:par. 40.

79 *S v Thomas* 2015 JDR 1932 (WCC).

80 *S v Thomas*:521-523.

81 *S v Thomas*:21.

82 *S v Thomas*:22.

83 See *S v Thomas*:20-21.

84 *S v Thomas*:31.

85 *S v Thomas*:32.

86 In terms of the *Intimidation Act 72/1982* sec. 1(1)(a).

several charges in terms of the *Firearms Control Act*.<sup>87</sup> It, therefore, appears that sec. 9(2)(a) would likely apply to leadership or high-ranking figures in criminal gangs.<sup>88</sup> This sentence of six years appears to be jarringly weak in comparison to the most comparable offence under Chapter 2 of *POCA* (which relates to racketeering offences). Where someone is found guilty of managing a criminal enterprise,<sup>89</sup> such a person shall face a fine of R1,000 million or life imprisonment.<sup>90</sup> Foreign courts<sup>91</sup> and international tribunals<sup>92</sup> have also held that criminal responsibility should *increase* along with a higher organisational position.

Persons who contravene sec. 9(2)(b) (inducement to contribute to gang activities) or (c) (gang recruitment) will face either a fine or a sentence not exceeding three years.<sup>93</sup>

### 3.4 Section 10(1)(c) and (d) read with sec. 10(2) of *POCA*

The penalties for contravening the offences under sec. 9 must be read with sec. 10(2) of *POCA*. Under sec. 10(2), an accused will face a more severe sentence if a sec. 9 offence is committed at or within 500 metres of a school or educational institution. Under normal circumstances, the maximum sentence of imprisonment is either three<sup>94</sup> or six<sup>95</sup> years; however, if the conditions under sec. 10(2) are met, a convicted person may face a maximum of five<sup>96</sup> or eight<sup>97</sup> years' imprisonment.

Children are particularly vulnerable to the presence of gangs.<sup>98</sup> The Western Cape Government has identified prominent gang influence and violence on the school grounds of the province, thus providing a public interest rationale for such a provision.<sup>99</sup> School grounds are often a market

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87 *Firearms Control Act* 60/2000. See *S v Thomas*:23-24, 29-30.

88 Van der Linde 2018:23. See also *S v Solomon and Others Trial*:par. 914, where the court also highlights the fact that the sanctions for sec. 9(2)(a) are comparatively severe as opposed to those for sec. 9(2)(b) and (c).

89 *POCA*:sec. 2(1)(f).

90 *POCA*:sec. 3(1).

91 See *Attorney General v Eichmann* (1961) Criminal Case No 40/61 at 197.

92 See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07 (30 September 2008):par. 503. See also Van der Linde 2020b:2-41 and fns. 59 and 60.

93 *POCA*:sec. 10(1)(b).

94 Under *POCA*:sec. 10(1)(b) for contravening of *POCA*:sec. 9(2)(b) or (c).

95 Under *POCA*:sec. 10(1)(a) for contravening of *POCA*:sec. 9(1) or (9)(2)(a).

96 Under *POCA*:sec. 10(1)(d) for contravening of *POCA*:sec. 9(2)(b) or (c).

97 Under *POCA*:sec. 10(1)(c) for contravening of *POCA*:sec. 9(1) or (9)(2)(a).

98 See Geldenhuys 2020; Oliver "Demobilising South Africa's 'child soldier' gangs" <https://www.thenewhumanitarian.org/news-feature/2020/01/23/South-Africa-gangs-child-soldiers-apartheid> (accessed on 13 May 2021).

99 Western Cape Government "Integrated Provincial Violence Prevention Policy Framework", <https://www.westerncape.gov.za/files/integrated-violence-prevention-policy-framework.pdf> (accessed on 26 October 2021). The

for the sale of drugs and young female learners may also fall victim to and be used in human trafficking.<sup>100</sup> Children in areas affected by criminal gangs are “most at risk” of falling victim to both the violence of criminal gangs and being swept up in criminal gangs on their way to and from school and during their free time.<sup>101</sup> Child murder rates in the Western Cape are also disproportionate to the rest of the country, due to children being caught in gang crossfires.<sup>102</sup> Sec. 10(2), unlike its sister provision below, does not operate independently of Chapter 4 and requires the commission of a sec. 9 offence to aggravate the sentence of a person convicted of said sec. 9 offence. Sec. 10(2) also differs from sec. 10(3) by using the word “committed” instead of “convicted”. This difference in wording is, however, inconsequential because the use of the sentence aggravation requires a conviction before it can be employed. Merely committing an act in the factual sense (without a legal conviction) is thus irrelevant in this context.

