evidence of this should be provided by parties who want the court to recognise a valid customary marriage without handing over. The Supreme Court of Appeal in *Moropane* has already rubber-stamped this requirement, hence a lower court cannot merely deviate from this precedent without providing any reason as to why the Supreme Court of Appeal's judgment is wrong in law, or providing any evidence that living law has developed since the decision in *Moropane*, to the extent that handing over is no longer required in living law. Living law cannot be changed merely for the sake of convenience. There is an argument to be made for legislative reform in customary law in order to address the difficulties created by non-recognition. However, this does not mean that true customary law should be compromised for a version that does not reflect what communities are doing in living law. The court cannot further seek to develop African customary law by arguing that handing over is unconstitutional without a contextual approach to the purpose of handing over in customary law.

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EFFECT OF AN ADMISSION OF GUILT AND PAYMENT OF A FINE IN TERMS OF SECTION 57 OF THE CRIMINAL PROCEDURE ACT

S v Madhinha 2019 1 SACR 297 (WCC)

OPSOMMING

Die effek van 'n erkenning van skuld en die betaling van 'n boete ingevolge artikel 57 van die Strafproseswet

In hierdie saak het die applikant aansoek gedoen vir die tersydestelling van 'n skuldigbevinding en vonnis opgedoen ingevolge artikel 57 van die Strafproseswet 51 van 1977 (SPW). Die applikant was regsverteenwoordig en het 'n beëdigde verklaring aan die landdros, Goodwood, verskaf. Die landdros het die aangeleentheid in die styl van 'n outomatiese hersiening ingevolge artikel 302 van die SPW na die Hoë Hof verwys. Die applikant se gronde van hersiening was dat: sy skuldigbevinding en vonnis nie in ooreenstemming met geregtigheid was nie; hy gedink het die enigste manier om vrygelaat te word was om die boete te betaal; sy optrede redelik was; hy nie behoorlik van sy regte ingelig was nie; en sy regte nie aan hom verduidelik was nie. Die Hoë Hof gebruik die geleentheid om hom uit te spreek oor die effek van 'n erkenning van skuld en die betaling van 'n boete ingevolge artikel 57 van die SPW en bevind dat 'n skuldigbevinding ingevolge artikel 57(6) nie 'n skuldigbevinding vir doeleindes van artikel 271 van die SPW was nie; nie permanent was nie; en, gevolglik, nie in die kriminele rekord sisteem opgeneem moes gewees het nie. Dit word aangevoer dat dit nie in die huidige aangeleentheid vir die hof behoorlik was om hersieningsgronde te oorweeg wat nie deur die applikant geopper was nie, en dat die bevindings van die hof hierbo nie korrek was nie. Dit word ook daarop gewys dat 'n beskuldigde nie op regshulp geregtig is waar hy bloot aandui dat hy nie geweet het dat hy by die betaling van die boete 'n kriminele rekord sou hê nie, en dat hy die skuldigbevinding in die hof wil teenstaan.

1 BACKGROUND

In this case, the applicant applied for an order to set aside a conviction and sentence incurred in terms of section 57 of the Criminal Procedure Act 51 of 1977 (CPA). Section 57(1) provides that an accused may, where a summons or a written notice is endorsed to the effect that the accused may admit guilt to the offence and pay a fine, admit his guilt in respect of the offence and pay the stipulated fine without appearing in court. Once the essential particulars of such admission of guilt and payment of a fine had been entered into, the applicable criminal record book, the accused shall be deemed to have been convicted and sentenced by the relevant court in respect of the offence in question (s 57(6)).

The Western Cape High Court seized the opportunity to pronounce on the effect of an admission of guilt and payment of a fine under section 57.

2 EVENTS LEADING UP TO THE APPLICATION

During October 2010 the applicant, who worked as a vendor, had an argument with another vendor concerning a vending spot. The next day the other vendor laid a complaint of common assault against the applicant at the police station. The applicant was arrested soon thereafter (para 7).

The case was processed, including it being entered into the SAPS registers, fingerprints being taken and a docket opened. While the applicant was being detained he was handed a written notice (J534) with an endorsement that he may admit guilt in respect of the offence and that he may pay a fine of R500 without appearing in court. The accused paid the fine and was released (*ibid*). Subsequently, the particulars were entered into the criminal record book at the relevant Magistrates' Court, the magistrate examined the documents as is required in terms of section 57(7) and the details were entered into the SAPS criminal record system (para 8).

