CRIMINAL PROCEDURE

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LEGISLATION

There were a few developments on the legislative front during 2009. They addressed long-outstanding issues in criminal procedure (such as the setting of bail amounts and the prosecution of diplomats who commit crimes in foreign countries) and brought certainty regarding the official name changes of the High Courts (for more detail, see the chapter on Civil Procedure and Constitutional Procedure and Jurisdiction). New legislation also gave rise to intense debate that culminated in the decision by the Constitutional Court in *Glenister v President of the Republic of South Africa & others* 2009 (1) SA 287 (CC) regarding the dismantling of the Scorpions.

The Judicial Matters Amendment Act 66 of 2008, which commenced partially on 17 February 2009 (*GG* 31908 of 17 February 2009), inserted section 60(2B) into the Criminal Procedure Act 51 of 1977. This amendment further regulates the release of an accused person on bail. In an attempt to address the situation where a person who qualifies for bail has to remain in custody because he or she is not in a position to afford the amount set for bail, subsection *(a)* introduces a compulsory separate inquiry into the ability of the accused to pay the amount in question. If it is found that the accused is unable to pay any amount, the court is obliged to consider setting other non-monetary conditions for the release of the accused on bail or to order the furnishing of a guarantee (s 60(13)). If it is found that the accused can afford to pay a sum of money, the setting of conditions and the sum of money that should be appropriate in the circumstances are important.

This provision is in line with section 12 of the Constitution of the Republic of South Africa, 1996, that promotes the freedom of all persons. It also seeks to impact on the overcrowding of prisons and supplements earlier guidelines from the Supreme Court of Appeal. In *S v Fhetani* 2007 (2) SACR 590 (SCA), the court emphasised that fixing bail at an excessive amount in a case

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involving an indigent person is 'tantamount to a refusal' (para [10]). To avoid this situation, it is important for a court to take into account an accused's means and resources when deciding on the amount. This new section is aimed at sensitising the bench in an effort to protect the unrepresented and indigent accused against unnecessary detention:

> 'According to the Inspecting Judge of Prisons 2008/9 Annual Report there are nearly 8500 people in prison who cannot afford the bail set by the courts. Recent research in three metropolitan courts found that half of the cases against accused are either withdrawn or struck from the roll. Their custody was without meaning or purpose, but they have to endure the pains of imprisonment and attempt to reconnect their lives once released. Magistrates . . . have a duty to prevent the unnecessary detention of people and to utilise the means available to them' (<http://www.polity.org.za/article/very-expensive-milk-and-cookies>, last visited on 13 April 2010).

In terms of the newly inserted section 110A, a person on diplomatic duty outside South Africa may now be prosecuted for offences committed during that period. The aim is to vest South African courts with jurisdiction regarding citizens who cannot, due to immunity (s 110A(1)), be prosecuted in the country where they allegedly committed the offence. The section requires that the person must be within the area of jurisdiction of the court and the court should have jurisdiction. The offence should also be an offence under the laws of the Republic of South Africa; the prosecution should be instructed by the Director of Public Prosecutions; and a certified copy of the court proceedings, together with any remarks from the prosecutor, should be submitted to the Minister of Foreign Affairs (s 110A(2)). This amendment addresses these shortcomings that allowed guilty people to escape sanction and which gave rise to serious questions regarding the integrity of our diplomatic service.

Lastly, significant amendments took place with regard to investigating directorates during 2009. Section 3 of the National Prosecuting Amendment Act 56 of 2008 amended section 7 of the National Prosecuting Authority Act 32 of 1998 by abolishing the Directorate of Special Operations, known as the 'DSO' or so-called Scorpions. While the amendments only came into force on 6 July 2009 (Proc 445 and 46 *GG* 32355 of 3 July 2009), transitional arrangements had already been introduced on 20 February 2009 (s 13 substituted s 43A (Proc R12 *GG* 31930 of 19 February 2009). The DSO was replaced by the Directorate of Priority Crime Investigation (DPCI) as provided for in chapter

6A of the South African Police Service Act 68 of 1995 (inserted by s 3 of the South African Police Service Amendment Act 57 of 2008, commencing on 20 February 2009 *GG* 31887 of 19 February 2009). SE van der Merwe and his co-authors (SE van der Merwe (gen ed), E du Toit, FJ de Jager, A Paizes & A St Q Skeen *Commentary on Criminal Procedure* 1–4N [service 43, 2009]) explain the current position as follows:

> 'The essential difference between the former DSO and the present DPCI is that the DSO was prosecution-driven and controlled by the National Prosecuting Authority, whereas the DPCI is a separate division within the South African Police Service. However, s 17F(4) in Chapter 6A of Act 68 of 1995 determines that the NDPP must ensure that a dedicated component of prosecutors is available to assist and co-operate with the DPCI in conducting its investigations. The DPCI is known as the ''Hawks''.'

