

ARTICLES

The right to a fair trial in subsequent criminal proceedings: How the Constitutional Court took matters into its own hands in *Shinga v The State*

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ABSTRACT

For the third time since 1996, the Constitutional Court had to decide in 2007 on the constitutionality of provisions in the Criminal Procedure Act 51 of 1977 relating to applications for leave to appeal, petitions, and appeals from criminal proceedings in the magistrates' courts. After examining the history of criminal appeals from the magistrates' courts by considering post-1994 case law and related legislative amendments, the Constitutional Court took matters into its own hands, and amended the Act. In its judgment, the court made it clear that all subsequent criminal proceedings, for example appeals and reviews, should meet the requirements of a fair trial as set out in s 35(3) of the Constitution of the Republic of South Africa, 1996. Although the procedures of applying for leave to appeal by way of an application or a petition have undergone serious judicial and legislative scrutiny over the past few years, the Constitutional Court stated that these procedures are necessary in order to identify and prevent unmeritorious appeals. The Constitutional Court ordered that in future the full record of the court a quo be sent to the High Court when a convicted person files a petition, that two judges consider the petition (who may also order that the petition be argued before them) and that, if leave to appeal is granted, the appeal be heard in an open court on oral argument. The order was made with immediate effect.

1. Introduction

In *Shinga v The State*¹ (hereinafter referred to as the CC case) the Constitutional Court (hereinafter referred to as the CC) had to con-

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¹ *Shinga v The State (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell v The State (1) 2007 (4) SA 611 (CC).*

sider the procedure for criminal appeals from the lower courts for the third time since 1996.² The case concerned the constitutionality of certain provisions of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the CPA) regarding applications for leave to appeal, petitions, and appeals from criminal proceedings in the magistrates' courts.

The CC had to decide on the confirmation of two High Court judgments regarding the unconstitutionality of certain provisions of the CPA. A full bench in the KwaZulu-Natal High Court in *Shinga v S*³ (hereinafter referred to as *Shinga*) declared unanimously that ss 309(3A), 309B and 309C were inconsistent with the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution). The Cape High Court in a unanimous judgment in *O'Connell v S*⁴ (hereinafter referred to as *O'Connell*) declared that the procedure and requirements set out in ss 309B and 309C were inconsistent with the Constitution.

a) The constitutional right to a fair trial

The Constitution protects an accused person's right to a fair trial. This right 'encapsulates a compendious guarantee of cognate due process rights, which is, however, not exhausted by those expressly enumerated and described in the Bill of Rights'.⁵ Section 35(3)(o) of the Constitution provides that the right to a fair trial includes the right 'of appeal to, or review by, a higher court'.⁶ Other relevant rights include the right

² *Shinga v The State (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell v The State (1)* supra (n1) at para [2].

³ *Shinga v S* 2007 (4) BCLR 433 (N).

⁴ *O'Connell v S* 2007 (5) BCLR 536 (C).

⁵ GE Devenish 'Constitutional Law' in WA Joubert (Founding Ed) *Law of South Africa* 2ed (2004) para [155].

⁶ See also IM Rautenbach & EFJ Malherbe *Constitutional Law* 5ed (2009) 394 and F Snyckers & J le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman, T Roux & M Bishop (Eds) *Constitutional Law of South Africa* 2ed (2006) 51-181 as well as 51-184 where the authors stated the following 'It may be observed that an interpretation of FC s 35(3)(o) as not providing for appeals to be heard in public nor for the presence of the accused during appeals begs the question whether the right to a fair trial extends to the final determination of the appeal, alternatively whether the specific right to be tried before an ordinary court, and to be present when being tried, extends to appellate stages' and '(i)t would be odd if the Constitution scrupulously provided for safeguards against secret trials, but had nothing to say about the question whether the decisions reached in these trials could be overturned on appeal in circumstances that would not be countenanced for the first, provisional, determination of the matter'(footnotes omitted).

to a public trial before an ordinary court⁷ and the right to be present when being tried.⁸

b) Section 309B of the CPA: applications for leave to appeal

Section 309B of the CPA (which was not amended in the CC case) provides for applications for leave to appeal. The application for leave to appeal against a conviction, sentence or order of a lower court must be lodged at that court and must be heard by the trial magistrate or, if he or she is not available, by another magistrate assigned for hearing the application. This section goes hand-in-hand with s 309C, which section deals with petitions.⁹ The test regarding leave to appeal is whether a reasonable person could, by adopting a different line of reasoning, come to a different conclusion.¹⁰

c) Section 309C of the CPA: petitions

If leave to appeal is refused by the lower court, the accused may file a petition at the Judge President of the High Court in terms of s 309C. Section 309C(4)(c) provides that the clerk of the court must then submit to the registrar of the High Court copies of the application, the magistrate's reasons for refusal, and the record of the proceedings that resulted in the refusal. Prior to the CC case, this subsection also listed certain exceptions where only the copy of the judgment (and not the full record of the proceedings) was required to be sent to the High Court (subsec (4)(c)(i) – (iv)). A petition was considered by a single judge in chambers (subsec (5)(a)).¹¹ A judge considering a petition had the option of requesting further information and, in exceptional circumstances, order that the petition or a part thereof be argued before him or her. The *exceptions* (s 309C(4)(c)(i) – (iv)), as well as the arrangement that a *single judge* should consider the petition in *chambers* (s 309C(5)(a)), were at issue in the CC case.

d) Section 309(3A) of the CPA: the appeal

Regarding the appeal itself, s 309(3A) is relevant. Before the CC case, this section stated that appeals from a lower court had to be disposed

⁷ Section 35(3)(c) of the Constitution.

