CRIMINAL PROCEDURE

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LEGISLATION

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Chapter 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 came into operation on 21 March 2008. This chapter provides for, among other things, the compulsory HIV testing of certain alleged sex offenders and contains comprehensive provisions in order to ensure that such HIV testing is conducted in a sensitive and effective manner both during the pre-trial and trial stages of criminal proceedings.

Chapter 6 establishes a National Register for Sex Offenders. This chapter came into operation on 16 June 2008.

Regulations made in terms of sections 39 of the Act were published in GN R561 *GG* 31076 of 22 May 2008. These regulations pertain specifically to chapter 5.

South African Judicial Education Institute Act 14 of 2008

This Act was assented to by the President on 16 September 2008 (*GG* 31437 of 16 September 2008). The principal aim of the Act is to establish a South African Judicial Education Institute to address the general and long-recognized need for the further training and education of judicial officers. The Act also aims to promote the independence, impartiality, dignity, accessibility, and effectiveness of South African courts through appropriate education and training initiatives. It is envisaged that such training and education will enhance judicial accountability and the transformation of the judiciary in order to promote the implementation of the values mentioned in section 1 of the Constitution of the Republic of South Africa, 1996 (s 2). The Act comes into operation on a date fixed by the President in the *Government Gazette* (s 20).

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Judicial Service Commission Amendment Act 20 of 2008

The Judicial Service Commission Amendment Act 20 of 2008 amends the Judicial Service Commission Act 9 of 1994 and establishes procedures, structures, and mechanisms to deal with the conduct of judges. In the first instance, a Judicial Conduct Committee is established to receive and deal with complaints about judges (s 8 of the Amendment Act). Procedures to deal with such complaints are also provided for in Part III of chapter 2 (ss 14–18 of the Amendment Act). Section 12 obliges the Chief Justice to compile a Code of Judicial Conduct, in consultation with the Minister of Justice. This Code will, once accepted by Parliament, serve as the prevailing standard for all judicial conduct. The Act also provides for the establishment and maintenance of a register of judges' registrable interests (s 13 of the Amendment Act) as well as the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence, or gross misconduct by judges, and related matters (ss 21–34 of the Amendment Act). The commencement date has yet to be proclaimed by the President. The reason for the delayed commencement of the Amendment Act is primarily the fact that various guidelines, processes, and procedures, as well as the Code of Judicial Conduct, have to be in place before the Act can effectively and properly be implemented.

Correctional Services Amendment Act 25 of 2008

This Act effects many insertions, substitutions, amendments, and deletions of provisions of the Correctional Services Act 111 of 1998. It was assented to by the President on 11 November 2008 (*GG* 31593 of 11 November 2008). Allowance is made for these amendments to come into operation on different dates to be fixed by the President by proclamation in the *Government Gazette*. Some of the changes to the principal Act relate to the manner in which inmates are detained and the manner in which correctional centres are managed, the period before an offender may be placed on parole or correctional supervision, the general functioning of Parole Boards and the Judicial Inspectorate, as well as matters relating to officials of the Department of Correctional Services. The Act comes into operation on a date fixed by the President by proclamation in the *Government Gazette* (s 87(1)).

Renaming of the High Courts Act 30 of 2008

The Renaming of the High Courts Act provides for the renaming of all High Courts according to the directions of section 16(6)*(a)* of Schedule 6 to the Constitution. The Constitution states that all courts, including their structure, composition, functioning, and jurisdiction, and all relevant legislation, must be rationalized with a view to establishing a judicial system suited to the requirements of the Constitution. Section 1 of the Renaming of the High Courts Act consequently provides for the High Courts to be renamed in order to reflect the different provinces and areas in which the courts are seated. The new names take effect from 1 March 2009.

Diplomatic Immunities and Privileges Amendment Act 35 of 2008

This Act amends the Diplomatic Immunities and Privileges Act 37 of 2001, specifically regarding the definition of a 'member of family' (s 2 of the principal Act). The Amendment Act also provides that a certificate by the Director-General stating a fact relating to any question as to whether or not a person enjoys immunity or privilege in terms of the Act is prima facie evidence of that fact (s 9 of the principal Act). The Act comes into operation on a date fixed by the President by proclamation in the Government Gazette (s 3).

Regulation of Interception of Communications and Provision of Communication-related Information Act 48 of 2008

This Act is relevant to the Law of Criminal Procedure during the pre-trial phases of a criminal trial (especially regarding police investigations), and during the trial phase of a prosecution (regarding the admissibility of relevant evidence). The Act amends the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 to provide for new technologies and developments with regard to information and communications generated through or stored by electronic media. Section 40 deals exclusively with information obtained and kept by an electronic communication service provider who provides a mobile cellular electronic communications service. Such a service provider is obliged to implement a process to record and store the Mobile Subscriber Integrated Service Digital Network (MSISDN) number of the SIM-card of all South African citizens or permanent residents, as well as non-

citizens and -residents of South Africa, who request that a particular SIM-card be activated by the provider (s 40(2) of the principal Act). The full name, surname, identity number, and physical address of all such persons must also be recorded and stored together with the MSISDN number and SIM-card details (ibid). The service provider is also obliged to verify all information provided by its clients and conducts this process of recording and storing information at its own cost (s 40(3) and (4) of the principal Act).

The Act also places obligations on clients of electronic communication service providers and owners of SIM-cards. Any customer who sells or provides an activated SIM-card to another person (other than a family member) and the recipient of the card must immediately, upon conclusion of the transaction, provide the relevant electronic communication service provider with all the pertinent information listed above (s 40(5) of the principal Act). The service provider is, in turn, obliged to verify all the information and to record and store the information at its own cost (s 40(6) of the principal Act). Any service provider who fails to comply with the directives and provisions of the Act is guilty of an offence and liable on conviction for a fine not exceeding R110 000 for each day on which such failure to comply continues (s 51(3)A of the principal Act). Any person or customer of a service provider who fails to discharge these obligations is likewise guilty of an offence and faces a fine or imprisonment for a period not exceeding twelve months (s 51(3)B of the principal Act).

With regard to existing clients of service providers prior to the commencement of the Act, a mobile cellular electronic communications service must, within eighteen months from such date, record and store the information contemplated in section 40(2) in respect of all customers whose SIM-cards are activated on its system, if the information in question has not already been recorded and stored in terms of section 40 (s 62(6)(a) of the principal Act). An electronic communication service provider may also not allow service continuation on its electronic communication system in respect of any activated SIM-card if the information has not been recorded and stored at the expiry of the eighteen month period (s 62(6)*(d)* of the principal Act). The Act comes into operation on a date fixed by the President by proclamation in the *Government Gazette* (s 7).

National Prosecuting Authority Amendment Act 56 of 2008, and the South African Police Service Amendment Act 57 of 2008

The National Prosecuting Authority Amendment Act 56 of 2008 amends the National Prosecuting Authority Act 32 of 1998 by deleting all references to the Directorate of Special Operations (the 'Scorpions') and any related matters.

The South African Police Service Amendment Act 57 of 2008 amends the South African Police Service Act 68 of 1995 to provide for the transfer of powers, investigations, assets, budget, and liabilities of the Scorpions to the South African Police Service. The Amendment Act also aims to enhance the capacity of the South African Police Service to prevent, combat, and investigate national priority crimes and other crimes.

Criminal Procedure Amendment Act 65 of 2008

This Act amends the Criminal Procedure Act 51 of 1977 to provide, inter alia, for the continuation of certain phases of a criminal trial via audiovisual link technology in certain circumstances (s 159A of the principal Act). An accused who is older than eighteen years, is in custody in a correctional facility pending his or her trial in respect of an offence, has already appeared in court, whose case has been postponed and who is required to appear or to be brought before a court in any subsequent proceedings for either a further postponement of the case or for consideration of release on bail in terms of sections 60, 63, 63A, 307, and 308A of the principal Act (where the granting of bail is not opposed by the prosecutor, or where the granting of bail does not require the leading of evidence) is not required to appear or to be brought physically before the court (s 159A(2)). Such an accused may rather, subject to the provisions of the Act, 'appear' before the court by means of an audiovisual link, and the accused will be deemed to be physically before the court, unless the court directs, in the interest of justice, that the accused appears or be brought physically before it. The proceedings provided for in section 159A(2) will be regarded as having been held in the presence of the accused person if, during the proceedings, that accused person is held in custody in a correctional facility and is able to follow the court proceedings and the court, in turn, is able to see and hear the accused person (s 159A(3) of the principal Act). The practical effect of

section 159A(2) is consequently that the remote point where the accused is held during the proceedings as described in this section is regarded as a part of the court (s 159A(4) of the principal Act). Section 159B sets out the requirements for the audiovisual appearance by accused persons, and section 159C the technical requirements for the use of an audiovisual link. Section 159D affirms that the protection afforded to the communication between an accused person and his or her legal representative applies also to the communication between an accused and his or her legal representative(s) via audio link, audiovisual link, or document transmission.