In early 2018, the applicant applied to join Uber. Uber required a police clearance certificate and, in the process of acquiring a clearance certificate, the applicant became aware that he had a criminal record. The SAPS informed the applicant that his admission and payment of a fine during October 2010 was by law a conviction and a sentence. The applicant approached an attorney and the magistrate, Goodwood. The applicant submitted an affidavit to the magistrate and applied for an order to have his conviction and sentence set aside. The magistrate drew up a memorandum and referred the matter to the High Court.

It therefore appears that even though the matter was escalated to the High Court in the ordinary course in terms of section 302 of the CPA, and the applicant was represented by legal counsel, he raised grounds of review and applied for an order to have his conviction and sentence set aside (paras 1 2 9).

3 GROUNDS OF REVIEW

The applicant's grounds of review were that

(a) his conviction and sentence was not in accordance with justice;

(b) he believed that the only option to be released from custody was to pay the fine immediately and accordingly the payment was not made freely and voluntarily;

(c) his actions in paying a fine in order to secure his release from custody was reasonable; and

(d) he was not properly informed of his rights, nor were his rights explained to him at any stage which was in violation of his constitutional rights in terms of section 35 of the Constitution, 1996 (para 10).

4 DECISION

Early on in the judgment, the court already expressed doubt that a conviction referred to in section 57(6) was a conviction envisaged in section 271 of the Act (s 271 provides that previous convictions may be proved). As a consequence, the court also doubted that a conviction in terms of section 57(6) was to be entered into the criminal record of a person at the Criminal Record Centre of the South African Police Services (SAPS) (para 5).

The court held that a written notice, as a means of securing the attendance of an accused in court, was meant for less serious offences in the Magistrates' Court, and that such a notice could only be issued where the peace officer reasonably believed that the Magistrates' Court would not impose a fine exceeding the amount determined from time to time by the Minister in the *Government Gazette* (s 56(1)). In such instance, the peace officer could endorse the notice that the accused could admit guilt and pay the fine without appearing in court (paras 11 12).

The court also indicated that generally where "a fine as a nature of punishment could be imposed upon a person convicted of an offence, which fine [was] determined without [a] punishment alternative to such fine" it was considered for trivial offences only. The court added that the fine that a Magistrates' Court could impose was R120 000 (save as otherwise specifically provided), and that the amounts determined for a written notice and a summons in sections 56(1) and 57(1) were R10 000. "R10 000 represented 8.33 per cent of the limit of jurisdiction for a fine which a District Court may ordinarily impose [and that] fine only as punishment (in admissions of guilt by payment of a stipulated fine) [was therefore] intended for trivial offences" (para 13). The court also indicated that with section 57(6) and (7) the admission of guilt fine was paid at the police station or local authority, and the relevant notice had to be forwarded to the relevant clerk of the Magistrates' Court who had to enter the essential particulars into the criminal record book. Subject to subsection (7) the accused would be deemed to have been convicted and sentenced by the court.

The court confirmed that the relevant judicial officer had to examine the documents and if it appeared that the conviction or sentence was not in accordance with justice or the determination made by the relevant magistrate, or where a determination was not made that the sentence was not adequate, he or she could set aside the conviction and sentence. The judicial officer could also in lieu of setting aside the conviction and sentence direct that any amount paid in excess of a determination by the magistrate be refunded to the accused (s 57(7); para 14).

The court accordingly held that a conviction and sentence in terms of section 57(6) were *sui generis*. It was not a verdict and not even a pronouncement by the clerk of the court. It was an automatic consequence of an administrative act performed by a member of the support services. The facts of the case and whether the accused admitted or denied some of them, and whether the accused

was guilty in law were not considered at all in the conviction. The clerk of the court simply entered what was essentially an agreement between the state and the accused on the court records (paras 15 16).

The trivial dispute was set out in the written notice with an endorsement that the accused may admit guilt. The state agreed not to pursue the trivial dispute in exchange for the agreed payment. It was therefore a documented waiver of the dispute which the state had against an accused upon payment of a stipulated amount. It was a waiver by the accused of his right to have his case proved beyond a reasonable doubt (para 17). In the settlement, the strength of the case on either side is never tested and the accused is not required to set out the facts which he admits and on which the admission of guilt is based. The section does not envisage an unequivocal admission of guilt. The admission of guilt is not the one envisaged in section 217 of the Act (para 18).