⁸ Section 35(3)(e) of the Constitution.

⁹ Therefore, if s 309C were to be found to be totally inconsistent with the Constitution, s 309B's total inconsistency would also follow (see *O'Connell v S* supra (n4) at 572).

¹⁰ A Kruger *Hiemstra's Criminal Procedure* (2008) 30-63.

¹¹ However, the Judge President could in exceptional circumstances assign two judges to consider the petition.

of by the High Court in *chambers* and *on written argument*, unless the court was of the opinion that it would be in the interests of justice to hear oral argument.

e) The powers of the Constitutional Court

Section 172 of the Constitution states that legislation can be declared unconstitutional by the High Court, the Supreme Court of Appeal or the CC. When a court other than the CC declares an Act invalid on this basis, such court must refer the order of constitutional invalidity to the CC for confirmation before it will be of any force.¹² Section 167(5) of the Constitution states that the CC makes the final decision on whether an Act of Parliament or a provincial Act is constitutional. Rule 16 of the Rules of the Constitutional Court governs the procedure of confirming an order of constitutional invalidity. An order of invalidity by the CC is binding on all persons to whom, and organs of state to which, it is applicable,¹³ and can have immediate effect or can be suspended in order for the relevant legislature to be able to correct the defect.¹⁴

A court may make any order that is just and equitable when deciding a constitutional matter.¹⁵ In a number of cases the CC applied the principles of modificative interpretation by using the tools of severance, reading in and reading down.¹⁶ In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹⁷ (hereinafter referred to as *National Coalition*) the CC found that:

‘The device of notional *severance* can effectively be used to render inoperative portions of a statutory provision, where it is the presence of particular provisions which is constitutionally offensive and where the scope of the provision is too extensive and hence constitutionally offensive, but the unconstitutionality cannot be cured by the severance of actual words from the provision’ (our emphasis).¹⁸

¹² Section 8 of the Constitutional Court Complementary Act 13 of 1995.

¹³ Section 165(5) of the Constitution states that ‘(a)n order or decision issued by a court binds all persons to whom and organs of state to which it applies’.

¹⁴ C Botha *Statutory Interpretation* 4ed (2005) 39. See also the in-depth discussion of the different types of remedies available to the Constitutional Court in *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006(1) SA 524 (CC) at (paras [115] – [161] and the minority judgment at paras [165] – [173]). See also Rautenbach & Malherbe op cit (n6) 255.

¹⁵ Section 172(1)(b) of the Constitution. See also Rautenbach & Malherbe op cit (n6) 253.

¹⁶ Botha op cit (n14) 38 and Rautenbach & Malherbe op cit (n6) 254 – 55.

¹⁷ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 1 SA 6 (CC).

¹⁸ *National Coalition for Gay and Lesbian Equality* supra (n17) para [63].

According to *National Coalition*, in cases where invalidity is caused by an omission, the device of *reading in* is the appropriate remedy.¹⁹ When a court makes a declaration of invalidity, it has to balance the obligation to provide ‘appropriate relief’²⁰ with the principle of the separation of powers.²¹ The court’s order may not constitute an unconstitutional intrusion into the legislature’s domain.²² The court stated ‘that reading in is, depending on all the circumstances, an appropriate form of relief under s 38 of the Constitution’.²³ The court set out guiding principles in paragraphs [73] – [76]. The provision resulting from severance or reading in must be consistent with the Constitution and its fundamental values. The result must interfere as little as possible with the laws adopted by the legislature. When reading in, the court must be able to ‘define with sufficient precision how the statute ought to be extended in order to comply with the Constitution’.²⁴ The court must ‘endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution’ and consider, for example, possible budgetary constraints.²⁵ It is important to bear in mind that the legislature exercises final control over the nature and extent of the legislation concerned. If need be, the court may forge new tools and shape innovative remedies to align the legislation to the norms and values lying at the heart of the Constitution.²⁶ The discussion below will indicate that the CC implemented these guidelines in the CC case currently under consideration.

In the CC case the CC also applied the test laid down in *Johannesburg City Council v Chesterfield House (Pty) Ltd*²⁷ (without specifically referring to it), namely

¹⁹ *National Coalition for Gay and Lesbian Equality* supra (n17) at para [64].

²⁰ Section 38 of the Constitution.

²¹ *National Coalition for Gay and Lesbian Equality* supra (n17) at para [66].

²² *National Coalition for Gay and Lesbian Equality* supra (n17) at para [68].

²³ *National Coalition for Gay and Lesbian Equality* supra (n17) at para [70].

²⁴ *National Coalition for Gay and Lesbian Equality* supra (n17) at para [75].

²⁵ *National Coalition for Gay and Lesbian Equality* supra (n17) at para [75].

²⁶ *National Coalition for Gay and Lesbian Equality* supra (n17) at para [81].

²⁷ *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822C-E, as applied in para [55] of the CC case: ‘The severance of the proviso to subsection 309C(4)(c) including sub-paragraphs (i), (ii), (iii) and (iv) from section 309C(4)(c) results in the separation of the good from the bad in circumstances where the good is not dependent on the bad. Moreover it results in the fact that part of the statute which is good is retained.’ See in this regard the application of this *Johannesburg City Council* dictum in the CC judgment of *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at para [15], where reference was also made to the application by the CC of this test in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) at para [16]; *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) at para [31].