The Amendment Act further provides for three categories of criminal records that will fall away as previous convictions or be expunged. Section 271A*(a)* and *(b)* of the principal Act allows certain previous convictions to fall away after the expiry of ten years, and after certain conditions have been met. According to section 271A*(a)*, the conviction of an accused found guilty of any offence in respect of which the sentence is imprisonment for a period exceeding six months without the option of a fine, but where the passing of the sentence was postponed in terms of section 297(1)*(a)*, or the convicted person was discharged in terms of section 297(2) without having passed a sentence, or the convicted person was called upon to appear before the court in terms of section 297(3), or the convicted person was discharged with a caution or reprimand in terms of section 297(1)*(c)*, will fall away after ten years. Section 271A*(b)* of the Act allows for previous convictions to fall away where the court convicted a person of any offence in respect of which the sentence is a period of imprisonment not exceeding six months without the option of a fine, and ten years have elapsed after the date of conviction of the said offence. However, if during that period of ten years the convicted person was convicted of another offence in respect of which the sentence was a period of imprisonment exceeding six months without the option of a fine, the previous conviction will not fall away.

Section 271B provides for the expungement of certain criminal records. There are two main categories of criminal records that qualify for expungement: Where a court has imposed any of the sentences listed in section 271B(1)*(a)* on a person convicted of an offence, the criminal record of that person must, subject to paragraph *(b)* and subsection (2) and section 271D of the Act, and on written application of the convicted person to the Director

General: Justice and Constitutional Development, be expunged after ten years have elapsed after the date of conviction for that particular offence. But this does not apply to persons convicted of sexual offences against children and whose names have been included in the National Register for Sex Offenders in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It also does not apply to persons convicted of certain offences in terms of the Children's Act 38 of 2005 and whose names have been included in the National Child Protection Register. If the convicted person was further convicted of another offence during that period, and was sentenced to a period of imprisonment without the option of a fine, the previous criminal record(s) cannot be expunged in terms of section 271B.

A second category of criminal records that may be expunged in terms of this Act includes the criminal records of persons convicted of offences under 'Apartheid' legislation enacted before the Constitution took effect and where these criminal records have, for some reason, not been expunged automatically by the head of the Criminal Record Centre. In such instances, the convicted person may apply to the Director General for a certificate of expungement to be issued (s 271C). Section 271D deals with the expungement of criminal records by the Criminal Record Centre, generally: the head of the Criminal Record Centre of the South African Police Service (or his or her official representative) must expunge the criminal record of any person if he or she is furnished with a certificate of expungement issued by the Director General, or if that convicted person qualifies for automatic expungement of his or her criminal record in terms of section 271C(1) The procedure for such expungement is provided for in section 271D(2).

Judicial Matters Amendment Act 66 of 2008

The Judicial Matters Amendment Act 66 of 2008 contains various amendments to the Criminal Procedure Act. Some of the most important and far-reaching amendments are the provisions to regulate further the payment of admission of guilt fines and the release of an accused person on bail, and the appointment of psychiatrists in cases involving the mental capacity of an accused person; to provide for the prosecution of persons who commit offences while on diplomatic duty outside the borders of South Africa; to regulate the imposition of periodical imprisonment; and to regulate further appeals in criminal proceedings

from a magistrate's court to a High Court, and from a High Court to the Supreme Court of Appeal.

The Amendment Act also amends the Attorneys Act 53 of 1979 to extend the category of persons entitled to engage candidate attorneys and to increase the fines that may be imposed on attorneys and candidate attorneys for improper conduct; the Criminal Law Amendment Act 105 of 1997, to insert certain serious offences in Part I of Schedule 2; the Judges' Remuneration and Conditions of Employment Act 47 of 2001, to regulate further the service of judges after discharge from active service; and the Prevention and Combating of Corrupt Activities Act 12 of 2004, further to regulate penalties. The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 is amended to extend the period within which the National Register for Sex Offenders must be established; the period within which the National Commission of Correctional Services, the National Commission of the South African Police Service, and the Director General: Health must forward particulars in their possession to the registrar; and the period within which the Minister of Justice and Constitutional Development must adopt and table the policy framework relating to sexual offences in Parliament.

CHILD JUSTICE ACT 75 OF 2008

This Act will come into operation on 1 April 2010 or any earlier date fixed by the President by proclamation in the *Government Gazette* (s 100). It will have far-reaching effects on criminal procedure regarding persons under the age of eighteen years. The Act effectively establishes a separate, but parallel, criminal justice system for children who are in conflict with the law and are accused of committing offences. The Act is mindful of the values underpinning the Constitution, the scope and nature of international instruments, and the obligations of South Africa in terms of these instruments. Special emphasis is placed on restorative justice, the present realities of crime in South Africa, the potential long-term benefits of a less stringent criminal justice system for troubled youth, the advantages and appropriateness of informal inquisitorial pre-trial procedures in trials involving the youth, alternative measures regarding sentencing, and the adjudication of matters involving children, generally.

CASE LAW

ARREST

Use of Force

In *Motswana v MEC for Safety and Security* 2008 (1) SACR 404 (NC), the appellant claimed damages after having been attacked and bitten by a police dog, a German shepherd dog called 'Rommel'. The attack occurred when the dog's handler assisted with the lawful arrest of the appellant and the appellant resisted arrest. In the court below, the magistrate dismissed the appellant's claim on the basis that the conduct of the dog's handler was justified in terms of section 49 of the Criminal Procedure Act 51 of 1977

On appeal, the court first had to decide whether the use of a police dog had been reasonably necessary in order to arrest the appellant, and if such force was proportional in all the circumstances. It is generally accepted that where force is necessary to effect arrest, only the least degree of force reasonably necessary may be used (*Ex parte Minister of Safety and Security: In re S v Walters* 2002 (2) SACR 105 (CC) at 134*g*). Three facts weighed heavily against the respondent in this regard. In the first instance, two police officers accompanied the handler and were less than a car's length away at the time of the incident. No explanation was given during the trial as to why the assistance of the two police officers was not called upon to effect the arrest. Secondly, after the first attack the appellant hobbled away to his own car and the police dog was released again to attack the appellant. It was clear from the testimony provided that the two police officers accompanying the handler would have arrested the appellant at this stage had the police dog been on its leash. Thirdly, the handler's choice of force — using the police dog rather than the assistance of the two accompanying policemen — was, objectively, not the option that would probably have caused the least injuries to the appellant. The handler testified himself that his dog was very aggressive and he clearly knew that the dog would bite the appellant once released (paras [7]–[8.2]). Lacock J observed that it was disturbing that trained dog handlers regarded the setting of a police dog on a person as the use of 'minimum force'. He found the setting of a dog on a person for purposes of arrest to be a grave violation of such a person's rights to dignity, freedom, and security, in addition to this being an extremely humiliating act. Police officers should consequently

exercise the greatest care and responsibility before they use dogs to apprehend suspects. Where the use of a dog was justified, the handler should, if at all possible, warn the suspect that the dog would be used and afford the suspect the opportunity rather to submit to the arrest. The use of a dog as 'minimum force' was not legally justified within the meaning of section 49(2) of the Criminal Procedure Act (paras [8.3]–[9.2]).

Without Warrant

In terms of section 40 of the Criminal Procedure Act, an arrest without a warrant constitutes a drastic means of initiating a prosecution or securing an accused's attendance in court. Such an arrest without a warrant will be lawful only where the arrestee committed, or is on reasonable grounds suspected of having committed, a crime listed in Schedule 1.

In *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (W), the appellant, an attorney and businessman, became involved in an altercation with one of his employees. The employee became quite violent and started to damage property at the place of business, which led the appellant to fear further attack. The appellant then drew a revolver, pointed it at the employee, and asked her to leave the premises. A few days later the appellant was requested to make a statement at the local police station. He did so voluntarily. He was arrested shortly afterwards without a warrant on suspicion of having unlawfully pointed a firearm and committed theft. (The latter charge pertains to the allegation that the appellant had refused to release the employee's handbag.) The appellant was escorted back to his business premises to lock up and was paraded in handcuffs in front of his employees. He was also held in a cell with other prisoners for longer than 48 hours. During this spell in detention, the appellant suffered the humiliation of being seen in the cell by a number of his fellow attorneys, and he was deprived of access to his heart medication. In the end the prosecution withdrew the charges after bail was granted. The appellant's subsequent claim for damages was dismissed in the court below on the grounds that his arrest had been lawful, as he was reasonably suspected of having committed an offence contemplated in Schedule 1.

In *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T), Bertelsmann J held that with each case falling within the ambit of section 40, the police are obliged to consider the availability of less invasive methods to bring a suspect to court.

However, in *Charles v Minister of Justice & others* 2007 (2) SACR 137 (W) (also *Tsose v Minister of Justice* 1951 (3) SA 10 (A)), *Louw* was rejected and the court held that no further conditions may be added for the purposes of an arrest without a warrant other than those provided for in the Act. And, the existing law does not demand that any milder method of bringing someone to court has to be considered or invoked whenever such milder method would be as effective as an arrest without a warrant (see (2007) 3 *JQR Criminal Procedure* 2.3). In *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) (see (2008) 1 *JQR Criminal Procedure* 2.1), the Constitutional Court did not resolve this conflict between *Louw* and *Charles*: it thought that *Van Niekerk* was not a viable test case as the trial court's judgment was based on the notion that the lawfulness of an arrest is highly fact specific. Sachs J also pointed out that nuanced guidelines for an arrest without a warrant already existed in the form of Police Standing Orders, and that executive and legislative options are available should the Minister wish to provide greater guidance to police officers (para [19]).