The court also explained that an admission of guilt in terms of section 57 differed from an unequivocal admission of guilt in terms of section 217 (s 217 provides for extra-curial confessions) because the facts upon which the admission was based did not have to be set out, and once made to a peace officer it was not required to be confirmed and reduced to writing in the presence of a magistrate or peace officer (see the requirements for a confession in s 217).

For these reasons, the legislature introduced the judicial oversight of such agreements by magistrates as a statutory requirement in section 57(7). Section 57(7) and the Department of Justice and Constitutional Development, Justice Codified Instructions: Code: Clerks of the Criminal Court (Justice Codified Instructions: Clerks of the Criminal Court), Chapter 6 paragraph 73 envisaged a close scrutiny of the documents by the judicial officer (paras 19 21). This oversight was part of the judicial audit of court processes which would otherwise not come to the attention of the judiciary, but which had the status of an order of court (para 22).

The court furthermore explained that the judicial oversight in terms of section 57 differed from the oversight where one magistrate did quality assurance with regard to the work of another magistrate. In the latter instance, if it appeared to the magistrate responsible for the quality assurance that the conviction and sentence by the other magistrate was not in accordance with justice, the oversight magistrate sought the comments of the magistrate who convicted and sentenced, and submitted the matter to the High Court with a memorandum requesting that court to review the proceedings. In the instance of section 57, the magistrate had the authority to set aside the conviction and sentence (para 23).

The nature of the examination in terms of section 57(7) was to detect problems with regard to the documents. Clearly the magistrate could not provide oversight with regard to the facts of the case. It was not a decision on the facts of the case and the magistrate could not pronounce that the evidence proved the commission of an offence. The magistrate did not find the accused guilty and did not sentence him (paras 24 25).

The court proceeded to discuss authorities with regard to a conviction envisaged in section 271 of the CPA. In *Director of Public Prosecutions, Limpopo v Mokgotho* (068/2017) [2017] ZASCA (24 November 2017) the Supreme Court of Appeal made general observations with regard to the correct approach regarding the evaluation of evidence in a criminal trial. The court held that an accused could only be convicted if the evidence established the accused's guilt beyond a

reasonable doubt. The court also referred to *Van der Meyden* 1999 1 SACR (W) 450a–b where it was held that the conclusion had to be reached on all the evidence (para 26).

In *S v Smullion (Sullivan)* 1977 3 SA 1001 (RAD) 1004D–E the court held that in relation to a sentence a conviction was not a previous conviction unless the offender was brought to court and convicted and sentenced for the offence before the current offence was committed (para 27).

Based on this the court explicated that a conviction in terms of section 57(6) did not follow only if the evidence established the guilt of the accused beyond a reasonable doubt. Not all the evidence, especially the facts setting out what happened upon which the accused admitted guilt, accounted for the accused's conviction. The accused was never brought before court and convicted. The "[p]apers in relation to court are surrendered to the clerk of the criminal court and the particulars of those documents are entered into court records and he is convicted" (para 28).

In *R v Zonele* 1959 3 SA 319 (AD) 330C–D the court held that a previous conviction may be described as one which occurred before the offence under trial, and that it generally aggravated an offence, because it tended to show that the accused had not been deterred by his previous punishment from committing the crime under consideration (para 29).

The court held that, seen against the background of *Zonele*, a previous conviction envisaged in section 271 had serious consequences for an accused. The court held that

> "[the conduct under discussion could not] be prior conduct and the manner in which an accused thought he or she behaved towards others seen against his or her own view of the accepted norms of society, generally without having obtained legal advice. A finding on such past conduct and the pronouncement of the conviction, because of its serious implications should . . . only follow where the evidence has established the guilt of an accused beyond a reasonable doubt".

The only competent authority to make a pronouncement with such dire consequences should be a judicial authority. A conviction referred to in section 57(6) is not such an authority (para 30).

The court also indicated that the admission of guilt "register" (J114) referred to in section 57(6) was different from the criminal record book (J546) used for criminal matters ordinarily heard in the Magistrates' Court. In this regard, the Justice Codified Instructions: Clerks of the Criminal Court *supra* Part IV paragraph 268 provided that a criminal record book (J546) was kept in respect of every court and furnished a daily account of the result of all cases in that specific court (para 31).