### 3.5 Section 10(3) of POCA

An aggravating factor, which *any* accused might face, is contained in sec. 10(3) of POCA, when the accused is guilty of “any offence” other than those contained in Chapter 4. A plain reading of the term “any offence” means that any statutory or common-law offence can be used in conjunction with this provision.

This provision requires someone to have been a member of a criminal gang at the time of the commission of the crime, as it empowers a court to consider gang *membership* “at the time of the commission of the offence” as an aggravating factor at sentencing. Gang membership before or after (such as where an accused joins a prison gang while awaiting trial) the commission of the offence will, therefore, not empower the court to invoke this provision.

Sec. 10(3) is free from evidentiary complexities such as having to prove a substantive offence (under sec. 9) and/or the existence of a “pattern of criminal gang activities” (under Chapter 1). It is assumed that evidence would still have to be led as to the existence of a criminal gang, as gang membership is a prerequisite. Sec. 10(3) is, however, easily attached to crimes. The definition only mentions gang members and thus would seem to exclude persons who are “merely” active participants in a criminal gang.

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Framework indicated that 61.6 per cent of 22 schools in at-risk areas have been affected by robbery and violence by gangs.

100 Standing 2005:3.

101 See Pinnock & Pinnock “Strategic roadmap towards implementation of the National Anti-Gangsterism Strategy in the Western Cape: Provincial response to the National Anti-Gangsterism Strategy (NAGS)” <http://www.sadpi.org/wp-content/uploads/2019/10/Roadmap-for-Safety-Report-.pdf> (accessed on 26 October 2021).

102 Parliamentary Monitoring Group “Western Cape Appropriation Bill: Vote 7: Social Development” <https://pmg.org.za/committee-meeting/32628/> (accessed on 13 May 2021).

The provision proved to be extremely useful to the State in *S. v Thomas*, which involved nineteen co-accused. The co-accused were charged with a total of 166 common-law and statutory offences and sec. 10(3) was used in conjunction with a large number of these offences, as described earlier.<sup>103</sup> It was used, for example, in combination with charges of murder,<sup>104</sup> incitement,<sup>105</sup> as well as the unlawful possession of firearms and ammunition.<sup>106</sup>

In *Solomon*, Accused 9 was convicted on charges relating to two counts of attempted murder as well as offences relating to the unlawful possession of a firearm and ammunition.<sup>107</sup> Furthermore, his membership of the TJs gang triggered sec. 10(3) of *POCA*.<sup>108</sup> As discussed earlier, Accused 1 and 2 were convicted of murder, attempted murder, as well as dealing in drugs. Their gang membership served as an aggravating factor in their sentencing for these offences.<sup>109</sup>

In the same case, Accused 10 was convicted of murder and attempted murder, as well as the unlawful possession of firearms and ammunition.<sup>110</sup> During the incident relating to the attempted murder, Accused 10 had shot at a group of three people, and, fortunately, wounded no one. His membership to the TJs was viewed as an aggravating circumstance, along with the fact that the act was committed “in broad daylight in a residential area” along with the fact that gun violence in the Cape Flats is “viewed in a very serious light”.<sup>111</sup>

Sec. 10(3), as alluded to earlier, allows an individual convicted of any offence to be punished more severely *solely* based on gang membership. This type of scheme of punishment is constitutionally suspect and is punishing

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103 See Part 3.2 above.

104 See *S v Thomas*:144.

105 Under sec. 18(2)(b) of the *Riotous Assemblies Act*. See *S v Thomas*:143-144.

106 See *S v Thomas*:145-146.

107 *S v Solomon and Others*:par. 41.

108 *S v Solomon and Others*:par. 48.

109 *S v Solomon and Others*:paras. 12, 19, 34.

110 *S v Solomon and Others*:par. 53. The firearm in question was a semi-automatic firearm, which, under Part II of Schedule 2 of the *CLAA*, imposes a minimum sentence of 15 years' imprisonment.