In *Gellman*, Salduker J and Levenberg AJ provided comprehensive judicial guidelines to govern arrest without a warrant. The court held that an interpretation of section 40 that supports the argument that a policeman always has the right to effect an arrest without a warrant whenever reasonable grounds of suspicion exist would actually render section 43 of the Act nugatory and irrelevant. Obtaining a warrant, according to such reasoning, would actually be an inconvenience that most peace officers could shrug off whenever they chose to do so. Having reviewed recent authority on whether arrest without a warrant should be used only as a last resort, the court suggested the following approach to determine whether or not to make an arrest without a warrant: The police officer should consider whether there are reasonable grounds to suspect that the person to be arrested has committed a Schedule 1 offence. In making such a determination, the officer should analyse the available evidence critically. It will be only in rare circumstances that the officer will be able to form a reasonable suspicion based only on a witness's statement; the officer should preferably find corroborative evidence before carrying out the arrest. Where the officer personally witnessed the events that gave rise to the suspicion, it may be that no corroborative evidence is necessary. Once the officer has determined that there are reasonable grounds for suspecting that

a Schedule 1 offence has been committed, the officer has to consider whether there are factors militating in favour of effecting an arrest without a warrant. Such factors may include the risk of the suspect absconding or committing further crimes, if the arrest is delayed in order to obtain a warrant. It is also preferable that a suspect's attendance at court be secured by means of a summons, and this method always has to be considered. The arresting officer should always carefully consider his or her standing orders. Where he or she exercised a discretion in violation of such orders, that may in itself indicate that the discretion was not properly exercised and that the arrest without a warrant was unlawful (para [97]). However, the court was quick to warn that these guidelines should not be regarded as absolute rules and that the court did not intend to be prescriptive. In the present case, the arrest and subsequent detention of the appellant was unlawful (paras [98]–[100]).

See also *Olivier v Minister of Safety and Security & another* 2008 (2) SACR 387 (W).

Authorization under Prevention of Organized Crime Act

In *Moodley & others v National Director of Public Prosecutions & others* 2008 (1) SACR 560 (N), the applicants were charged with racketeering in terms of section 2(1) of the Prevention of Organized Crime Act 121 of 1998 ('POCA'). The applicants brought an application in the regional court to have the authorization of the prosecution by the National Director of Public Prosecutions (NDPP) declared invalid. Section 2(4) of the POCA provides that a person will be charged with committing an offence contemplated in section 2(1) only if a prosecution is authorized in writing by the NDPP. The authorization in the present case did not stipulate the dates on which the alleged offences were committed, and also omitted to identify the places where the alleged offences were committed. While the charge sheet was a lengthy document containing details of each of the charges, the authorization itself was very wide — it covered any act or omission of the applicants' prior to the date mentioned in it; the only limitation was that certain sections and subsections of the POCA were set out (paras [15] and [20]–[24]).

In reviewing a decision of a regional court magistrate, Nicholson J (Mtshangase J concurring) held that the section 2(4) authorization by the NDPP was invalid and of no force and effect. In fact, if such an authorization were permitted, it would certainly

lead to abuse (paras [15] and [20]–[24]). The rationale of the authorization required in section 2(4) was that the ordinary decision of a prosecutor regarding the prosecution of a case relating to racketeering was not sufficient, given the importance and complexity of these sort of charges. The authorization of the NDPP is consequently pivotal before a prosecution can be instituted. The NDPP had to apply him- or herself to the information in the docket and to the particular charges that emerged from them before he or she issued an authorization (paras [25]–[37]). In the present case, the authorization was too broad and lacked the necessary specificity.

In *S v De Vries* 2008 (1) SACR 580 (C), the accused likewise attacked the validity of the section 2(4) authorization. Bozalek J held that the authorization in the present case was valid; '[the] POCA does not prescribe the form which such authorization should take, and the authorization concerned not only the identity of the accused, but also stated the specific offences in terms of s 2(1)' (para [33]).

BAIL

In *S v Petersen* 2008 (2) SACR 355 (C), the appellant appealed against the Wynberg regional court's refusal to grant her second application for bail pending the finalization of her trial. Her first application for bail was brought in terms of section 60(11)(1)*(a)* of the Criminal Procedure Act. It states that an accused charged with a Schedule 6 offence must be detained in custody pending his or her trial, unless the accused adduces evidence which satisfies the court that exceptional circumstances exist which, in the interest of justice, permit his or her release. The exceptional circumstances relied on by the appellant included the following: she had a history of severe psychiatric problems; her 'precarious mental state' required ongoing psychiatric care, medication, and support which the prison facilities and services would not be able to supply; and the needs of her eight-year-old daughter necessitated her pre-trial release. The State opposed this first bail application on the grounds set out in section 60(4)*(a)*, *(b)*, *(c)*, and *(e)*, arguing that there was a likelihood that the appellant would, if released on bail, endanger the safety of the public, attempt to evade her trial, attempt to influence or intimidate witnesses, and disturb the public order or undermine the public peace and security.

The regional court refused to grant the appellant bail. White-

head AJ, in his judgment on appeal against such refusal, agreed with the court below that the appellant had failed to establish that her history of severe psychiatric problems or her precarious state of health at the time constituted exceptional circumstances as required by section 60(11)(1)*(a)*. The same applied to her need for ongoing psychiatric care and the alleged inability of the prison facilities and services to meet those needs. Regarding the parental needs of her minor daughter, the court found that the appellant had actually been unable to care for her daughter because of her ongoing ill health, and that she relied on two domestic assistants to act as primary caregivers (para [19]). Not only was the appellant limited in her ability to give the child parental care, but there was also the question as to whether unlimited access to the appellant might prove stressful to the child (para [20]).

The second bail application, before the same regional magistrate who had heard the first application, was rather more substantial than the first. It was based on various new factors and exceptional circumstances requiring the court's consideration (para [24]). The regional court again refused bail. It was clear to the court that in an application for bail the burden is on the accused to adduce evidence and to prove, to the satisfaction of the court, the existence of exceptional circumstances of such a nature as to permit the release of the accused on bail. The court must also be satisfied that the release of the accused on bail is in the interest of justice (para [54]).

On appeal, it was held that there had been wide-ranging opinions on the meaning and interpretation of 'exceptional circumstances' in the context of section 60(11)*(a)*. 'Exceptional', generally, connotes something unusual, extraordinary, remarkable, peculiar, or different. The particular context and circumstances of a case under consideration may mandate a varying degree of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity, or difference. Allowance should accordingly be made for a certain measure of flexibility in the judicial approach to the question (paras [55]–[56]). In a second or subsequent application for bail where an accused relies on new facts, the court must be satisfied that such facts are indeed new and that they are relevant to the new application. The purpose of adducing new facts should not be to address problems encountered in the previous application or to fill gaps in previously presented evidence. And where evidence was avail-

able to the accused at the time of the previous application but for whatever reason was not adduced, it cannot be relied on in a later application for bail as new evidence. If, however, the evidence is new and relevant, it must be considered together with all the facts placed before the court in the previous bail application(s) (paras [57] and [58]).

As to whether an accused should, in the interests of justice, be released on bail, section 60(4) states five grounds, the existence of one or more of which would preclude such a release. Section 60(6) enumerates a number of factors which a court may consider, including any other factor which, in the opinion of the court, should be considered (s 60(6)*(j)*). But these provisions do not affect the right of an accused 'to be released from detention if the interests of justice permit, subject to reasonable conditions', as provided in section 35(1)*(f)* of the Constitution. They are likewise not intended to increase the burden on the accused to prove, on a balance of probabilities, that there are exceptional circumstances justifying his or her release and that such release would not prejudice the interests of justice (paras [59] and [60]).

In the present case, the court found that, on an analysis of the evidence as a whole, old and new, the appellant had not succeeded in demonstrating that the decision of the regional court was wrong and should be set aside (para [82]).

Conduct of Presiding Officer

In *S v Phiri* 2008 (2) SACR 21 (T), the regional magistrate constantly criticized the police, the prosecution, the defence, and a higher court which sought answers to queries concerning the conduct of a trial. Such conduct was held to be unbecoming. Also, discourtesy to witnesses and insults hurled with impunity in facie curiae could not be condoned. The conduct rendered the proceedings irregular (at 25–6). Examples of the conduct described as unbecoming and irregular include the following: The magistrate directed the prosecutor to watch TV and DSTV on channel 69 and gave lessons to the prosecutor on how to conduct the prosecution. The magistrate had, for no acceptable reason, stopped the complainant from answering a question by the defence. She also stopped the prosecutor from leading evidence of identity, and instead led the evidence herself. She had, in respect of at least two State witnesses, taken over the examination. She explained that completion of at least eighteen cases per month was needed to keep the court roll under control

and that the prosecutor was inexperienced. She also said that if the High Court could provide her with an experienced and competent prosecutor, she would be able to sit back and listen to evidence.

In *S v Mlimo* 2008 (2) SACR 48 (SCA), the appellant attacked his convictions for murder and attempted murder on three grounds. The first was that he had not received a fair trial due to the impatience, confrontational manner, and continuous descents into the arena of the trial judge. Mthiyane JA (Farlam JA and Kgomo AJA concurring) was satisfied that the trial judge participated actively in the proceedings and agreed that there were undoubtedly times when the trial judge was impatient with the appellant's attorney. However, after each verbal skirmish between the trial judge and the attorney, the judge invited the attorney to proceed with his cross-examination. Also, the attorney handled the trial judge's impatient interventions with ease, and was steadfast and never lost his composure. The court was consequently satisfied that the manner in which the judge conducted the case had not affected the fairness of the trial.