The court furthermore found it significant that the case record of the admission of guilt in terms of section 57 was disposed of after one year, and the admission of guilt "register" (J114) was disposed of after three years (referring to the Justice Codified Instructions: Archives Annexure C under List of Records in Offices of Lower Courts for the disposal of which Authority has been obtained). On the other hand the criminal record book had to be transferred to the archives after a period of ten years from the date of the last entry therein (referring to the Justice Codified Instructions: Archives Part IV para 15(a)). A previous conviction which followed the verdict after court proceedings before a magistrate and entered into the criminal record book was accordingly never destroyed. The record of a conviction by a court following proof of the charge beyond reasonable doubt was therefore

permanent and the record of conviction entered into a "register" had a limited life (paras 32–34).

The court also referred to section 57A to explain the difference between a prosecution geared towards a section 57(6) conviction and a prosecution geared towards a section 271 prosecution. In terms of section 57A an accused who has already appeared in court could, under certain circumstances, be given the opportunity to admit guilt and pay a fine in terms of section 57 (para 35).

The court explained that an accused referred to in section 57A would already have been entered into the criminal record book (J546) and appeared before a magistrate. The accused would be facing a charge and would be entitled to a verdict which might result in a conviction in terms of section 271. An opportunity was then provided by section 57A because of the trivial nature of the offence to opt out of a permanent criminal record and admit guilt in terms of section 57 which did not bring about the lifelong serious consequences of section 271 (para 36).

Relying on the unreported judgement in *S v Houtzamer* (B7968969/08) [2015] ZAWCHC 25 (10 March 2015), the court also held that a review court should not inquire into the merits of the case, and that an accused ought to be entitled to relief if he paid the admission of guilt without knowing that he would receive a criminal record, and if he wished to defend himself (para 38). The court additionally held that the appropriate way of reviewing the proceedings where the magistrate did not set aside the conviction and sentence in terms of section 57(7) was in terms of section 304(4) of the CPA (para 39).

In summary and for the reasons stated the court found that the conviction of the accused in terms of section 57(6) was not a conviction as envisaged in section 271. The court further held that a conviction and sentence following an entry into the admission of guilt record book by the clerk of the criminal court "was not a conviction whose record [was] permanent". It was furthermore not a conviction and sentence to be entered into the criminal record system by the SAPS (para 44). The court accordingly set aside the conviction and sentence.

5 DISCUSSION

5 1 Was it proper for the court in the present case to consider grounds of review not raised by the applicant?

The first point of interest is whether it was proper for the court in the present case to consider grounds of review not raised by the applicant. It was not a ground of review that the applicant's conviction in terms of section 57(6) was not a conviction envisaged in section 271. It was also not a ground of review that the conviction and sentence in terms of section 57(6) was not permanent, or that a conviction and sentence in terms of section 57(6) should not have been entered into the criminal record system by the SAPS. Furthermore, there is no evidence in the case record that the applicant expanded on the issues in any other way.

The applicant acknowledged that he had been convicted and sentenced and relied thereon that his conviction and sentence were not in accordance with justice. He also believed that the only option to be released from custody was to pay his fine. The payment therefore was not made freely and voluntarily. The applicant furthermore relied thereon that he was not properly informed of his rights, nor were his rights explained to him.

The grounds of review were accordingly in line with a long line of earlier review applications where it was accepted that a section 57(6) conviction and sentence were a conviction and sentence envisaged in section 271 of the CPA, but where it was argued that the conviction and sentence were not in accordance with justice in the particular circumstances (see, eg, *S v Esposito* 2007 1 SACR 527 (C) 533g–f; *S v Tong* 2013 1 SACR 346 (WCC) paras 21 24; *S v Parsons* 2013 1 SACR 38 (WCC) and *S v Rademeyer* (A186/17) [2017] ZAGPPHC 175 (12 April 2017) where the applicants relied thereon that their rights were not explained to them and/or that they did not know that the admission had the same effect as a conviction in a court of law. In *Esposito* and *Tong* the applicants also relied thereon that they paid the fine to avoid being held in custody.) In all these cases, the matter was decided in favour of the applicants by way of a special review in terms of section 304(4) of the CPA.