The President may, in addition to the DPCI, by proclamation in the *Gazette*, establish one or more Investigating Directorates in the Office of the National Director, in respect of such offences or criminal or unlawful activities as set out in the proclamation (s 7). The team enlisted to assist the head of an Investigating Directorate in the exercise of his or her powers and the performance of his or her functions includes, amongst others, prosecutors (s 7(4)(ii)). A framework has thus once again been created for formal co-operation between police and prosecution. The emphasis is, however, on *prosecutorial assistance* to investigators in both the DPCI and Investigating Directorates. This may give rise to a situation where the functions of investigators and prosecutors overlap with regard to the overseeing of search and seizure activities and the conducting of interrogations. Despite challenges in this regard (see *S v Shaik & others* 2008 (1) SACR 1 (CC) and *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA)), the Supreme Court of Appeal (*Killian* supra paras [25]–[28]), relying on *Shaik* (supra), held that the mere participation of a prosecutor during the investigative phase does not automatically rob him of the required impartiality. Rather, the presence of personal vendettas or impairing the conduct of the proceedings and dignity of the court would be indicative of partiality. It is submitted that this is the correct approach and that it will prevent unnecessary future litigation in regard to the operations of the newly created DPCI and component of prosecutors assigned to it (see also WP de Villiers 'Recent case law: *DPP, Western Cape v Killian* 2008 5 BCLR 496 (SCA):

Compulsion to give self-incriminating evidence — derivative use of inquiry proceedings at subsequent criminal trial' (2009) 42 *De Jure* (2009) 316).

CASE LAW

Appeal

Condonation

Courts are often approached to exercise discretion when condoning failure to adhere to the fairly tight time limits on good cause shown. In criminal cases the court has been more accommodating to grant condonation to allow an accused every reasonable opportunity to present his case as fully as he wishes to the court of appeal (*S v de Vos* 1975 (1) SA 449 (O)). However, where the delay can be attributed to the accused (and in the absence of reasonable prospects of success on the merits) the chances for obtaining condonation are slim. Litigants often do not grasp the importance of their own engagement in the prosecution of an appeal. It is submitted that a way should be established to address this obvious lack of understanding of the appeal process.

In *S v Mantsha* 2009 (1) SACR 414 (SCA), the accused indicated that he wished to appeal immediately following his conviction and sentencing to fifteen years' imprisonment by the regional court. Consequently, the court assigned a Legal Aid attorney, who failed to act. Four years later, the accused sent a notice of appeal to the clerk of the court. In the interim, the record and tapes of the proceedings were lost. The appellant presented an application to the High Court, but it was dismissed as the explanation for the delay was unsatisfactory and inadequate and the matter was struck off the role. The court took the decision on appeal. The appellant sought indulgence for not having lodged his notice of appeal within the period of fourteen days after sentence (in terms of rule 47 of the then Magistrate Court Rules) and was therefore required to show good cause for condonation to be granted. The Supreme Court of Appeal pointed out that good (or sufficient) cause for condonation has two requirements: a satisfactory and acceptable explanation for the delay and reasonable prospects of success on the merits of the appeal (para [5]). Furthermore, the court could only interfere with the

High Court's order if it could be persuaded that judicial discretion had not been exercised (para [9]).

The court restated a number of considerations regarding an application for condonation: the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court and the avoidance of unnecessary delay in the administration of justice (para [11]).

According to the accused, the delay was due to confusion whether the Legal Aid attorney needed to prosecute the appeal or merely investigate its success. The attorney also had a problem regarding payment by the Legal Aid Board. However, the court emphasised that the accused had failed to provide a reasonable explanation for the entire period of delay — an unaccounted period of three and a half years (para [12]). It found that the court below had been well aware that allowance had to be made for the appellant's own involvement in the pursuit of his appeal below and that such involvement could not supplement fundamental lacunae in the substance of the application (para [10]).