In *S v Maasdorp* 2008 (2) SACR 296 (NC), Bosielo AJP (Makgohloa J concurring) found it unacceptable that a magistrate should mero motu instruct a prosecutor to bring an exhibit to court and receive the exhibit without involving either the prosecution or the defence.

In *Mafongosi v Regional Magistrate, Mdantsane & another* 2008 (1) SACR 366 (Ck), the accused's conviction and sentence were set aside on the basis that the accused's trial had been unfair, which resulted in a failure of justice. The magistrate decided and submitted in open court that the accused's right to legal representation had expired, and that the accused would not be granted a further remand to secure legal representation. This declaration was made after many attorneys had previously either withdrawn or been unable to continue with the case. The accused agreed to take responsibility for her own representation and the magistrate accepted this. However, on automatic review, Ndzondo AJ (Petse J concurring) found this to be 'grossly irregular': 'The fact that the accused had confirmed in open court that she would conduct her own defence could not assist the State as her confirmation had to be considered in the light of what the magistrate had decided earlier and repeated in open court, namely that there would be no further opportunity to obtain another legal representative' (para [25]).

See also *S v Mafu & others* 2008 (2) SACR 653 (W).

Date of Release

Section 276A(3)*(a)*(ii) of the Criminal Procedure Act provides that where a person has been sentenced to imprisonment for a period exceeding five years but his or her date of release in terms of the Correctional Services Act 8 of 1959 is not more than five years in the future, an application may be made to the trial court for the reconsideration of the sentence. In *Price v Minister of Correctional Services* 2008 (2) SACR 64 (SCA), the appellant had been sentenced in December 2000 to fifteen years' imprisonment. After serving four and a half years he launched proceedings in the High Court for a review of the decision of the prison authorities not to consider him eligible for possible referral for reconsideration of sentence. The appellant interpreted the to the 'date of release' in section 276A(3)*(a)*(ii) to be to the earliest possible date upon which a prisoner becomes eligible to be considered for placement on parole, or the date of expiration of sentence, whichever occurred first. The respondent, however, contended that the 'date of release' meant the date of the expiration of the prisoner's sentence, less any legal remission of sentence. A further question for determination was whether the fact that the appellant had been released on parole in October 2006 precluded him from such consideration in terms of section 276A(3)*(a)*(ii).

The court found that, at first blush, section 276A(3)*(a)*(ii) appears to refer to the date of the expiration of the prisoner's sentence so that the period of correctional supervision provided for in that section would similarly not exceed five years. However, the provisions of the Act and the regulations qualified the wording of section 276A(3)*(a)*(ii). In particular, section 63(1)*(b)*(i) provides, for purposes of the recommendations that a parole board has to make regarding the possible placement of a prisoner under correctional supervision, that the date of release contemplated in section 276A(3)*(a)*(ii) is deemed to be the earliest date on which the prisoner may be considered for parole, or the date of expiration of sentence, whichever occurred first. However, this construction had been rejected on two grounds. In the first instance, the 'date of release' referred to in section 63(1)*(b)*(i) was deemed to be the date of release only for purposes of the recommendations to be made by the parole board, and for no other purpose. Secondly, it had been held that the construction

contended for results in serious anomalies which would be contrary to Parliament's intention that the period during which a person should be under correctional supervision should not exceed five years (*Steenkamp v Commissioner of Correctional Services; Maaga & others v Minister of Correctional Services & others* [2005] JOL 13668 (T)). But if this interpretation of the particular section was accepted, then section 63(1) would serve no purpose. The court consequently held that the words 'date of release' in section 276A(3)(a)(ii) connoted, for the purpose of a prisoner subject to the provisions of the Act, the date on which such prisoner might be considered for placement on parole, or the date of his or her release on expiration of the sentence, whichever occurred first (paras [10]–[14]). Also, as there were material differences between release on parole and the possible consequences of a referral for reconsideration of sentence in terms of section 276A(3)*(a)*(ii) of the Criminal Procedure Act, no reason existed why a prisoner who had reached his or her parole consideration date should, as a matter of policy, be denied the opportunity of having the sentence subsequently reconsidered (para [15]). And section 276A(3)*(a)*(ii) applied only to prisoners — a person released on parole was no longer a prisoner even though his or her sentence was yet to expire (para [16]).

Duplication of Convictions

In *S v Whitehead & others* 2008 (1) SACR 431 (SCA), the appellants were convicted in a regional court of public violence and culpable homicide. The seventh appellant was furthermore convicted of assault with the intent to do grievous bodily harm. All the appellants were sentenced to five years' imprisonment on each charge, of which two years were suspended. The seventh appellant received an additional two years for the assault. All seven appellants appealed against their convictions and sentences for culpable homicide and against their sentences for public violence. The seventh appellant appealed against his assault sentence.

The Supreme Court of Appeal court mero motu raised the issue as to whether the guilty verdicts on the counts of public violence and culpable homicide constituted a duplication of convictions. The court emphasized that there was no infallible formula to determine whether there had been a duplication of convictions. The various tests formulated by the courts were not rules of law, nor were they exhaustive. Also, where the matter could not be

decided satisfactorily by applying these practical guidelines, common sense, wisdom, experience, and fairness had to guide the court (paras [34] and [35]). In contesting multiple convictions, a court may use an 'evidence test' which enquires whether the evidence necessary to establish the commission of one offence involved proving the commission of another offence (paras [39]–[41]). Courts also sometimes apply the 'intention test', in terms of which a person is regarded to have committed only one offence if that person had committed several acts and each act has the potential to be an offence on its own, but all the acts together rather constitute a continuous transaction carried out with a single intent. (The minority opinion in this case ignored these two tests and argued that where on the charge sheet there is a duplication, the tests are irrelevant (para [10]).)

The difficulty in the present case, however, was that in the first count specific reference was made to the unlawful and negligent killing of a person, a fact which the State proved in order to show that the conduct of the appellants satisfied the 'serious dimensions' element of the crime of public violence. And with regard to the second count (culpable homicide), the death of the particular victim was again the main point of contention. The minority (per Combrinck JA; Farlam JA concurring) took the view that on the basis of the rule against the duplication of convictions, the appellants should not have been convicted on the second count. The minority found that proof of culpable homicide as part of the offence of public violence necessarily proved the allegations in the second count (paras [1]–[13]). The minority sought to enforce the rule against the duplication of convictions on the basis that it forms part of the constitutional right to a fair trial.

The majority, by contrast, took the substantive law definitions of the two offences concerned as its point of departure and held that the State, in certain instances, will be able to prove the crime of public violence without any reference whatsoever to the negligent or intentional killing of another person. But the offence of culpable homicide is also capable of proof independent of acts of public violence. The majority consequently held that both these two propositions hold good in the present matter and the evidence of the general disturbance caused by the assailants to the public order would be sufficient to secure a conviction on the public violence charge. The State was also at liberty then to continue to prove the offence of culpable homicide.

Duty of Legal Practitioners to Assist Court

In *S v Tshabalala* 2008 (1) SACR 486 (T), the court noted with regret that it did not receive full and proper professional assistance from the appellant's legal representative and from the Director of Public Prosecutions (para [18]). Counsel had not been able to address the court meaningfully on particular points and both counsel had delivered heads of argument dealing with conviction and sentence when it was clear that leave to appeal had been granted only in respect of sentence. The court then listed a number of specific failings by the respective counsel. The court concluded that such poor performance could not be tolerated and ordered that neither counsel be permitted to recover fees for their appearance in the matter (ibid).

Duty of Police Officers to Report Crimes

In *S v Pakane & others* 2008 (1) SACR 518 (SCA), the appellants (two police officers) were aware of a shooting in which another senior police officer was involved but chose not to report the incident. By not reporting the incident the appellants tried to assist the perpetrator to avoid conviction. The Supreme Court of Appeal found such inaction by police officers to be unacceptable, and that it resulted in the appellants being guilty as accessories to the shooting. The court found that a police officer's duty to report crimes flowed from both section 205(3) of the Constitution and section 13(2) of the South African Police Service Act 68 of 1995 (para [30]). In terms of the latter section, a police officer is required to report an offence to his or her commanding officer as soon as he or she becomes aware of the unlawful conduct. However, the appellants claimed that they could not adhere to the requirement in section 13(2), as the person responsible for the unlawful shooting was also their commanding officer. Maya JA (Mthiyane JA and Hurt AJA concurring) held that such an interpretation of section 13(2) was 'a brazen perversion of the section' and that it 'would be absurd to accept that the officers honestly believed that they had no obligation to report the shooting incident because they were with their commanding officer when it occurred' (para [31]).

Extradition

In *S v Stokes* 2008 (2) SACR 307 (SCA), the South African government requested the government of the United States of

America provisionally to arrest the appellant with a view to his extradition. The appellant, after his arrest, waived his rights under the applicable extradition treaty, was extradited from the United States, and was charged with one count of theft and three counts of fraud (alternatively, theft) upon his arrival in South Africa. The appellant submitted that he could not be charged with these offences, as they were not the offences in respect of which his extradition had been sought. It was also contended that despite the provisions of section 100 of the Criminal Procedure Act, each of the thefts which the appellant allegedly committed must first be proved. Also, as the names of only three of the thirteen persons mentioned in the indictment had been mentioned in the application for his provisional arrest, it was submitted that a charge of theft in respect of the remaining ten persons must be excluded in terms of section 19 of the Extradition Act 67 of 1962.