It has already been indicated that the matter was escalated to the High Court in the style of review in the ordinary course in terms of section 302 read with sections 303 and 304 of the CPA. This process, also referred to as automatic review, is aimed at ensuring the validity and fairness of certain categories of criminal proceedings (*S v Jacobs and Six Similar Matters* 2017 2 SACR 546 (WCC)) in light of the high number of unrepresented accused in the lower courts (*S v Mokubung; S v Lesibo* 1983 2 SA 710 (O) 714; Joubert *et al Criminal procedure handbook* (2017) 423; Du Toit *et al Commentary on the Criminal Procedure Act* (loose-leaf updated to 31 July 2018, 30-9)). The reviewing judge is not limited to irregularities but may also attend to any issue that is subject to appeal (Du Toit *et al* 30-9; Kriegler and Kruger *Hiemstra Suid Afrikaanse strafproses* (2002) 799).

In this regard, in *S v Cedras* 1992 2 SACR 530 (C) 53i–532b the court laid down guidelines that a court should follow when dealing with a review of this nature. The court held as follows: The question is always whether there are considerations of equity and fair dealing which compel the court to intervene to prevent a probable failure of justice. There must furthermore be evidence showing the likelihood of such inequity should the court not intervene. A court must be satisfied that the admission of guilt was probably mistaken or incorrect and the applicant must satisfactorily explain how the admission of guilt was mistakenly or erroneously made. There must be good cause for condoning the mistake or error. It must furthermore be established that were the charge to go to court, the applicant would have a probable or arguable defence to the charge, and his deemed conviction and sentence was accordingly not in accordance with justice.

This position was confirmed in *S v Price* 2001 1 SACR 110 (C) (see also *De Wee* 2006 1 SACR 210 (NPD)). In *Jacobs* paras 8 and 37 the court of late also confirmed that the reviewing judge had to evaluate the fairness of the underlying conviction and sentence. The court further held that the complete proceedings had to be evaluated.

However, I submit that this does not mean that it was proper for the court in the present case to consider grounds not raised by the applicant. In this matter the applicant was duly assisted by a legal practitioner and provided grounds of review. It was not a normal review in the ordinary course where an unrepresented accused did not provide grounds of review, or even where an unrepresented accused presented grounds of review.

The general principle in the South African adversarial system is furthermore that the role of the reviewing court, whether due to a review or an appeal, is

limited to deciding issues raised by the party who seeks to do the review (see *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) paras 15 19 with regard to the limits of the judiciary's powers; *Kauesa v Minister of Home Affairs* 1996 4 SA 965 (NmS) 973H–974A with regard to litigation in general; *S v Baloyi* 1991 1 SACR 265 (B); *Mtokonya v Minister of Police* 2018 5 SA 22 (CC) para 76, Du Toit *et al* 30-28 with regard to a criminal appeal; *Cusa v Tao Ying Metal Industries* 2009 2 SA 2004 (CC) para 67 with regard to an arbitral award; *Fisher v Ramahlele* 2014 4 SA 614 (SCA) para 14 and *South African Police Service v Solidarity OBO Barnard* 2014 6 SA 123 (CC) paras 217 218 with regard to applications and motions in general). It is accordingly not for the court to tell the litigant what to complain about.

This is so even where the dispute involves an issue pertaining to the basic human rights guaranteed in the Constitution. It is impermissible for a party to rely on a constitutional complaint that was not raised by the party (*Fisher v Ramahlele* para 13). Moreover, the applicant may have his own reasons for not raising the issue.

The decisions and guidelines set out above furthermore confirm that the grounds raised by the applicant justified the court's intervention. The matter could therefore have been properly decided on the grounds raised by the applicant. There was furthermore no indication in law that there was an incorrect application of the relevant legal principles with regard to section 57(6). It was accordingly not necessary for the court to consider grounds not raised in the review to ensure the fairness and validity of the proceedings. Consequently, it was not proper in these circumstances for the court to consider grounds not raised by the applicant.

In concluding this point I wish to add that it is inconceivable that a point of law as important as this could be decided in this manner. The system for allowing the payment of an admission of guilt fine is an indispensable and important component of our criminal justice system which lessens the burden on our already overloaded system (see also *S v Tong* para 23; Du Toit *et al* 8-1). I submit that even if the court were able to raise the issues *mero motu* and decide the matter premised on those issues, the court should at the very least have directed the relevant Director of Prosecutions in terms of section 304(3) to address the court on the issues before making a decision (see also *Kauesa* 973I–974A). In this regard the court in *S v Gcoba* 2011 2 SACR 231 (KZP) para 21 held that a court was duty-bound on automatic review to see that justice was done both to the convicted person and the state (see also *S v Zulu* 1967 4 SA 499 (T) 501F). I accordingly submit that in this regard, the interests of justice had not been served.