‘where it is possible to separate the good from the bad in a Statute and the good is not dependent on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute’.

2. The history of criminal appeals from the magistrates’ courts: post-1994 case law and legislative amendments as set out in the CC case

a) Provisions at the commencement of the new constitutional order in 1994

At the commencement of the new constitutional order in 1994, s 309(4) (a) (read with s 305) of the CPA made provision for an automatic right of appeal, which right was limited as it was only available to convicted persons who were not imprisoned, as well as convicted and imprisoned persons who had legal representation. Convicted and imprisoned persons who had no legal representation were not entitled to appeal in person, unless a High Court judge issued a certificate stating that reasonable grounds for such appeal existed.²⁸

b) *S v Ntuli* 1996 (1) SA 1207 (CC)

The above limitation with regard to unrepresented imprisoned people was challenged in the *Ntuli* case. The guarantee of a fair trial, as provided for in the Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter referred to as the 1993 Constitution) was used as a yardstick by the CC. This right included the right ‘to have recourse by way of appeal or review to a higher court than the court of first instance’.²⁹ The CC found that the s 309(4)(a) limitation was inconsistent with the 1993 Constitution, and therefore invalid. The reasons for the finding included the fact that no procedure for the application of a judge’s certificate (stating that the reasonable grounds for an appeal existed) was statutorily specified and the fact that the record was not statutorily required to be sent to the judge when he/she considered said application. Representations made by unrepresented persons were most often of a very poor quality, leading to a situation where it was almost impossible to make an appropriate reassessment of the magistrate’s findings without recourse to the record of the proceedings in the court a quo.³⁰

²⁸ *Shinga v The State (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O’Connell v The State (1)* op cit (n1) at para [3].

²⁹ Section 25(3)(b).

³⁰ *Shinga v The State; O’Connell v The State (1)* supra (n1) at paras [4] – [5]. See also Bekker *et al Criminal Procedure Handbook* 8ed (2007) 343–4.

c) The first amendment: The Criminal Procedure Amendment Act 76 of 1997

Subsequent to the *Ntuli* case, the CPA was amended in 1997 (the amendment was only put into operation on 28 May 1999). This amendment provided for the abolishment of all automatic criminal appeals from magistrates' courts. A single procedure applied to all applications for leave to appeal.³¹ With regard to *petitions*, the clerk of the court was obliged to submit only two documents, namely a copy of the application and the magistrate's reason for refusal of the application (this despite the fact that the court in *Ntuli* emphasised the need to oblige the clerk to provide the whole record). The petition had to be considered by two judges, and if their findings differed, by three judges. If the judges so wished, it was possible to request more information from the magistrate. A new s 309(3A) was also introduced, which provided for the disposal of an *appeal in chambers* upon *written argument* if the parties agreed thereto and the Judge President of the court so directed in appropriate cases. This section thus did not provide for the disposal of an appeal in an open court after having heard oral argument.³²

d) *S v Rens* 1996 (1) SA 1218 (CC)

This case was decided after the *Ntuli* case, but before the enactment of the 1997 amendments. It concerned the validity of the procedure for applying for leave to appeal in criminal appeals from the *High Court* (as provided for in s 316 (read with s 315(4)) of the CPA). The CC found the procedure to be consistent with the 1993 Constitution.³³

e) *S v Steyn* 2001 (1) SA 1146 (CC)

The constitutional validity of the first (1997) amendment was at issue in the CC case of *S v Steyn* 2001 (1) SA 1146 (CC) (hereinafter referred to as *Steyn*). The state contended that the procedure was valid as it was equivalent to the procedure from the High Court (which was found to

³¹ With two possible stages: an application for leave to appeal and a petition in terms of ss 309B and 309C respectively.

³² *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [6]. See also *Bekker et al* op cit (n30) 344 where it is stated that the Department of Justice explained the rationale for the wording of the (1997) s 309(3A) amendment as the huge financial impact and the further increase in the appeal workload of the then already overburdened High Courts.

³³ *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [7]. See also Snyckers & le Roux op cit (n6) 51-181.

be valid in, amongst others, the *Rens* case). The CC, however, found that the requirements of the submission of only the copy of the application and the reasons for the magistrate's refusal, were insufficient. It decided that no informed decision could be made on these documents alone and that there could therefore be no adequate reappraisal. The CC emphasised the fact that the provision for the possibility to apply for further information was also inadequate, as many judges would not request same. With regard to the argument that the procedure was the same in the High Court, the CC stated that the 'risk of an error leading to an injustice is substantially greater in the magistrates' courts than in the High Courts'.³⁴ The CC found the limitation of the right of appeal to be unjustified and invalid. The invalidity order was suspended for a six-month period in order for the legislature to address the issue.³⁵

f) The second amendment: The Criminal Procedure Amendment Act 42 of 2003

The second amendment (2003) restored the automatic right of appeal in two situations, namely to accused persons who were under the age of 14 when sentenced to any form of imprisonment, and to convicted persons between the ages of 14 and 16 who were sentenced to imprisonment by a regional court while not legally represented. All other convicted persons had to apply for leave to appeal (in terms of s 309B (application for leave to appeal), and, if unsuccessful, s 309C (petition)).