The court held that the word 'sought' in section 19 could not have been intended to mean anything other than 'successfully sought'. If the word 'sought' were interpreted differently, it would result in the anomaly that a fugitive could be prosecuted in respect of offences that neither the requested state nor the fugitive himself consented to. Moreover, to interpret 'sought' to relate to offences for which extradition was required but not disclosed to the requested state or the fugitive would have an equally anomalous result (para [10]). The accused in this case could thus be prosecuted only for those offences mentioned in the application for his provisional arrest and on the strength of which the accused waived his rights in terms of the applicable extradition treaty (paras [11]–[14]).

Failure of Regional Court to Appoint Assessors in Murder Trial

In *S v Naicker* 2008 (2) SACR 54 (N), a regional court had failed to apply section 93ter(1)*(a)* of the Magistrates' Courts Act 32 of 1944, which requires a regional court magistrate to appoint two assessors to assist him or her in a murder trial. The assessors need not have experience in the administration of justice. And where the accused requests that the trial proceeds without assessors, this request may be adhered to or the magistrate may exercise a discretion to appoint one or two assessors. In *Naicker*, though, the accused did not request the trial to proceed without any assessors.

As it was trite that section 93ter(1)*(a)* is couched in peremptory

terms, the primary issue for decision was whether this type of irregularity constituted a failure of justice and required the conviction and sentence to be set aside (at 57–8, 60, and 61–2). The policy consideration underlying the compulsory appointment of assessors in regional court murder trials was aimed at facilitating the participation of lay assessors from other racial groups in the administration of the criminal justice system, which had hitherto been perceived as predominately white. Assessors would thus not always be of any real assistance to a regional court in reaching a final decision on factual issues relating to the guilt or innocence of an accused. Thus, despite the peremptory wording of section 93ter(1)*(a)*, a failure to comply with it is not so serious and fundamental as to vitiate the proceedings (ibid; see also *S v Gambushe* 1997 (1) SACR 638 (N)).

FAIR TRIAL

In *S v Toba & another* 2008 (1) SACR 415 (E), the appellants were convicted in a regional court of rape and sentenced to 36 months' correctional supervision and to seven years' imprisonment conditionally suspended for five years. The appellants appealed against their convictions and applied to have the matter referred back to the regional court for further evidence. Their case for remittal was based on the allegation that they did not have a fair trial and that their attorney had not conducted their defence properly. They further alleged that their attorney had closed their cases without their having testified.

The prerequisites for a successful application for remittal include the following: there should be some reasonably sufficient explanation why the evidence sought to be led had not been led at trial; there should also be a prima facie likelihood of the truth of the evidence; and the evidence should be materially relevant to the outcome of the trial. Once issues of fact had been judicially investigated and pronounced upon, further evidence would be permitted only in special circumstances (at 419–20). With regard to the allegation that the legal representative had not conducted the appellants' defence properly, it is trite that such a situation might indicate that the accused persons did not have a fair trial. But from the evidence and trial record it was evident that the attorney had studied the docket and was actually well prepared for the case. Also, the decision not to allow the appellants to testify had actually been discussed with them. The attorney indicated that he, as an experienced attorney, was of the opinion

that the appellants would not stand up to cross-examination, and that this opinion had been discussed with the appellants.

It is evident from *Toba* that a defence lawyer cannot make a unilateral decision about whether a client should testify in his or her own defence. Legal representatives should consult with their clients and provide them with the necessary information about their right to testify or to refuse to testify, as part of the general duty to assist clients in their defence strategy.

In *S v Tandwa & others* 2008 (1) SACR 613 (SCA), the accused alleged that he and his counsel had initially agreed that he would testify, but that his counsel later changed his mind and decided that the accused should not testify. The accused alleged that he had incompetent counsel who had given incorrect advice, which resulted in an unfair trial. In his own defence, counsel stated in an affidavit appended to the State's written heads of argument that he had fully advised the accused of the consequences of giving, or not giving, evidence, and that the accused readily accepted his advice and elected not to testify. The primary question for decision was whether or not the failure of representation complained of by the first appellant had actually occurred. The Supreme Court of Appeal noted that the assertion and counter-assertion were both on affidavit, and that neither deponent had been cross-examined. It held that the appeal court was not helpless — it was possible to explore two unprobed counter-assertions in order to establish the truth, and the court had the inherent power to develop a mechanism to allow this. Such a procedure would, however, be required only where the accused's allegations raised a legal possibility that there had been incompetence or misconduct on the part of the legal representative. It was held that no further enquiry was necessary, as the accused's allegations were so weak, contradictory, and inherently improbable that they could be rejected (paras [21]–[26]).

In *S v Shaik & others* 2008 (1) SACR 1 (CC), it was contended, *inter alia*, that the applicants' rights to a fair trial had been infringed in that one of the beneficiaries of corrupt payments from the first applicant, as well as a company and another individual, had not been joined as co-accused in the prosecution — as corruption was a reciprocal crime, a joint trial should have been held. The Constitutional Court held that the appellants should have raised this concern in the High Court and/or Supreme Court of Appeal, as all the information necessary to enable them to raise

such a constitutional complaint was already available to them at that stage of the proceedings. It is trite that some irregularities may result in a failure of justice and an unfair trial, but not every irregularity has this effect (para [44]). Moreover, while there may be cogent reasons for holding joint trials, this does not mean that a specific trial would be unfair simply because other possible perpetrators were not charged together with a particular accused person. In the present case, the Constitutional Court found that it was speculative to argue that the joinder of other accused persons to the trial would have been to the applicants' advantage and that the non-joinder was to their detriment (paras [47] and [48]). Even where a particular accused was disadvantaged by the fact that someone else was not charged in the same trial, this alone cannot render the trial unfair: ' the proposition cannot be upheld that the failure to charge another party, who may be suspected to be involved in the same offence, in the same trial together with an accused amounts to a breach of any established rules of criminal procedure and thus to an irregularity of the kind that would result without more in a failure of justice, render a trial unfair and require a conviction to be set aside on appeal' (para [50]).

Fatal Irregularity

It is trite that where an accused is represented by a legal representative who has no right of appearance, it is a fatal irregularity that vitiates the proceedings. In *S v Dlamini en 'n ander* 2008 (2) SACR 202 (T), the court had to decide whether it would also vitiate the proceedings if an attorney is suspended by the Law Society during the course of a trial but continues to represent the accused. Prinsloo J (Jooste AJ concurring) held that lack of the right to appear during a part of the trial still taints the proceedings to the extent that it should be set aside in its entirety. The circumstances of the present case were such that no real attempt could be made to separate the tainted from the untainted.

Habitual Criminal

In *S v Stenge* 2008 (2) SACR 27 (C), it was held that a long list of previous convictions does not necessarily support a declaration in terms of section 286 of the Criminal Procedure Act that the accused is a habitual criminal. It should be borne in mind that

force of habit is not the only reasonable inference that can be drawn from a long list of frequent previous convictions. The socio-economic conditions of the offender and all other relevant factors that motivated the person to commit offences is central to a declaration in terms of section 286: 'Precisely because the appellant is effectively being punished for his previous convictions as well as for the present one, it is important to know the circumstances under which they were committed before a declaration is made' (para [24]).

INTERNATIONAL CO-OPERATION IN THE INVESTIGATION OF CRIME

At the request of the National Director of Public Prosecutions (NDPP), the Durban High Court issued a letter of request in terms of section 2(2) of the International Co-operation in Criminal Matters Act 75 of 1996. The letter requested the Attorney-General of Mauritius to transmit to the NDPP original documents, together with the statements of authentication. The applicants in *Thint Holdings (SA) (Pty) Ltd & another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC) argued that section 2(2) did not apply, and that rather section 2(1) applied to the matter. (Section 2(2) provides for the issue of a letter of request for purposes of a criminal investigation, whereas section 2(1) provides for its issue during a criminal trial.) Although the criminal proceedings against the applicants had been struck off the roll, the matter was still pending and section 2(2) thus applied. The applicants also raised a number of other issues pertaining to the letter issued in terms of section 2(2), including that their right to a fair trial under section 35(3) of the Constitution had been violated, as well as their access to the courts in terms of section 34 of the Constitution. The applicants also submitted that the Supreme Court of Appeal did not apply section 39(2) of the Constitution, and that the issue of the letter of request did not comply with the principle of legality, primarily as it was not established that the issue of the letter was in the interests of justice.

The court began by considering two legal questions. The first concerned the proper interpretation of section 2(2) in order to determine whether the State could use this provision to procure original documents of which it already had copies. The second was whether the fact that the applicants had previously been charged, though the case had been struck off the roll, prevented the State from using section 2(2) in this case. Here, the NDPP

sought to obtain the original documents to ensure that there would be no dispute as to the documents' admissibility during the trial. The applicants contended, however, that section 2(2) could not be invoked to obtain evidence but merely to obtain information for the purposes of the investigation. The applicants based this contention on the fact that section 2(1) referred to 'evidence', whereas section 2 (2) referred to 'information', and that as the NDPP already had copies of the seized documents, they would not obtain any new 'information' from the originals. The Constitutional Court found, however, that an investigation consisted of two simultaneous processes — the first, to determine whether a crime had been committed, and the second, to gather evidence to prosecute the crime. The narrow understanding of 'investigation' which the applicants suggested referred only to the first of the two processes would ascribe a meaning to section 2(2) that was incompatible with the manner in which criminal investigations were undertaken. A more functional and appropriate understanding of section 2(2) would recognize that the two processes were intertwined and that section 2(2) should give effect to that close relationship (paras [32]–[39]).