With regard to the requirement for sufficient cause for condonation, the appellant's attorney submitted that, since the record had been lost and could not be reconstructed, the appellant had good prospects of success. This proposition relied on authority that where a record was inadequate for a proper consideration of an appeal, the conviction and sentence would generally be set aside (para [14]). However, the court cautioned that authority should be read in context and that a reliance on it was misplaced in this case. There was no doubt that the setting-aside of a conviction and sentence, in a case where a record had been lost, was not based on a finding made after a consideration of the merits. The expectation of such a result could not lay the foundation for an argument that the appeal had prospects of success. In the circumstances of the matter the appellant ought to have taken the court below into his confidence concerning the evidence led at trial; the lack of a record would merely have made it more difficult for the State to rebut his version. However, he had made no effort in this regard (para [15]). As a result the approach of the court below could not be faulted and the application for condonation was accordingly dismissed.

Primarily, this judgment confirms trite principles, but also raises serious concerns regarding the standard of conduct of some

legal practitioners involved in the High Court proceedings. Despite admonitions previously issued by the court (para [12]), the lack of appreciation of the basic requirements for a successful application for condonation is apparent (para [13]). Though the diligence of a legal representative would not have saved the application of *Mantsha* (supra*),* who was equally lax and inactive towards the prosecution on appeal, a practitioner's lack of diligence may have far reaching consequences for applicants (*S v Mohlathe* 2000 (2) SACR 530 (SCA)).

In *S v van der Westhuizen* 2009 (2) SACR 350 (SCA), the Supreme Court of Appeal dealt with a similar application. After having been convicted of fraud and sentenced in terms of section 276(1)*(i)* of the Criminal Procedure Act, the applicant failed to comply with several rules of the court in the prosecution of his appeal. As in *Mantsha* (supra*)*, the matter had been before the court in terms of an automatic right of appeal that arises from section 21(1) of the Supreme Court Act 59 of 1959. The appellant sought the reinstatement and enrolment of his appeal, condonation for the failure to appear in his appeal, and condonation for the lateness of the application for condonation.

Once again the law relating to the application for condonation was reiterated. When an application for condonation is considered, the court has to exercise a judicial discretion on a consideration of all the relevant facts. The same considerations, as mentioned above in *Mantsha*, were highlighted and it was emphasised that they are interrelated; good prospects of success on appeal may compensate for a bad explanation for the delay (para [4]). Furthermore, an appeal court is entitled to interfere with the discretion exercised by the court below only if it was done capriciously, based on a wrong principle, has not brought an unbiased judgment to bear on the question, or has not acted for substantial reasons (para [5]).

It was held necessary for the appellant to have explained the reasons for not filing heads of argument and for no appearance, as well as for the delay in bringing an application for condonation (para [13]). The appellant's lengthy reasons for non-compliance with the rules were found to be totally inadequate (paras [10]–[14]).

Unlike *Mantsha* (supra), the Supreme Court of Appeal was in a position to consider the reasonable prospects of success on the merits of the appeal. However, it was held that there were no prospects of success on appeal in relation to conviction or

sentence, and no other factors relevant to condonation were raised or argued by any of the parties. Condonation had, therefore, rightly been refused by the court below (paras [31]-[32]). However, the order dismissing the appeal was found not to be competent, as the appeal had not been heard, and was accordingly set aside (para [32]).

Leave to appeal against sentence but not conviction

The refusal of an application for leave to appeal against decisions of the lower courts does not necessarily signify the end of the road. Equally, partial success on petition to the High Court (granting appeal against sentence only) does not close the door to an applicant who is convinced that his conviction was not in accordance with the law. The correct forum for the seeking of further relief would, however, be from a higher tribunal.

In *S v Van der Merwe* 2009 (1) SACR 673 (C), the appellant was convicted in a regional court on four counts of indecent assault and sentenced to twelve years' imprisonment. On petition to the High Court in terms of section 309C(7)*(a)* of the Criminal Procedure Act, leave to appeal was granted regarding sentence, but not conviction. On appeal before the High Court, both judges had reservations regarding the conviction. This raised the question whether the court had the necessary jurisdiction to interfere with the conviction, given that two other judges of the division had already granted leave to appeal against sentence only. It was contended for the appellant that the court did indeed have jurisdiction: *(a)* by way of its inherent jurisdiction; *(b)* by way of statutory and inherent review jurisdiction; and *(c)* by virtue of its expanded jurisdiction in terms of section 173 of the Constitution of the Republic of South Africa, 1996.