The *petition* procedure was amended in the following respects: the clerk was obliged to submit a copy of the application for leave to appeal, the magistrate's reasons for refusal, as well as the record of the proceedings in the magistrate's court in respect of which the application was refused. However, the 2003 Amendment Act specifically determined that, in the following four exceptional cases, a copy of the judgment (including the reasons for conviction and sentence on the merits of the case) sufficed for purposes of a petition:

- (i) the accused was legally represented at his trial in the regional court,

³⁴ *S v Steyn* 2001 (1) SA 1146 (CC) at para [22].

³⁵ *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [8]. See also A Steenkamp & R Nugent 'Arrested, detained and accused persons' in MH Cheadle, DM Davis & NRL Haysom (Eds) *South African Constitutional Law: The Bill of Rights 2ed* (2009) 29-31, *Bekker et al* op cit (n30) 344 (where it is stated that the CC order of invalidity in *Steyn* became effective as of 28 May 2001 as the Parliament failed to cure the defect timeously) and *Snyckers & le Roux* op cit (n6) 51-185 & 51-186.

- (ii) the accused and the Director of Public Prosecutions agreed,
- (iii) the appeal was against the sentence only, or
- (iv) the petition concerned an application for condonation.³⁶

The *number of judges* considering a *petition* was reduced to one. The Judge President, in exceptional circumstances, could designate two judges.

With regard to the *appeal* itself, the second (2003) amendment provided for *all* appeals to be disposed of in *chambers on the written argument* of the parties or their legal representatives. The court could, however, in exceptional circumstances, find that the interests of justice require the submission of oral arguments.³⁷

3. The High Court judgments in Shinga and O'Connell

a. *Shinga v S* 2007 (4) BCLR 433 (N)

In the *Shinga* case the accused was legally represented and convicted of robbery in June 2004 and, as a result, sentenced to ten years' imprisonment. Leave to appeal was granted by the magistrate in terms of s 309B.³⁸ The issue at hand concerned the statutory arrangements regarding the appeal itself (s 309(3A)) and related to the legal principle and tradition that legal proceedings have to take place in open court; the rule that an accused person is not to be tried in his or her absence (unless special circumstances exist); and the standard that an accused person should not be inhibited from placing all factors favourable to his or her case before the court.³⁹ In addition, the court also dealt with ss 309(1)(a), 309B and 309C, as they form part of a single leave-to-appeal-procedure.⁴⁰

i. Sections 309B and 309C of the CPA: applications for leave to appeal and petitions

In the *Shinga* case, the KwaZulu-Natal High Court held that both ss 309B and 309C were in their entirety inconsistent with the Constitution.⁴¹

³⁶ Subsection (4)(c)(i) – (iv).

³⁷ *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [9].

³⁸ *Shinga v The State; O'Connell v The State (1)* supra (n1) at paras [12] – [16].

³⁹ *Shinga v S* supra (n3) at 435.

⁴⁰ *Shinga v S* supra (n3) at 440.

⁴¹ *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [32].

The court found that an adequate and informed reappraisal cannot be done by the High Court with the inadequate information the clerk is obliged to send to it. The second (2003) amendment did not adequately address the deficiencies (as identified by the CC in *Steyn*) in, and the criticisms against, the CPA.⁴² The court stated that

‘(e)ven where a record of the proceedings in the lower court accompanies the petition to the Judge President for leave, the other adverse factors which prevailed at the time when *Steyn* was decided, remain unaffected by the otherwise superficial changes to ss 309B and 309C’.⁴³

b. *O’Connell v S* 2007 (5) BCLR 556 (C)

The *O’Connell* case concerned six applicants who were convicted and sentenced to long terms of imprisonment. Their applications for leave to appeal were refused and they applied by way of petition for leave to appeal to the High Court. The questions arose whether the provisions of ss 309B and 309C were constitutionally valid and whether, if found to be invalid, the applicants could be exempted from the requirement to obtain leave to appeal.⁴⁴ Three issues were raised in this case, namely the fact that not all convicted persons who applied for legal aid to assist them with their applications for leave to appeal, received the same; the fact that a single judge considered a petition; and the fact that the full record was not placed before the judge in all instances.⁴⁵

i. Sections 309B and 309C of the CPA: Applications for leave to appeal and petitions

The Cape High Court in the *O’Connell* case held that only the following two specific aspects of s 309C were unconstitutional:⁴⁶

- Subsection (4)(c)(i) – (iv), which provides for trial records to be made available to petition judges *except* in the following cases:
 - ‘(i) if the accused was tried in a regional court and was legally represented at the trial; or

⁴² *Shinga v The State; O’Connell v The State (1)* supra (n1) at paras [33] – [34].

⁴³ *Shinga v S* supra (n3) at 445.

⁴⁴ *Shinga v The State; O’Connell v The State (1)* supra (n1) at paras [17] – [19].

⁴⁵ *S v O’Connell* supra (n4) at 569 – 72.

⁴⁶ *Shinga v The State; O’Connell v The State (1)* supra (n1) at para [32].

- (ii) if the accused and the Director of Public Prosecutions agree thereto;
- (iii) if the prospective appeal is against sentence only; or
- (iv) if the petition relates solely to an application for condonation...'

These 2003 exceptions (second amendment) were found to be unjustifiable. This position was not cured by the 1997 (first amendment) empowerment of the judges to request further information. A request for further information would in any event result in even more delays.

- Subsection (5)(a) reduced the *number of judges* to consider a petition from two to one (unless the Judge President directs otherwise). The court found that this was a 'fundamental defect'.⁴⁷

The Cape High Court left it to the CC to decide on the possibility of saving the provisions through severance and reading-in.⁴⁸

4. The 2007 Constitutional Court judgment

The CC judgment in *Shinga v The State; O'Connell v The State (1)* 2007 (4) SA 611 CC considered four sets of issues relating to the constitutional validity of the then current (2006) ss 309B, 309C and 309(3A) of the CPA regulating applications for leave to appeal, petitions, as well as the hearing of appeals.