However, the applicants were correct in their submission that the NDPP could not use section 2(2), as the case against the applicants had been struck off the roll. Once a case was struck off the roll it terminated and could not be re-enrolled, but rather had to start afresh (paras [41]–[46]). The Constitutional Court made the following obiter remark (para [47]):

> 'The Supreme Court of Appeal concluded that the applicants did not have standing to challenge the issue of the letter of request. It concluded that the process of obtaining information is a preliminary process that does not affect the rights of the applicant. In our view, this is a matter that does not need to be decided in this case and we accordingly refrain from doing so. We should note, however, that our Constitution has adopted a broad approach to questions of standing. We wish to make it clear that we are not persuaded that the approach of the Supreme Court of Appeal is necessarily correct given our constitutional approach to standing. '

JURISDICTION

Section 89(1) of the Magistrates' Courts Act determines jurisdiction for purposes of trial. Until a court is seized with a trial, the question of jurisdiction cannot arise. Section 75 of the Criminal Procedure Act makes it clear that a case cannot be transferred to

a regional court or High Court unless the prosecutor so requests (*S v Khalema and Five Similar Cases* 2008 (1) SACR 165 (C)).

Power to Stop a Prosecution

In *S v Gouws* 2008 (2) SACR 640 (T), the prosecutor closed the State's case without calling any witnesses after the accused had pleaded not guilty to a charge of defeating the ends of justice, and after a number of postponements. In the prosecutor's opinion, the accused had pleaded to the wrong charge. The magistrate, in turn, found the accused not guilty and discharged him. On special review, it was submitted that the prosecutor's actions amounted to stopping the prosecution, and, in terms of section 6*(b)* of the Criminal Procedure Act, this could be done only with the consent of the Director of Public Prosecutions.

It is trite that a mere acceptance of a plea cannot amount to a stoppage of the prosecution in the manner contemplated by section 6*(b)*. There is further no duty on a court to enquire from a prosecutor who accepted an accused's plea or decided to call no further witnesses whether that prosecutor was stopping the proceedings: 'All that the prosecutor was doing under the circumstances was to leave the matter to the court to decide' (para [22]). Where a prosecution was halted by the withdrawal of the charge before plea in terms of section 6*(a)*, the accused was not entitled to an acquittal and could not plead *autrefois acquit* if charged again. Section 6*(b)*, by contrast, dealt with prosecutions halted after an accused's plea: the plea of *autrefois acquit* would then ordinarily be available to the accused (paras [23] and [24]).

In the present case, the prosecutor had not acted inappropriately and had not purported to act in terms of section 6(b) — he had merely exercised a day-to-day discretion (paras [25] and [26]).

Powers of Review Court

S v Nkosi 2008 (1) SACR 87 (N) came before the Natal Provisional Division on automatic review. The accused had been convicted of robbery in a magistrate's court and sentenced to three years' imprisonment, suspended on condition that he was not again convicted of housebreaking with intent to steal and theft committed during the period of suspension. It was clear from the evidence at the trial, however, that the accused had acted very violently when he committed the robbery: he threatened the

complainant with a knife, throttled him, and stabbed him. On review, the Office of the Director of Public Prosecutions submitted a memorandum alleging that the facts, coupled with the accused's previous convictions, placed the matter beyond the penal jurisdiction of the magistrate's court, which required the trial magistrate to exercise his discretion to stop the proceedings and to commit the accused for sentence by a regional court in terms of section 116 of the Criminal Procedure Act and section 51 of the Criminal Law Amendment Act 105 of 1997 (in the magistrate's court, the Amendment Act was not brought to the accused's attention and the sentence was not invoked in terms of this Act).

Section 304(2)*(c)*(iv) of the Criminal Procedure Act empowers a review court, generally, to give such a judgment, impose such a sentence, or make any other order as the magistrate's court ought to have given, imposed, or made. This particular provision has been construed by the courts as not to include the power to increase a competent sentence imposed by a magistrate or to remit the case to the magistrate's court for such purpose (at 89–90, and 90*c*). The anomaly consequently exists that an appeal court may increase a sentence on appeal, but a review court may not, even where to do so is imperative to meet the ends of justice. The following two reasons have been advanced for the existence of this anomaly. In the first instance, section 310 of the Criminal Procedure Act is said adequately to provide for supervision of the sentencing function and to ensure balance in the sentencing process. Secondly, the undesirability of placing the convicted person again in peril after the conclusion of his case is crucial. The court held that neither reason was convincing where the sentence of the lower court was disturbingly inappropriate by reason of its being unduly light. Empowering the court on review by legislative provisions to allow the convicted person to be heard would place such a person in no greater peril than that which was occasioned by the right of the prosecution to appeal against sentence in terms of section 310A after conclusion of the trial, or to seek an increase of sentence on cross-appeal. Also, although the prosecution's right of appeal would appear to provide an adequate mechanism to supervise the process of sentencing, good reason for empowering the review court to increase the sentence in appropriate cases becomes apparent when there has been an improper failure by the prosecution to exercise its right of appeal, as appears to have occurred in this matter (at 90).

The proceedings in the lower courts are reviewed to establish whether their results were obtained in accordance with justice and, if not, to correct them. Corrections should also include increasing a sentence that is too light: a sentence that is too light because the proceedings were not in accordance with justice is as contrary to law and the ideal of justice as a sentence that, for the same reason, is too heavy (SE van der Merwe (gen ed), E du Toit, FJ de Jager, A Paizes & A St Q Skeen *Commentary on the Criminal Procedure Act* 30–16).

In *S v Greyling* 2008 (1) SACR 537 (E), the accused was convicted on four counts of fraud. In each case the sum involved was about R3 600, and on each count the accused was sentenced to a fine of R2 000 or six months' imprisonment, wholly suspended on condition that the accused repay the various complainants. The magistrate realized that the sentence imposed gave rise to the absurdity that it would be more advantageous to the accused to pay the fine than to repay the complainants. The matter was sent to the High Court on special review. The court held that while the sentence might be absurd and illogical, it was neither incompetent nor incapable of being understood or implemented. Accordingly, the court was unable to interfere with the sentence on review, especially since it appeared that the magistrate wanted the sentence to be increased, and it was trite that the court could not increase sentences on review (at 537–8).

Reservation of Question of Law

In *S v Dawlatt* 2008 (1) SACR 35 (N), it was held that while section 316 of the Criminal Procedure Act provides for an application for leave to appeal on the basis of either questions of fact or questions of law, if a question of law was already dealt with in a previous, unsuccessful application, and it was concluded that no prospect of success on appeal exists, an application for the reservation of the same question of law in terms of s 319 of the Act will be refused (para [25]).

Role of Prosecutor During Pre-trial Investigation Phase

In *S v Shaik & others* 2008 (1) SACR 1 (CC), it was contended, inter alia, that the applicants' rights to a fair trial, equality, and dignity had been infringed. They alleged, inter alia, that the prosecutor was guilty of misconduct for overstepping the line between prosecution and investigation in a number of instances

by overseeing search and seizure operations in Mauritius, by assisting Mauritian officials to prepare an application to that country's Supreme Court, by assisting the Mauritian police to identify material documents for seizure, and by interrogating employees of the corporate accused in terms of section 28 of the National Prosecuting Authority Act 32 of 1998. The Constitutional Court noted that the Act provides for the overlapping of certain functions, and that it cloaks prosecutors with more authority than just the institution of cases. In terms of section 7(4)*(a)*(ii), an Investigating Directorate is established and provision is made for prosecutors to assist this directorate (paras [54]–[56]). While the Constitution requires prosecutors to remain impartial and to execute their functions without fear, favour, or prejudice they are entitled to assist any investigating team (paras [57]–[68]). The applicants' contentions were dismissed.

Shortly after the Constitutional Court's decision in *Shaik* the Supreme Court of Appeal also held that the fact that a prosecutor had fulfilled the dual role of interrogator and prosecutor did not per se render the trial unfair. In *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA), Howie P, writing for a full bench, stated that '[u]nfairness does not flow axiomatically from a prosecutor's having had that dual role' (para [28]).

SEARCH AND SEIZURE

Innocent Owner Defence

A preservation order was granted under section 38(2) of the POCA to preserve, inter alia, a farm and a trailer. An application for the forfeiture of this property in terms of section 50(1) of the POCA was then brought. In *National Director of Public Prosecutions v Mazibuko & others* 2008 (2) SACR 611 (N), the first and second respondents conceded the submission by the NDPP that the property was an instrumentality of an offence but submitted that the proportionality argument favoured the applicant. The legal question in this case was whether or not the first and second respondents were innocent owners as contemplated by section 52(2A) of the POCA. The burden of proof for an exclusion from forfeiture in terms of the innocent owner defence in section 52(2A) is on the party seeking the release of the assets from forfeiture. The standard is a balance of probabilities. The purpose

of chapter 6 of the POCA is, inter alia, to recruit property owners into an active role as guardians of their property against crime.