111 *S v Solomon and Others*:par. 59. See also Du Toit 2020, where the author refers to *S v Delport* 2016 2 SACR 281 (WCC):paras. 36-37, where the court pointed to the increase in possession and use of unlawful firearms in violent crime and describes it as a “very menacing evil”. See also Western Cape Provincial Committee on Community Safety, Cultural Affairs and Sport “Gang-related violence in Western Cape: Stakeholder engagement”, <https://pmg.org.za/committee-meeting/32684/> (accessed on 21 May 2021); Portfolio Committee on Police “Hawks illegal firearms unit; SAPS anti-gang strategy; Quarter 1 performance; Vetting senior management”, <https://pmg.org.za/committee-meeting/24881/> (accessed on 20 May 2021); Davids “Cape Town’s crime crisis”, <https://www.news.uct.ac.za/article/-2020-07-03-cape-towns-crime-crisis> (accessed on 31 May 2021); Mzantsi “Former top cop gets 18 years for illegal gun trade”, <https://www.iol.co.za/capetimes/news/former-top-cop-gets-18-years-for-illegal-gun-trade-2037039> (accessed on 21 May 2021) regarding police officials distributing and providing access to unlawful firearms to gangs.

mere gang membership without any reference or connection to any type of gang activity.<sup>112</sup>

#### 4. THE POSSIBLE ROLE OF RESTORATIVE JUSTICE IN GANG-RELATED CASES

The National Anti-Gang Strategy (“the Strategy”) recognises restorative justice under its fourth pillar (the criminal justice process). Restorative justice processes facilitate the *rehabilitation* of gang offenders and the *reintegration* of these persons into their communities. Restorative justice in these cases can, therefore, potentially improve or restore social cohesion between victims and offenders.<sup>113</sup> A restorative justice process should thus be considered an alternative (where appropriate) or additional sentence in gang-related cases, even though it is not explicitly recognised in *POCA*.

Restorative justice processes usually stand in stark contrast to the usual functioning of the criminal justice system. The criminal justice system essentially revolves around the accused and places the victim of the crime in the background, often invisible or passive throughout the process.<sup>114</sup> Roach states that

[d]iscursively, both punitive and non-punitive models of victims’ rights promise to control crime and respect victims, but the punitive model focuses all of its energy on the criminal justice system and the administration of punishment while the non-punitive model branches out into other areas of social development and integration.<sup>115</sup>

Christie states it even more profoundly:

So, in a modern criminal trial, two important things have happened. First, the parties are being represented. Secondly, the one party that is *represented* by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double loser; first, *vis-à-vis* the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life. The victim has lost the case to the state.<sup>116</sup>

Roach and Christie, therefore, make it clear that the modern criminal justice process has further victimised the victims of crime. The professionalisation

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112 See Van der Linde 2021:288-305.

113 Western Cape Department of Community Safety “Implementing the National Anti-Gangsterism Strategy”, [https://www.westerncape.gov.za/assets/departments/community-safety/presentation\\_nags\\_workshop\\_gang\\_strategy.pdf](https://www.westerncape.gov.za/assets/departments/community-safety/presentation_nags_workshop_gang_strategy.pdf) (accessed on 21 September 2021).

114 See Department of Justice and Constitutional Development “Restorative justice: The road to healing”, <http://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf> (accessed on 21 September 2021).

115 Roach 1999:673. See also Joubert 2020:12-14.

116 Christie 1977:3 (original emphasis).

of (legal) conflict has essentially dehumanised this process, with the conflict becoming the “property” of legal professionals and the State.<sup>117</sup> Restorative justice allows victims to reclaim ownership of the justice process.

Although the definition of restorative justice has not always been readily susceptible to crystallisation,<sup>118</sup> certain widely accepted principles and definitions have emerged. The United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Justice Matters (“UN Basic Principles”)<sup>119</sup> holds that a “restorative process”

means any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles.<sup>120</sup>

The Department of Justice and Constitutional Development expands on these ideas and specifies “victims, offenders, families, concerned and community members” all as stakeholders in the restorative process, with the focus on repairing the harm that was inflicted upon the victim and not merely on retributive justice as the focus has been traditionally.<sup>121</sup>

Restorative justice may be invoked at several stages of the criminal process.<sup>122</sup> It may be done before the crime has been reported and is dealt with by the affected parties before the matter is escalated to the formal justice process. This may be more appropriate for petty crimes of a non-violent nature.<sup>123</sup>

Restorative processes may also take place during the pre-sentencing (where certain conditions are set as part of suspended or postponed sentences) or post-sentencing stages (such as correctional programmes).<sup>124</sup>

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117 Christie 1977:4; Zernova 2007:48.