5 2 Conviction in terms of section 57(6) not a conviction envisaged in section 271

The second point of interest is the conclusion reached by the court that a conviction in terms of section 57(6) was not a conviction envisaged in section 271. The finding is in the first place at odds with the decision in *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 4 SA 738 (A) where the Appellate Division held that an admission of guilt in terms of section 351 of the previous CPA 56 of 1955 could be proved as a previous conviction against an accused (s 351 is the forerunner and functional equivalent of s 57 of the CPA).

Section 57(6) furthermore specifically and clearly provides that where a fine is paid in terms of the provision, and entered into the criminal record book, the accused "shall subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court with respect of the offence in question". There is no doubt that if the court convicts an accused, it is a conviction envisaged by section 271.

It follows that if a conviction in terms of 57(6) is deemed to be a conviction by the court, and a conviction by the court is a conviction for purposes of section 271, then a conviction in terms of section 57(6) is a conviction for purposes of section 271. It is difficult to see how the court could have come to a different conclusion (see also *S v Fynn* 2011 2 SACR 178 (KZP) 181 where it was held that an admission of guilt fine was the equivalent of a plea of guilty in court).

It is also noted that the term "conviction" is not defined in the CPA. However, the *South African concise Oxford dictionary* (first published 2002) 252 confirms that the term refers to "an instance of being convicted [of a criminal offence]" (see also the *Longman dictionary of the English language* (first published 1985) 320). Whether an accused was convicted by a formal hearing, or whether he was convicted by his agreement to be convicted by his payment of a fine, or whether he was convicted out of his own mouth by admitting guilt, the result is the same, namely, the accused was convicted of a criminal offence (see also *NGJ Trading Stores* 739).

It is also submitted that there is nothing in the CPA or otherwise to suggest that a special or technical meaning was intended by the legislator for the term "conviction" in section 57(6). Therefore, there is no reason to interpret the term in section 57(6) any differently than in accordance with the ordinary grammatical meaning of the word.

Moreover, the South African system of criminal justice does not as a matter of principle or policy provide for different types or levels of convictions. One is convicted or deemed to have been convicted, or not, of prohibited conduct constituting an offence. Of course offences differ markedly in how serious they are, and there are varying levels of guilt involved, but it is the function of the sentencing process and/or considerations to provide for the punishment of each offender.

It is also the prerogative of the legislature to decide whether a certain category of offences or offenders are to be treated differently as was done by the legislature by way of section 341 of the CPA. In terms of section 341 an offender is allowed to pay a fine with respect to certain minor offences whereupon the offender will not be prosecuted for the offence. No such or similar provision was made by the legislator with regard to prosecutions provided for in terms of section 57.

The fact that section 57(6) provides for a specific *sui generis* procedure also does not change the position and does not bring about that a conviction in terms of section 57(6) is not a conviction for purposes of section 271. I therefore submit that the court was misguided in its deliberations and findings in this regard. Nonetheless, I shall briefly refer to some of the errors made by the court in coming to its conclusion.

The court erred in distinguishing a conviction in terms of section 57(6) from a conviction for purposes of section 271 on the basis that:

(i) Section 57(6) only provides for less serious offences where the fine could not exceed the amount of R10 000, and that the (Magistrates') court could

impose a fine of R120 000. The court erred insofar as it did not take into account that section 112(1)(a) provides for a plea of guilty to a minor offence in court, where the fine could not exceed the amount of R5 000 (see ss 56(1) 57(1) 112(1)(a) and GN R62 *GG* 36111 of 30 January 2013). Section 112(1)(a), therefore, provides for a fine in court that is limited to a fine of half the amount provided for in terms of section 57(6). There is furthermore no doubt that a conviction and sentence in terms of section 112(1)(a) are a conviction for purposes of section 271. This perceived distinction therefore was incorrect.