In the present case, the court held that the first respondent had failed to act with the degree of vigilance and care required by section 52(3) of the POCA and had thus failed to discharge the burden of proof on him in terms of section 52(2A)*(a)* (paras [5] and [33]–[41]).

With regard to the farm being an asset in the joint communal estate of the respondents, the court found that while an innocent spouse, married in community of property, may have to help pay damages arising out of contract or delict, it was questionable whether such a spouse should have to pay for the criminal conduct of his or her spouse. Yet, as many crimes relating to the person or property are also delicts and actionable, it is not anomalous that the second respondent should forfeit her half share in the farm in a seizure of this nature (paras [42], [47], [52], [60], and [63]). If the opposite were true and the second respondent's half share in the farm were safe from forfeiture, the anomalous position would arise that the first respondent would still own an undivided half share in that part by virtue of the marriage being in community of property. The second respondent could also apply to court for a division of the joint estate and, on divorce, could ask for an order that divided the estate in such a way that her loss of the farm would be recouped from other assets. Such recourse against the second respondent's husband is a lesser evil than that of depriving creditors of the redress stipulated in the statute and at common law (paras [64]–[66]).

Preservation Order Even Though Warrant Invalid

In *National Director of Public Prosecutions & another v Mahomed* 2008 (1) SACR 309 (SCA), the appellants appealed against an order of the High Court in terms of which they had been directed to return to the respondent various documents, records, data, and other material seized under two search and seizure warrants that had earlier been issued in terms of section 29 of the National Prosecuting Authority Act 32 of 1998 (*Mahomed v National Director of Public Prosecutions* 2006 (1) SACR 495 (W)). The material was the property of the respondent, an attorney, and purportedly related to an ongoing investigation into the possible unlawful activities of one of her former clients and a company. The respondent claimed privilege in respect of all but three of the items seized.

The majority of the court held that no court had the power to make a preservation order for the purpose which the appellants indicated as their reason why the material should be made available to them (the appellants submitted that the material should be made available to them in order to establish whether or not the particular individual and the company committed the offences, or proving the same). However, the retention by the registrar of the High Court of such material or copies of it, even if not viewed, would be a continuing violation of the respondent's privacy (paras [17] and [18]). While it was so that sections 38 and 172(1) of the Constitution gave courts the power to fashion remedies for constitutional violations, this power was given to enable courts to vindicate rights, not to deny them. The power to create remedies to redress constitutional violations was consequently not capable of being used to deny such redress in order to serve some other purpose (paras [19]–[22]).

The second purpose for which the preservation of the material was sought placed the appellants' arguments on firmer ground. The material seized under the warrants related to the affairs of a particular person, whose legal representatives had already advised the appellants that if that person were ever brought to trial, the ability of the State to afford that person a fair trial would be contested on the grounds that the prosecution had had access to privileged material. And, if this were to happen, the correct identification of what had been among the seized documents would be crucial for the just adjudication of that person's objection. Thus the preservation of the material was not sought so that its content could be used in a prosecution, but so that a court might be in a position to identify with certainty what material was seized. Since everyone, including the State, has the right to a fair hearing and to have factual disputes resolved expeditiously and justly, ample authority exists for a court to order, in appropriate circumstances, that evidence be preserved to achieve this end (paras [27]–[31]).

It was also stressed that a court was bound to exercise its power with regard to the making of a preservation order within the constraints of section 36 of the Constitution. The benefit that would flow from allowing the intrusion upon protected rights had to be weighed against the loss that the intrusion would entail. Only if the benefit outweighed the loss to an extent that met the standard set by section 36 would the court be permitted to order the intrusion. In the present case it was held that the limitation of

the respondent's right to privacy was negligible considering that the material would be held by the Registrar under lock and key. The benefit of the expeditious and just resolution of any dispute concerning the identity of the material was self evident and enormous, and clearly outweighed the loss to the respondent (paras [32] and [33]).

Ponnan JA dissented. He stated that the State could not be permitted to benefit from its own unlawful conduct and found that the seized items should not be retained in the hands of the Registrar.

In *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director of Public Prosecutions & others* 2008 (2) SACR 421 (CC), the search and seizure operations in question were found to be lawful and the Constitutional Court did not have to resolve the issue with regard to a preservation order. The court did make the following comments about preservation orders in the interest of justice. It stated that an order for the preservation of seized material would frequently be a just and equitable remedy in situations where a court concluded that a search warrant issued under section 29 of the National Prosecuting Authority Act was unlawful. Such an order is sanctioned by section 172(1)*(b)* of the Constitution: it states that a court, in deciding a constitutional matter, can make any order that is just and equitable, including an order suspending a declaration of invalidity. According to section 172(1)*(b)*, an ongoing violation of a right, pending rectification, is consequently possible (paras [217]–[220]).

It is primarily the trial court's concern to ensure trial fairness, generally, and the admissibility of evidence, in particular, including the balancing of the need to protect the right to privacy, on the one hand, and important public considerations, on the other. Thus, when a court finds a section 29 warrant to be unlawful, that court should preserve the evidence so that the trial court can apply its discretion under section 35(5) of the Constitution to decide whether or not to admit evidence obtained by means of that warrant: 'It is only in instances where an applicant can identify specific items, the seizure of which constitutes a serious breach of privacy that affects the inner core of the personal or intimate sphere, or where there had been some particularly egregious conduct in the execution of the warrant, that a preservation order should not be granted' (paras [222] and [223]).

Validity of Search Warrants

In *National Director of Public Prosecutions v Zuma & another* 2008 (1) SACR 258 (SCA), a majority of the Supreme Court of Appeal upheld an appeal against the judgment of Hurt J in which search warrants granted in terms of section 29 of the National Prosecuting Authority Act were declared invalid (*Zuma v National Director of Public Prosecutions* 2006 (1) SACR 468 (D)). The majority (per Nugent JA; Ponnan and Mlambo JJA concurring) pointed out that the validity of a warrant is determined by the requirements of the authorizing statute. It was held that two criteria for validity apply to every warrant for search and seizure on account of its nature alone: the warrant must be intelligible, as it must be possible to determine, with certainty, the scope of its authority, and the warrant must authorize no more than what was permitted by its authorizing statute. If it purported to authorize what it was not permitted to authorize, it would be invalid to the extent of the excess and wholly invalid if the good could not be severed from the bad (paras [76] and [78]). In applying the above principles and after having analysed section 29, the warrants in the present case were found to express intelligibly and with certainty the scope of the authority that they confer. The appeal was consequently upheld with costs (paras [88]–[90]).

In *Thint v National Director of Public Prosecutions* (supra), a special investigator in the employ of the Directorate of Special Operations applied for and obtained 21 search and seizure warrants issued in terms of section 29(5) and (6) of the National Prosecuting Authority Act. Most of the warrants were executed simultaneously. Some three months later the applicants were indicted to stand trial on charges of corruption. While the second applicant obtained an order in the Durban High Court declaring certain of the warrants invalid, the first applicant was unsuccessful in the Pretoria High Court in a similar application. Both these rulings were appealed. The Supreme Court of Appeal overturned the judgment of the Durban High Court and upheld that of the Pretoria High Court. The applicants then approached the Constitutional Court to have the orders of the Supreme Court of Appeal set aside. Nine legal issues were identified: whether it was in the interest of justice to grant leave to appeal; whether the prosecution should have notified the applicants of the application for the issue of the warrants; whether the prosecution had failed to disclose various material facts in that application; whether the prosecution's affidavit had established the need for a search and

seizure operation under section 29; whether the affidavit should have expressly justified the need to seize every class of items mentioned in the annexure to it; whether the warrants were overbroad or unduly vague; whether the warrants had been unlawful for any other reason, including the presence of 'catch-all' paragraphs and the lack of explicit reference to section 29(11); whether the warrants had been executed in a way that provided insufficient protection for the applicant's legal professional privilege; and, if the search and seizure operations were unlawful, whether the court should grant a preservation order or order that the seized items be returned to the applicants (see also *National Director of Public Prosecutions v Mahomed* (supra)).

With regard to whether the prosecution should have notified the applicants of the application for the issue of the warrants, the Constitutional Court held that the default position was that an application in terms of section 29 could be made without notice to the affected parties. Section 29(4) states expressly that premises may be entered only under a search warrant 'issued in chambers' — this indicates that the procedure is ordinarily without notice. Section 29(1) refers to the Investigating Director entering premises 'without prior notice', which also confirms the interpretation that no notice in advance is required. The court also found that this interpretation of the particular provision is in accordance with common sense: if suspects were to receive notice of an impending search, it is highly likely that they will remove or destroy the incriminating evidence (paras [96]–[100]).

The duty of utmost good faith of the applicant in an ex parte application to place all the relevant materials before the court was emphasized by the Constitutional Court, but it was accepted that an investigator cannot be expected to disclose facts of which he or she is completely unaware. The duty was limited to material facts. Where there was no crystal-clear distinction between facts that were material and facts that were not, the applicant had to judge which facts might influence the judicial officer and which were sufficiently relevant to justify inclusion. This test for materiality should not be set at a level that rendered it practically impossible for the State to comply with its duty of disclosure, or which would result in applications being so voluminous that they would swamp ex parte judges (para [102]).