- Issues regarding the record of the proceedings in the court a quo: the possible unconstitutionality of the exceptions provided for in s 309C(4)(c);
- Issues regarding the required number of judges: the possible inconsistency of the provisions of s 309C(5)(a) with the constitutional right to appeal or review;
- Issues relating to the possibility of the whole application for leave to appeal and petition procedure being inconsistent with the Constitution, as the findings of unconstitutionality as identified in *Steyn* were not adequately addressed by the 2003 amendments; and
- Issues relating to the appeal itself: the possible unconstitutionality of s 309(3A).⁴⁹

⁴⁷ *S v O'Connell* supra (n4) at 571.

⁴⁸ *Shinga v The State; O'Connell v The State (1)* supra (n1) at paras [35] – [38].

⁴⁹ *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [39].

a) Section 309C(4)(c) of the CPA: issues regarding the record of the proceedings in the court a quo

The CC stated that the reason why the full record of proceedings in the court a quo is required in the case of a *petition* is to enable a judge to determine whether the evidence contained in the record amounted to proof of the findings of fact made by the magistrate and whether there were irregularities material enough to possibly vitiate the conviction. The CC made it clear that '(w)ithout the record, such an assessment cannot reliably be made and accordingly without a record it cannot be said that the accused has been afforded an opportunity to have the conviction and sentence "adequately reappraised".⁵⁰ In determining whether the exceptions provided for in s 309C(4)(c) are justifiable, the CC examined them separately.

Subsection (4)(c)(i) provides that the record is not required to be sent to the High Court if the accused was legally represented at the trial in the regional court. There is no justification to make an exception with regard to accused persons who were represented at trial but who no longer enjoy representation. On account of the fact that unrepresented persons have to prepare their own petitions, there is no valid reason why they should not be dealt with by the general rule (the compulsory making available of the full record of the proceedings in the court a quo).

Subsection (4)(c)(ii) provides that the full record of proceedings in the court a quo need not be submitted to the High Court if the accused and the prosecutor so agree. Not all accused persons will, however, be able to determine whether the record will be required. There is thus no justification for this exception.

Subsection (4)(c)(iii) states that the record need not be sent if the appeal relates only to the sentence. The CC stated that

'(i)t is entirely possible that neither the judgment of the magistrate on the merits and sentence nor the petition would pick up on matters favourable to the accused that would have an effect on sentence. The absence of the record in these cases might well perpetuate an error made by a magistrate'.⁵¹

Subsection (4)(c)(iv) exempts the clerk from sending the full record of the proceedings from the court a quo in a petition regarding an application for condonation. The CC stated that the prospects of success are relevant in these cases, and that this exception cannot be justified.

⁵⁰ *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [40].

⁵¹ *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [43].

The CC concluded by finding that s 309C is inconsistent with the Constitution to the extent that all four exceptions set out above could not be justified, and consequently were constitutionally invalid.⁵²

b) Section 309C(5)(a) of the CPA: issues regarding the required number of judges

The CC compared the situation of an application for leave to appeal from a magistrates' court to the High Court, on the one hand, with an application from the High Court to the Supreme Court of Appeal, on the other hand. In the second instance, two judges are required to consider such applications. The CC found that there is no reason why the same should not be required in the first instance (an application for leave to appeal from a magistrates' court to the High Court). The reasons as to why two judges are required include the fact that a refusal to grant leave will be the end of the road for many accused persons; the fact that collegial discussion is very valuable; and the fact that it serves as a safeguard to prevent the improvident preclusion of the right to appeal.⁵³ The CC stated that 'the constitutional requirement of an adequate reappraisal of the record requires two Judges to consider the record' and that 's 309C(5)(a) is inconsistent with the Constitution to the extent that it provides for the petition for leave to appeal to be heard by a single Judge'.⁵⁴

c) Section 309B and 309C of the CPA: issues relating to the possibility of the whole application for leave to appeal and petition procedure being inconsistent with the Constitution

The CC examined the above by presuming that in the event of the magistrate refusing to grant leave to appeal, the full record of the proceedings in the court a quo will in all matters be placed before two High Court judges, and found that there are practical reasons why such procedure is desirable: 'It allows for unmeritorious appeals to be identified and prevented and therefore not result in a waste of Judicial resources'.⁵⁵ Once amended according to the CC judgment, the procedure will afford the right contemplated in s 35(3)(o) of the Constitution. The procedure as a whole can therefore not be declared invalid. When considering an application for leave to appeal, the magistrate

⁵² *Shinga v The State; O'Connell v The State (1)* supra (n1) at paras [40] – [45]. See also *Bekker et al* op cit (n30) 367.

⁵³ *Shinga v The State; O'Connell v The State (1)* supra (n1) at paras [46] – [48].

⁵⁴ *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [48].