118 See Skelton & Batley 2008:38, where the authors hold that there is “widespread agreement” on the definition of restorative justice and criticise Bezuidenhout’s view that there is no consensus regarding the definition and scope of restorative justice. See Bezuidenhout 2007:43-60.

119 ECOSOC Res. 2000/14 (21 July 1999) UN Doc No E/2000/INF/2/Add.2.

120 Annex I:par. 1(2).

121 Department of Justice and Constitutional Development “Restorative justice: The road to healing”, <http://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf> (accessed on 21 September 2021).

122 Department of Justice and Constitutional Development “Restorative justice: The road to healing”, <http://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf> (accessed on 21 September 2021).

123 This seems to be the most popular application of the process (outside of diversion of youth offenders in terms of the CJA) – Hargovan 2008:26.

124 Department of Justice and Constitutional Development “Restorative justice: The road to healing”, <http://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf> (accessed on 21 September 2021).



A convicted person, who is considered for community correction,<sup>125</sup> may be required to partake in mediation between him or her and the victim or family group conferencing.<sup>126</sup> Family group conferencing<sup>127</sup> and victim-offender mediation<sup>128</sup> are diversion options in terms of the *Child Justice Act 75* of 2008 (“CJA”). The rationale for victim-offender mediation under the CJA is stated as a consensual process,<sup>129</sup> which brings the alleged child-offender together with the victim of his or her alleged crime. These parties shall then, mutually, formulate a plan which aims to redress the impact and effects of the offence.<sup>130</sup>

A sentence seated in restorative justice is not appropriate in all crimes. The SCA in *S v Thabethe*<sup>131</sup> cautioned against the indiscriminate use of restorative processes. Bosielo JA warned against its application in relation to serious offences, as this might “evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society”.<sup>132</sup> Inappropriately resorting to restorative processes may discredit the entire criminal justice system. A sentence must always, as a general point of departure, represent some sort of equilibrium between the “seriousness of the offence and the natural indignation and outrage of the public”.<sup>133</sup>

Restorative justice, at its core, is a consensual process, which aims to involve all the stakeholders affected by a crime. The aim of the process is usually to redress harms caused, heal, or restore relationships, and identify the underlying rationale for the criminal behaviour.<sup>134</sup> Such processes must furthermore take place within the general framework of sentencing and always be cognisant of the seriousness of the offence and whether such a process is “appropriate”, given the nature of the crime.

The influence of criminal gangs extends beyond the individual and also affects communities at large, especially communities such as the Cape Flats. Community involvement in readdressing the harm caused by gang members could thus be extremely apposite in healing a community, especially a community plagued by gang activity. An interesting example is that of the Kanana township in Orkney in the North-West province. A restorative

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125 In terms of the *Correctional Services Act 111/1998* (“CSA”):sec. 1, “community correction” means all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department.

126 CSA:sec.52(1)(g).

127 CJA:sec.61.

128 CJA:sec.62.

129 CJA:sec.62(1)(b).

130 CJA:sec.62(1)(a).

131 *S v Thabethe* 2011 2 SACR 567 (SCA).

132 *S v Thabethe*:par. 20.

133 *S v Thabethe*:par. 20. See also Terblanche 2016:par. 11.6, where the author seems to doubt the potential widespread application of restorative justice, unless there is an overhaul of the criminal justice system; accompanied by a shift from the “fixation” of the legislature on retributive justice.

134 Department of Justice and Constitutional Development “Restorative justice: The road to healing”, <http://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf> (accessed on 21 September 2021).

justice plan was implemented by the Office of the Premier. This resulted in a community engagement meeting between the members of eleven gangs and the two non-profit organisations (“NPOs”) with the ultimate goal of “unity and reconciliation”.<sup>135</sup> The then Premier Mahumapelo called upon the gang members to rather “jealously protect the community against criminal acts, instead of being the ones harassing and killing community members”. Although not evidence of large-scale acceptance of the initiatives of the government and NPOs, a gang member did voice his approval in favour of these initiatives, stating that it would prevent the youth from destroying their futures. He also apologised for the misery caused by the gangs in the area and displayed a willingness to change and plead for “a second chance”.<sup>136</sup>