In view of all the relevant issues, it was held that no power was conferred upon the High Court (either by statute or inherently) to deal with the question of conviction where the same division had only granted leave to appeal a sentence (para [30]). Further, if the legislature had intended that the High Court should have such special jurisdiction in terms of section 309C of the Criminal Procedure Act, it would have accordingly and expressly provided for it. In particular, with regard to the third contention above, notwithstanding the constitutional duty placed on High Courts to protect every appellant's fundamental rights (the right to appeal or review in s 35(3)*(o)* of the Constitution), it was held that section 173 of the Constitution should only be resorted to where no other

remedy exists to protect the infringed right of the appellant (para [27]). The court emphasised the dicta from *S v Steyn* 2001 (1) SACR 25 (CC) that 'there must be procedural checks and balances of such a nature that wrong convictions and inappropriate sentences are reduced to the barest minimum', and that '[t]he appeal procedure must be suited to the correction of error'. Finding that there were sufficient procedural checks in place to deal with wrong convictions from lower courts (para [29]), and considering it by implication to be 'a reasonable procedure' (para [26]), the appellant was advised to petition the President of the Supreme Court of Appeal (s 21 of the Supreme Court Act). Consequently, the appeal against sentence was postponed sine die in order to allow him to proceed as advised.

Powers of court of appeal: remitting matters to trial court

Section 112 of the Criminal Procedure Act regulates the procedure after a plea of guilty. In the case of more serious offences, section 112(1)*(b)* requires the court to question the accused to ascertain whether he or she admits all allegations of the charge to which he or she pleads guilty, and, further, the court should be satisfied that the accused is indeed guilty as pleaded. Only then may a conviction follow. Instead of the questioning, a written statement may be prepared by the accused containing all the required admissions and explanations (s 112(2)).

Section 312 of the Criminal Procedure Act seeks to prevent an accused who has been convicted after a plea of guilty, from misusing non-compliance with provisions of a mainly technical nature as a ground for a successful appeal or review (*S v Khupiso; S v Africa* 1997(2) SA 615 (O) at 609A). It provides that if a conviction is set aside solely on the basis of non-compliance with section 112, the matter should be remitted to the trial court for compliance of the section or alternatively, to act in terms of section 113 of the Criminal Procedure Act. The latter allows for the recording of a plea of not guilty if the court doubts the accused's guilt or understanding of the charge. The provision in section 312 has always been considered to be mandatory (Du Toit et al op cit at 30–66–7).

However, in *S v Mshengu* 2009 (2) SACR 316 (SCA), the Supreme Court of Appeal departed from this view and held that section 312(1) is not peremptory (para [17]). The court analysed the language of the section and pointed out that the use of the word 'shall' is not susceptible to a conclusive test, and should

further be construed within the context, scope and object of the relevant Act of which it forms a part (para [15]). It was further held that, in addition to statutory context, the section must be interpreted consistently with the Constitution and, if possible, it must be given a construction which will not be inconsistent with an accused's fair-trial rights (para [16]). Citing *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as amicus curiae)* (2007 (3) SA 484 (CC) (para [47])), it was stressed that section 39(2) of the Constitution obliges every court to 'promote' the spirit, purport, and objects of the Bill of Rights when interpreting legislation, and not simply avoid conflict.

Jafta JA pointed out that the purpose of section 312 is to prevent a possible injustice if an accused person were to escape punishment for a crime only because the conviction was set aside on the ground that there was a failure to comply with section 112 (para [17]). He added that an injustice cannot occur where the accused has served the entire sentence by the time the conviction is set aside on appeal. Injustice is also ruled out where a fresh conviction cannot be achieved following a remittal to the trial court. The court held that to construe section 312(1) in the manner that renders its provisions peremptory may result in an injustice or even an infringement of an accused person's right to a fair trial. There can be no justification for ordering a second trial for an accused person who has already served the full punishment; it would be inconsistent with the right to a fair trial. He concluded that section 312(1) is not peremptory.

The court held, however, that in all matters the course prescribed by the section must be followed unless 'the court on review or appeal is of the view that it would lead to an injustice or would be a futile exercise' (para [18]). The court thus retains the discretion not to order a remittal only if the circumstances of the case are such that the remittal will be inappropriate.

In the above-mentioned matter the sentence of eight years' imprisonment had, on a previous remittal, already been changed to one of a non-custodial nature (paras [2] and [19]). As the accused had served his full punishment, it would have been unfair to order another remittal. Bearing this in mind, and notwithstanding the court's finding that the section 112(2) statement 'did not admit the charge in all its ramifications' (para [9]), it exercised its discretion not to order a remittal. The conviction and sentence were simply set aside.