⁵⁵ *Shinga v The State; O'Connell v The State (1)* supra (n1) at para [51]. See also *Bekker et al* op cit (n30) 345.

is required to consider whether another court may reach a different conclusion either with regard to the facts or to the law or to both.⁵⁶ The Court stated that this consideration

‘... should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court’.⁵⁷

d) Section 309(3A) of the CPA: issues relating to the appeal itself

At the time of the CC case, s 309(3A) read as follows:

- (a) An appeal under this section must be disposed of by a High Court in *Chambers* on the *written argument* of the parties or their legal representatives, unless the Court is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the Court regarding the appeal.
- (b) If the Court is of the opinion that oral argument must be submitted regarding the appeal as contemplated in para (a), the appeal may nevertheless be disposed of by that Court in *Chambers* on the written argument of the parties or their legal representatives, if the parties or their legal representatives so request and the Judge President so agrees and directs in an appropriate case’. (our emphasis)

The KwaZulu-Natal High Court in the *Shinga* case referred to the traditional, statutory and constitutional provisions which required all court proceedings to be held in public, and held that the right of a fair trial also included subsequent proceedings such as appeals and revisions. The accused or his/her legal representative should be given the opportunity to give oral argument. Counsel for the amicus curiae submitted that the object of s 309(3A) was to save judicial time and resources and to streamline the process, but stated, in fact, that the opposite was accomplished. For example, in cases where the judges agree that oral argument is required, the resultant necessary arrangements would cause long delays and further burden the court resources. In addition, there was no indication as to the manner in which decisions were to be published. The CC stated that ‘even practical merit would not easily render them acceptable’.⁵⁸ The CC made it clear in paragraphs [25] and [26] that:

⁵⁶ *Shinga v The State; O’Connell v The State (1)* supra (n1) at paras [49] – [53].

⁵⁷ *Shinga v The State; O’Connell v The State (1)* supra (n1) at para [53].

⁵⁸ *Shinga v The State; O’Connell v The State (1)* supra (n1) at paras [22] – [24].

‘(t)he section makes dangerous inroads into our system of justice which ordinarily requires court proceedings that affect the rights of parties to be heard in public. It provides that an appeal can be determined by a Judge behind closed doors. No member of the public will know what transpired; nobody can be present at the hearing. Far from having any merit, the provision is inimical to the rule of law, to the constitutional mandate of transparency and to justice itself. And the danger must not be underestimated. Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based.

The importance of criminal appeals being argued and heard in open court cannot thus be gainsaid. The survivors of crime, those accused of it, and the broader community have a right to see that justice is done in criminal matters. Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster Judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal-justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.’

The general exception permitting applications for leave to appeal to be heard in chambers is permitted in order to ensure that judicial resources are preserved for deserving cases.

The CC found that the review or appeal must be as fair as the trial itself must be. The accused and the prosecution must be given the opportunity to advance their cases. Oral argument is an important and significant tool in the hands of the parties. In addition, victims and their families have a right to attend these proceedings as they have an abiding interest in the outcome of the appeal. The CC therefore supported the High Court’s finding in this regard, and found that the provisions of the section are inconsistent with the Constitution.⁵⁹

5. The appropriate remedy, retrospectivity, and the issue with regard to legal aid

The procedure established by ss 309B and 309C was found to be inconsistent with the Constitution in three aspects. First, the CC decided to sever the proviso to s 309C(4)(c) as well as s 309C(4)(c)(i), (ii), (iii) and (iv) as the clerk of the court would not be obliged to send any

⁵⁹ *Shinga v The State; O’Connell v The State (1)* supra (n1) at paras [20] – [31]. See also *Bekker et al* op cit (n30) 368.

record to the petition judges if all of s 309C(4)(c) were to be set aside. The effect of the CC judgment is that the full record of the proceedings in the court a quo must be furnished in every case. Secondly, it would also have been inappropriate to set aside the whole of s 309C(5). The CC decided to use the remedies of severance and reading-in.⁶⁰ Thirdly, s 309(3A) was found to be unconstitutional and invalid in its entirety.⁶¹ The order had no retrospective effect as it would not be just and equitable.⁶² It applied to all cases in which judgment had not been delivered before 22 March 2007.⁶³

The issue with regard to legal aid could not be dealt with by the CC as the Legal Aid Board was not joined as a party to the proceedings. In passing, the CC made it clear that if an accused person had been provided with legal aid for trial, and was subsequently convicted, he or she should ordinarily also be entitled to make an application for leave to appeal.⁶⁴

6. The CC order

The CC made the following order:

- With regard to applications for leave to appeal and petitions, the proviso to s 309C(4)(c) and subparas (i), (ii), (iii) and (iv) (s 309C(4)(c)(i) – (iv)) were declared to be inconsistent with the Constitution and invalid, and were severed from s 309C(4)(c).
- The words ‘a judge’ and the proviso to s 309(5)(a) were declared to be inconsistent with the Constitution and invalid, and were severed from s 309C(5)(a). The omission of the words ‘two judges’ in s 309C(5)(a) was also declared to be inconsistent with the Constitution and therefore invalid. The words ‘two judges’ were read into s 309C(5)(a) in substitution of the words ‘a judge’.
- With regard to the appeal itself, s 309(3A) was declared to be inconsistent with the Constitution and invalid.

The *Shinga* appeal was referred back to the KwaZulu-Natal High Court to be finalised in accordance with the CC judgment.⁶⁵

⁶⁰ *Shinga v The State; O’Connell v The State (1)* supra (n1) at paras [54] – [56].

⁶¹ See also Kruger op cit (n10) 30-2 and 30-65.

⁶² *Shinga v The State; O’Connell v The State (1)* supra (n1) at para [57].

⁶³ Order no. 6; see also Kruger op cit (n10) 30-65.

⁶⁴ *Shinga v The State; O’Connell v The State (1)* supra (n1) at para [58].