(ii) With a section 57(6) conviction the state agreed not to pursue the trivial dispute in return for the agreed payment (para 20). The court erred in that with a section 57(6) prosecution the prosecution had already been initiated with the summons (s 54) or the written notice (s 56). When the accused pays the fine, the state does not agree not to pursue or waive the offence against the accused. The accused is deemed to have been convicted. What is pre-empted is the need to go to court (see also *S v Shange* 1983 4 SA 46 (N) 49E; *S v Tong* para 23; Du Toit *et al* 8-1; Joubert *et al* 116).

The court also erred in holding that an accused who had already appeared in court, but had not pleaded, could admit guilt in terms of section 57A and that this did not amount to a conviction in terms of section 271 (para 36). The court erred in finding that a conviction in terms of section 57A was not a conviction for purposes of section 271. It has long been accepted that an accused could pay an admission of guilt fine and have a conviction noted against his name without appearing in court (see the discussion below). Section 57A merely provides that it can also be done after the accused has already appeared in court but had not pleaded.

The court further erred in distinguishing a section 57(6) conviction from a conviction for purposes of section 271 on the basis of (1) the facts of the case and whether the accused admitted or denied them, and whether the accused was guilty in law, were not considered with a conviction in terms of section 57(6) (paras 16 28); and (2) an accused could only be convicted where all the evidence established the accused's guilt beyond a reasonable doubt (paras 26 34).

The court again erred because it did not take account of a conviction in terms of section 112(1)(a). In terms of section 112(1)(a) the court may convict for a minor offence on a plea of guilty alone, without considering the facts or the law. As has been indicated there is also no doubt that a conviction and sentence in terms of section 112(1)(a) was a conviction for purposes of section 271.

The court likewise erred in that it misconstrued the decision in *Director of Public Prosecutions, Limpopo v Mokgotho* referred to. The finding that an accused could only be convicted where all the evidence established the accused's guilt beyond a reasonable doubt, only applies to the situation where a criminal trial took place. These perceived distinctions were therefore also incorrect.

The court additionally erred in distinguishing a section 57(6) conviction from a conviction for purposes of section 271 on the basis that:

(i) A section 57(6) admission of guilt differs from an unequivocal admission of guilt envisaged in section 217 of the CPA, and once made to the peace officer it is not required to be confirmed and reduced to writing in the presence of a magistrate "or peace officer" (paras 18 19). In this regard,

the court again erred because it did not take account of a conviction in terms of section 112(1)(a). In terms of section 112(1)(a) the court may convict for a minor offence without an unequivocal admission of guilt. This perceived distinction therefore was also incorrect.

Moreover, section 217 lays down requirements for a completely different situation. Due to the fact that the accused is served with the summons or written notice containing the admission of guilt, and the accused can within the time period allowed pay the fine or decide to go to court, there is no real risk that an admission of guilt for purposes of section 57(6) would not be made by the accused freely and voluntarily, in his sound and sober senses and without having been unduly influenced thereto (see the requirements in s 217).

It has long been accepted that an accused could pay an admission of guilt fine, and have a conviction noted against his name without the intervention of a magistrate or justice of the peace (see the discussion below).

(ii) An accused could only be convicted by a verdict in court (see paras 15 25 27 28 34 36). There is also no doubt that these findings were incorrect. Admissions of guilt resulting in a conviction, in lieu of the accused having to appear in court, have long since been a proper element in South African criminal law enforcement. If is furthermore safe to postulate that without this element, the criminal justice system would not be able to cope with the volume of prosecutions. This element therefore is essential to society's compelling interest in convicting and punishing those who commit less serious offences.

It is accepted that the Constitution, 1996, including the right to remain silent and the right against self-incrimination (see s 35(3)(h)), does not prohibit an accused from waiving his rights, agree to pay an admission of guilt fine and have a conviction noted against his name instead of going to court. Far from being prohibited by the Constitution, an admission of guilt fine, if the safeguards are met, are most probably also desirable to the wrongdoer as it relieves the wrongdoer of the burden of going to court.

(iii) The admission of guilt "register" (J114) referred to in section 57(6) was "different" from the criminal record book (546) used for criminal matters heard in court (para 31; see paras 15 31 for the "differences"). Form J114 is in the first instance not a register. It is a record book (see s 57(6); the Justice Codified Instructions: Archives Part 1V – Closing and Disposal of Records: General para 10.2.2 and Annexure D).