The gravity and seriousness of gang-related crimes must, however, be borne in mind. They range from harmful initiation processes that remove a young boy from his home to that boy being used in murders for the gang.<sup>137</sup> Disruption of public services such as clinics, schools, and transport affect Cape Flats communities on a large scale. Streets in these areas are often the battleground for turf wars, claiming the lives of innocent children who are hit by stray bullets.<sup>138</sup>

It would thus be advantageous, in the appropriate circumstances, to invoke restorative processes in order to heal victims of gang violence as well as communities at large. The Constitutional Court considered the appropriateness of restorative processes in a defamation case in *Dikoko v Mokhatla*.<sup>139</sup> Perhaps, as guiding principles in gang cases, reference can be made to Sachs J’s separate judgment in which he references Skelton,<sup>140</sup> who identifies four principles or elements of restorative justice, namely encounter (dialogue or interaction addressing the harm caused and potential future resolution); participation (informal interaction between the victim and the offender and other possible stakeholders close to the core parties); reintegration (back into the community in which the offender caused harm), and reparation (the goal being healing rather than retribution).

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135 South African Government “North-West on restorative justice plan”, <https://www.gov.za/speeches/kanana-township-orkney-13-dec-2016-0000> (accessed on 21 September 2021).

136 South African Government “North-West on restorative justice plan”, <https://www.gov.za/speeches/kanana-township-orkney-13-dec-2016-0000> (accessed on 21 September 2021).

137 See, for example, Swinger “The Cape’s youth gangs: Bigger, deeper, more dangerous”, [https://www.dailymaverick.co.za/article/2014-05-26-the-capes-youth-gangs-bigger-deeper-more-dangerous/#.Wg\\_mJ0qWaUm](https://www.dailymaverick.co.za/article/2014-05-26-the-capes-youth-gangs-bigger-deeper-more-dangerous/#.Wg_mJ0qWaUm) (accessed on 21 September 2021).

138 See Van der Linde 2020:2-37.

139 *Dikoko v Mokhatla* 2006 6 SA 235 (CC).

140 Skelton 2006:18-21.

## 5. CONCLUDING REMARKS

*POCA* provides a relatively simple sentencing structure for instances of gang-related offences. It does, however, appear that the aggravating provisions are utilised more than the sentences for the substantive offences under sec. 9. The latter offences are relatively complex in nature, due to the preliminary requirements of proving the existence of a “criminal gang” and “criminal gang activity” in addition to proving the elements of the offence in question. The sec. 10(3) aggravation can, however, simply be tacked on to *any* other offence which is not a sec. 9 offence and empowers the court to consider a more severe sanction within its existing sentencing powers for the substantive offence of which an accused has been found guilty. The alternative to a fine appears to be peculiar in the context of gang-related offences and this option does not seem to have been exercised since the inception of *POCA*.<sup>141</sup> This option would likely only be appropriate for non-violent offences, as pointed out earlier.<sup>142</sup>

One could question whether the sentences under *POCA* are severe enough to serve as a deterrent against gang activities. The offence of managing an enterprise (which is often applied to white-collar criminals) under Chapter 2 of *POCA*, for example, carries a potential life sentence, while the harshest term of imprisonment under Chapter 4 is eight years. If anything, the degree of violence often involved in criminal gang activity would justify harsher sentences. However, more does not always mean better. Justice Cameron has been critical of minimum sentence legislation<sup>143</sup> and submits that the effectiveness of punishment rather lies in *certainty*. He posits that

[t]he major response to the crime wave in our country should be to recognise that the sole inhibiting institutional response to criminal conduct is the certainty of detection, the certainty of follow up, the certainty of arraignment, the certainty of prosecution – and the certainty of punishment. In this certainty, the length of sentence plays no role. In other words, whether a potential rapist faces a sentence of 2, 5, 10 years or life, it is not the length of sentence but the certainty of sentencing that will make them stop.<sup>144</sup>

This also challenges the criminal justice system to move away from an overreliance on traditional means of sentencing in gang-related cases, inviting a consideration of means founded in restorative justice. This would also shift the focus from being rooted mainly in deterrence and rehabilitation to the healing of affected communities.

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141 Terblanche 2016:298-299.

142 See Part 3.1 above.

143 In particular under the *Criminal Law Amendment Act 105/1997*.

144 Cameron 2020:4-10.

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