⁶⁵ *Shinga v The State; O’Connell v The State (1)* supra (n1) at para [59].

7. Post-CC case: recent legislative amendments with regard to criminal appeals from the lower courts

The Criminal Law (Sentencing) Amendment Act⁶⁶ was assented to on 21 December 2007, and commenced on 31 December 2007. Section 6 of this Act amends, amongst others, s 309(1)(a) of the CPA by extending the instances where persons convicted of an offence by a lower court may note an appeal without having to apply for leave in terms of s 308B.⁶⁷ The extension includes persons who were, at the time of the commission of the offence, below the age of 16 years; or at least 16 years of age but below the age of 18 years and who were not legally represented at the time of the conviction in a regional court, as well as to persons who were sentenced to imprisonment for life by a regional court under s 51(1) of the Criminal Law Amendment Act.⁶⁸

A copy of the CC order was published in Government Notice 373 of 2008.⁶⁹ The CC judgment only provided for amendments to the CPA with regard to criminal appeals from the magistrates' court to the High Court. However, the 2008 Judicial Matters Amendment Act⁷⁰ (hereinafter referred to as the JMAA) not only included these amendments, but also inserted amendments to the CPA regarding criminal appeals from the *High Court* to the *Supreme Court of Appeal*. The Memorandum on the Objects of the Judicial Matters Amendment Bill, 2008,⁷¹ acknowledges the fact that the CC found certain provisions of the CPA

⁶⁶ Act 38 of 2007.

⁶⁷ Section 309(1)(a) of the CPA (as amended in 2007) states as follows:

'Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that—

- (i) if that person was, at the time of the commission of the offence—
 - (aa) below the age of 16 years; or
 - (bb) at least 16 years of age but below the age of 18 years and was not assisted by a legal representative at the time of conviction in a regional court; and
 - (cc) sentenced to any form of imprisonment as contemplated in section 276 (1) that was not wholly suspended; or
- (ii) if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997),

he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a); ...'. (own emphasis indicating the 2007 amendments)

⁶⁸ Act 105 of 1997.

⁶⁹ Published in *Government Gazette* 30874 of 20 March 2008.

⁷⁰ Act 66 of 2008.

⁷¹ B 48B-2008.

to be inconsistent with the Constitution. The JMAA was assented to on 15 February 2009, and a number of sections commenced on 17 February 2009. However, the JMAA sections amending the sections 309C(4)(c), 309C(5)(a), and 309(3A) of the CPA have not yet been put into operation.

With regard to s 309(3A) of the CPA, s 13 of the JMAA addresses the finding of the CC by deleting the s 309(3A). As indicated above, s 15 of the JMAA does likewise with regard to criminal appeals from the High Court to the Supreme Court of Appeal by deleting ss 315(1)(b) and (c) of the CPA, which sections contain provisions similar to s 309(3A) of the CPA (which deal with appeals from the lower courts to the High Court).⁷² In respect of s 309C(4) of the CPA, s 14 of the JMAA deletes the proviso to, and the exceptions contained in that section (s 309C(4)(c)(i) – (ii)). Section 16 of the JMAA amends ss 316(10) and (12) of the CPA with regard to criminal appeals from the High Court to the Supreme Court of Appeal, which sections are similar to ss 309C(4) and (6) of the CPA. With reference to s 309C(5) of the CPA, s 14 of the JMAA determines that two judges must consider any petition as envisaged in s 309C of the CPA. The amendments to s 309C(6) of the CPA are consequential in nature.

The relevant sections in the Judicial Matters Amendment Act provide as follows:

Section 309C(4):

‘When receiving the notice referred to in subsection (3), the clerk of the court must without delay submit to the registrar of the High Court concerned copies of–

- (a) the application that was refused;
- (b) the magistrate’s reasons for refusal of the application; and
- (c) the record of the proceedings in the magistrate’s court in respect of which the application was refused.’

Section 309C(5):

- ‘(a) A petition as provided for in this section must be considered in chambers by *two judges* designated by the Judge President.
- (b) If the judges referred to in paragraph (a) differ in opinion, the petition must also be considered in chambers by the Judge President or by any other judge designated by the Judge President.
- (c) For the purposes of paragraph (b) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three judges.’ (our emphasis)

⁷² See also Kruger op cit (n10) 31-5 where it is stated that in light of the CC judgment in respect of s 309(3A), s 315(1)(b) should be regarded as invalid too, as the CC made it clear that criminal appeals should not be disposed of behind closed doors.

Section 309C(6):

‘Judges considering the petition may–

- (a) call for any further information from the magistrate who refused the application in question, or from the magistrate who presided at the trial to which the application relates, as the case may be; or
- (b) in exceptional circumstances, order that the petition or any part thereof be argued before them at a time and place determined by them.’

8. Conclusion

In its 2007 *Shinga* decision, the CC made it clear that all subsequent proceedings, for example applications for leave to appeal, petitions, appeals and reviews, should meet the requirements of a fair trial as set out in s 35(3) of the Constitution. Although the procedures of applying for leave to appeal by way of an application or a petition have undergone serious judicial and legislative scrutiny over the past few years, the CC stated that these procedures are necessary in order to identify and prevent unmeritorious appeals. In order to give full effect to the constitutionally guaranteed right to a fair trial, the CC ordered that the full record of the proceedings of the court a quo be sent to the High Court when a convicted person files a petition, that two judges consider the petition, and, that, if leave to appeal is granted, the appeal be heard in an open court with oral argument being provided for.