I furthermore submit that there is no significance in the fact that an admission of guilt record book for purposes of section 57(6), is "different" from the criminal record book kept by a court. The subject matter of both the admission of guilt record book and the criminal record book is the same; namely, the record of convictions and sentences. The "differences" in content are merely the result of the different routes which led to the conviction and sentence. Pragmatism and convenience furthermore dictate that the convictions for purposes of section 57(6), and the convictions with regard to every court be kept separate for future reference, as part of a case management system.

(iv) The case record of the admission of guilt fine was disposed of after one year, and the admission of guilt record book was disposed of after three years. On the other hand, the criminal record book of each court was

archived after ten years from the last entry, and never disposed of (paras 32 34).

I submit that this does not bring about that the section 57(6) conviction was not a conviction for purposes of section 271. With regard to the case record of an admission of guilt being disposed of after one year, the court case records of cases disposed of without evidence in terms of section 112(1)(a) are also disposed of after 1 year, cases with evidence, convictions in terms of section 112(1)(b) and opposed bail applications after 2 years, and where a suspended or postponed sentence or correction supervision has been imposed, after 7 years (see the Justice Codified Instructions: Archives Part 1V – Closing and Disposal of Records: Annexure B Schedule 1). All the retention periods are based on common sense considerations depending on the nature and outcome of the case and the sheer volume of cases dictate that almost all records are disposed of at some point. The fact that the case record of an admission of guilt is disposed of after one year is therefore of no significance in this deliberation.

The fact that the admission of guilt record book is disposed of after three years, and a criminal record book is never disposed of also does not bring about that a section 57(6) conviction was not a conviction for purposes of section 271. The period of retention of the admission of guilt record book, also referred to as the loose-leaf admission of guilt record book, is in the first instance provided for in Annexure D and not C of the Justice Codified Instructions: Archives, and the retention period is 7 years and not 3, as indicated by the court. The fact that the criminal record book is archived is furthermore provided for in paragraph 13(1) of the Justice Codified Instructions: Archives and not paragraph 15(a).

The protocols with regard to the retention periods and disposal of the case records, the admission of guilt record book and the criminal record book are also not legislative acts. They are codified internal administrative instructions issued by the Director-General of the Department of Justice and Constitutional Development (see s 7 Magistrates' Courts Act 32 of 1944. Directives and policy documents are not included in legislation (see *Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng (No. 2)* 2003 6 SA 308 (W); Bekink *Principles of South African constitutional law* (2016) 209). These instructions therefore do not have the force of law. It is furthermore the prerogative of the legislature to decide whether certain offenders are to be treated differently. As such, these instructions have no bearing on whether a section 57(6) conviction was a conviction for purposes of section 271 or not.

5 3 Conviction and sentence in terms of section 57(6) not permanent, and should accordingly not have been entered into the criminal record system

The third and fourth adjoining points of interest which I discuss together, are the conclusions reached by the court, namely, that a conviction and sentence in terms of section 57(6) was not permanent and that the conviction and sentence should accordingly not have been entered into the criminal record system.

I submit that if it is accepted that the admission of guilt in terms of section 57(6) was substantively and evidentially a previous conviction, the conviction and sentence should have been entered into the SAPS criminal record system. I have furthermore indicated that the codified instructions were not legislative acts

and that it was the prerogative of the legislature to decide whether certain offenders were to be treated differently. I accordingly submit that the retention and disposal instructions with regard an admission of guilt fine do not undo any of the ordinary legal consequences of the conviction and sentence.

6 CONCLUSION

The court erred in considering grounds of review not raised by the applicant and in finding that a conviction in terms of section 57(6) was not a conviction envisaged in section 271, was not permanent, and accordingly should not have been entered into the SAPS criminal record system.

It further is not correct that a review court should not enquire into the merits of a case, and that an accused ought to be entitled to relief if he had paid an admission of guilt fine without knowing that he would receive a criminal record, and if he wished to defend himself in court. What is required to intervene is a probable failure of justice. The facts as set out above do not point to a probable failure of justice. The court must further be convinced that the accused's admission of guilt was probably incorrect or mistaken, and if the accused went to court he would have had a probable or arguable defence to the charge (see *S v Cedras*; *S v Prince* and *De Wee*).

However, it is appropriate for the conviction and sentence to have been reviewed in terms of section 304(4) of the CPA.

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