It is noteworthy that the CC finally took matters in its own hands. The CC decided to amend the CPA by using the tools of severance and reading in. In addition, the order was granted with immediate effect.

These amendments were subsequently published in Government Notice 373 of 2008. They were also included in the Judicial Matters Amendment Act 66 of 2008. However, the relevant sections of the 2008 Act have not yet commenced. (The authors have not been able to ascertain the reason for this delay as regards the commencement of the amending sections.)

The procedures regulating criminal appeals from the High Court to the Supreme Court of Appeal were also amended in order to align same with the Constitution, taking into account the implications of the CC judgment.

It remains to be seen whether this was the final intervention by the CC in criminal appeals from the lower courts. The 2007 *Shinga* decision was the third case of its kind that had to be decided upon by the CC during a period of 11 years (1996 – 2007); the previous two cases were *Ntuli* (1996) and *Steyn* (2001). It may be argued that the 2007 decision of the CC in *Shinga* to amend the objectionable provisions of the CPA was, at least in part, based on the reality that the legislature had not complied with the clear instructions of the CC in 1996 in *Ntuli*

and 2001 in *Steyn* as regards both the prescribed time frames for legislative amendment and the prescribed substance of the amendments in question. It may be surmised that the CC decided on this approach on account of insufficient formal and substantive compliance with its above-mentioned previous two judgments.⁷³

⁷³ Within this context, reference may also be made to the Constitution Eighteenth Amendment Bill, 2009 (General Notice 689 of 2009 (Department of Justice and Constitutional Development) published in *Government Gazette* 32289 of 1 June 2009), and the State Liability Bill, 2009 (also published in GN 689).

The State Liability Bill, 2009 has been published in response to the CC decision in *Nyatbi v Member of the Executive Council for the Department of Health, Gauteng* 2008 (9) BCLR 865 (CC) where the CC confirmed the order of constitutional invalidity of certain sections of the State Liability Act 20 of 1957 (as contained in the order of the Gauteng High Court in *Minister of Justice and Constitutional Development v Nyatbi In re: Nyatbi v Member of the Executive Council for Health, Gauteng* Case No. CCT53/09).

The Constitution Eighteenth Amendment Bill, 2009 would amend the Constitution to ensure that national legislation (the to be enacted State Liability Bill, 2009) would prescribe (cl 173A(1)(a)-(c))

- '(a) procedural requirements for the institution of legal proceeding against the state;
- (b) measures for enforcing the execution of final court orders against the state, including payments made by the state to comply with final court orders; and
- (c) measures to enable the state to deal efficiently and effectively with all legal proceedings in which the state is involved.'

According to cl 7 of the State Liability Bill, orders against organs of state (as defined in cl 1) sounding in money must be dealt with in a prescribed manner, which excludes the attachment of government property. An elaborate system of applications for, and approvals of, the release of funding is provided for. However, no provision is made for the attachment and sale in execution of government property in the event of payment not having been effected.

The fact that this approach is to be provided for within in the context of a special constitutional framework (to be introduced by the abovementioned cl 173A) would imply that the drafters are of the opinion that the enactment of the State Liability Bill, 2009 may result in a successful constitutional challenge. These provisions of the State Liability Bill, 2009 may possibly – in the absence of cl 173A – be challenged on the basis that the State Liability Bill, 2009 would represent a significant deviation of, and to a certain extent excludes, the normal manner in which court orders are executed. This, in the absence of a specific enabling provision in the Constitution, would probably be contrary to the constitutionally prescribed (s 173) inherent power of the superior courts to regulate their own process.

If enacted, the Constitution Eighteenth Amendment Bill, 2009 (read with the State Liability Bill, 2009) would also result in the lack of full formal and substantive compliance with a CC decision on constitutional invalidity. This approach, it may be argued, is another example of a process of not giving full effect to administratively contentious issues. This envisaged 2009 constitutional amendment may also be seen as a paradigm shift from (a) non-timeous formal compliance and incomplete substantive compliance (see the 1996 *Ntuli* and 2001 *Steyn* CC decisions), to (b) the exclusion of the constitutionally guaranteed fundamental power of the superior courts to determine and regulate its own processes (s 173 of the Constitution).

In this regard, mention might also be made of a number of attempts during the drafting and certification processes (1996 Constitution) to have the Labour Relations Act 66 of 1995 excluded from constitutional scrutiny by the CC (cl 241(1) NT: 'A provision of the Labour Relations Act, 1995 (Act No. 66 of 1995) remains valid, despite the provisions of the Constitution, until the provision is amended or repealed'). The CC dealt with this issue in the first certification judgment (*In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), para [149]). The objections against the inclusion of such provision included that it was in conflict with Constitutional Principle (hereinafter referred to as CP) IV (providing for the supremacy of the Constitution), CP II and CP VII (stating that the fundamental rights contained in the Constitution shall be justiciable). The CC made it clear that all statutory provisions (not contained in the Constitution itself) must be made subject to the supremacy of the Constitution and found that the section concerned was not in compliance with the CPs. In the *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) (the second certification judgment) the CC again ruled against such provision. In para [15] the CC stated that 'there is no longer any sustainable ground for objection to the constitutional provisions relating to labour relations (NT 23), the shielding of ordinary legislation from constitutional scrutiny (NT 241, and NT sch 6 s 22(1)(b))...' (footnotes omitted). The final text, as promulgated on 18 December 1996 (date of commencement: 4 February 1997) did not contain such provision.