The validity of the warrants, and specifically whether they were unduly vague and overbroad, must be assessed in the light of the common-law principle that a warrant must convey intelligibly to

searcher and searched the ambit of the search it authorizes, and in the light of the Bill of Rights and relevant constitutional principles. Section 29(1) is qualified by section 29(2), which provides that any search operation must be conducted with strict regard to decency, order, and the searched person's rights to dignity, freedom, and security of the person and personal privacy (paras [137]–[146]). It was also suggested that search warrants need not always be drafted in terms that everyone subjectively understands, nor do such warrants necessarily define the scope of the search in an absolutely exhaustive or perfect way (paras [148]–[150]). The test for intelligibility cannot be subjective (it would render search warrants practically unworkable) but should rather be objective, requiring warrants to be reasonably intelligible in the sense that they are reasonably capable of being understood by a reasonably well-informed person with a grasp of the relevant empowering legislation and the nature of the offences under investigation (paras [151]–[157]).

It is also not permissible to consider sources beyond the warrant in order to determine its general ambit and intelligibility. A warrant issued in terms of section 29 should state at least the following, in a manner that is reasonably intelligible without recourse to external sources of information: the statutory provision in terms of which it was issued; to whom it was addressed; the power it conferred upon the addressee; the suspected offences under investigation; the premises to be searched; and the classes of items that were reasonably suspected to be in or on the premises (paras [159]–[160]). In the present case the court concluded that the warrants were neither too vague nor too broad, and that they were reasonably intelligible to both searcher and searched (paras [164]–[173]).

Section 29(11) of the National Prosecuting Authority Act enables a court to determine quickly and finally whether an item is actually privileged, in a way that protects the item against the risk of loss, damage, or destruction. The wider the application of section 29(11), the greater the benefit to the State, as it would ensure that non-privileged items do not slip through the net. But the application of section 29(11) is limited to the search and comes to an end with the completion of a search. Search warrants need not make specific mention of section 29(11), as there is no benefit to a person being searched in being notified of these particular provisions. Only once a person claims privilege does section 29(11) come into operation, and the failure to follow

its procedure is unlawful. Where a person did not claim privilege because that person did not realize that the items were privileged, the ordinary common-law protection of privileged documents persists and privilege can accordingly be claimed later (paras [188]–[195]).

SENTENCE

Accused Primary Caregiver of Minor Children

In *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC), the applicant was a 35-year-old divorced mother of three boys aged eight, twelve, and sixteen. The applicant was convicted of 38 counts of fraud and sentenced to four years' imprisonment. The magistrate considered various factors before imposing the sentence. These included the applicant's previous criminal record for fraud, and the fact that the applicant had received a fine and suspended sentence in 1996 and, during the period of suspension, she had again been charged with fraud. In addition, while out on bail on those charges, the applicant again committed fraud. The High Court imposed a sentence of imprisonment in terms of section 276(1)*(i)* of the Criminal Procedure Act, which resulted in the convicted becoming eligible for release under correctional supervision only after having served eight months' imprisonment. In this case, the main concern was the duties of a court regarding sentencing in view of section 28(2) of the Constitution, and where the person being sentenced was the primary caregiver of minor children.

The Constitutional Court held that the ambit of section 28 of the Constitution was undoubtedly wide and that law enforcement must consequently always be child sensitive. Section 28 should also be placed within the context of South Africa's international obligations as a party to the United Nations Convention on the Rights of the Child. What united these principles and lay at the heart of section 28 is the right of a child to be a child and to enjoy special care: 'Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her her parents, umbilically destined to sink or swim with them' (para [18]).

Section 28(2) further provides an expansive guarantee that a child's best interests will be paramount in every matter concern-

ing the child, including the imposition of a just sentence for the primary caregiver of minor children (paras [22]–[26]). Put differently, focused and informed attention need to be given to the interests of children at appropriate moments in the sentencing process; the sentencing court must be in a position adequately to balance all the varied interests, including those of any minor children placed at risk. The form of punishment imposed should ultimately be the one that is least damaging to the interests of children, given the legitimate range of choices available to the sentencing court. The Constitutional Court also emphasized that the purpose of highlighting the duty of a court to acknowledge the interests of children during the sentencing phase of criminal proceedings is not to allow errant parents the opportunity to avoid punishment; rather, the primary aim of this duty is to protect innocent children from avoidable harm.

The court provided the following guidelines for sentencing where minor children are involved in order to promote uniformity of principle, consistency of treatment, and individualization of outcome. In the first instance, a sentencing court should determine whether an accused is the primary caregiver of a family. Secondly, the court should, if imprisonment is a just possible sentence in a particular case, ascertain what the effect of such a custodial sentence will be on the minor children involved. If, based on the '*Zinn* triad approach' — which requires the court, during sentencing, to consider the crime, the offender, and the interests of society — the appropriate sentence is clearly custodial and the convicted person is indeed the primary caregiver of a family, the court must apply its mind as to whether it is necessary to take steps to ensure that the minor children will adequately be cared for while the caregiver is incarcerated. Where the appropriate sentence is non-custodial, however, the sentence must be determined while bearing in mind the interests of the children. Thirdly, if there are a range of appropriate sentences, the court must use the paramountcy principle as a guideline when it decides which sentence to impose (paras [33]–[36]).

The two competing considerations that must be weighed by a court dealing with the sentencing of a convicted person who is also the primary caregiver of minor children are, in the first instance, the importance of maintaining the integrity of family care, and, secondly, the State's duty to punish criminal conduct. It should also be kept in mind that both the community and

children, generally, have a substantial interest in seeing that laws are obeyed and that criminal conduct is appropriately penalized (paras [37]–[42]).

See also *S v Maluleke* 2008 (1) SACR 49 (T) and *Petersen* (supra).

Compensatory Order

In *S v Mgabhi* 2008 (2) SACR 377 (D), the accused was convicted of driving a motor vehicle without a driver's licence and of negligent driving. These charges arose from an incident where a woman was seriously injured as a result of a collision. At the hearing on sentence, the husband of the injured woman indicated that he would like to apply for compensation in terms of section 300 of the Criminal Procedure Act. As the accused was a student without any resources, the accused's father, the owner of the vehicle, indicated that he would assist with the payment of compensation. The magistrate consequently imposed a fine of R2 000 or six months' imprisonment, plus a further three years' imprisonment suspended on the condition that the accused compensate the complainant in an amount of R30 000 at a rate of R1 000 per month.

On automatic review it was held that the magistrate had erred in making the suspension of the sentence subject to the accused's paying compensation to the complainant, primarily because it was impermissible to make an award of compensation subject, in the alternative, to a sentence of imprisonment, and as it was plain that the accused was in no position to pay such compensation. The magistrate also provided for the accused's father to pay compensation, which was highly irregular, as the magistrate did not have the power to make such an order. Section 300 (especially subsections (2) and (4)) clarifies that the accused is the only person against whom an award of compensation can be made. This also accords with the principle that a magistrate in a criminal case has jurisdiction only over the accused and no other person (paras [7]–[10] and [13]).

It was further held that the present case was not appropriate for making a compensatory award, as the Road Accident Fund Act 56 of 1996 was obliged to compensate the woman for any loss and damages. In terms of section 21 of the Act, the injured woman was not entitled to claim compensation in respect of her loss and/or damage from either the accused or his father, as driver and owner of the vehicle, respectively. Section 300 of the

Criminal Procedure Act cannot be used to circumvent this restriction imposed by the Road Accident Fund Act (paras [14]–[16]). The compensatory award was accordingly set aside.

Confiscation

In *S v Shaik & others* 2008 (5) SA 354 (CC), the first appellant was convicted on two counts of corruption and one of fraud in terms of the Corruption Act 94 of 1992. The remaining ten appellants were companies associated with the first appellant. They were convicted on various counts of corruption and fraud and sentenced to the payment of fines in varying amounts. The High Court also granted confiscation orders against certain of the appellants' property in terms of section 18 of the POCA.

The Constitutional Court stressed one of the objectives of the POCA — no person convicted of an offence should benefit from the fruits of that or any related offence. Legislation is thus necessary to provide for a civil remedy for the restraint, seizure, and confiscation of property that forms the benefit derived from such an offence. The rationale of a confiscation provision is accordingly that by preventing the enjoyment of the proceeds of crimes it deters people from joining the ranks of criminals. A secondary purpose of the provision is to remove from the hands of criminals the financial means necessary to commit and partake in further criminal activities (paras [51]–[52] and [57]).

Section 12(3) of the POCA states that a person has benefitted from unlawful activities if he or she received or retained any proceeds of such unlawful activities. What constitutes a benefit depends on whether that person received or retained any proceeds of the unlawful activities in which he or she was involved. Also, what constitutes a benefit is defined by reference to what constitutes the 'proceeds of unlawful activities'. Section 18(2) of the Act consequently expressly states that a confiscation order be made in respect of any property that falls within the broader definition of what constitutes a benefit received or retained from the proceeds of unlawful activities, and it is not limited to a net amount (para [60]). Accordingly, where the acquisition of shares in a company is a benefit received from a crime, the shares and the dividends on them can be confiscated under section 18 of the POCA (paras [59] and [62]).

Section 18 further confers a discretion upon a court to determine the appropriate amount that it should order a defendant to pay. Such a determination is made once a court has convicted

the accused of a criminal offence and at approximately the same time as it imposes a sentence upon the person. '[G]iven the close connection between the criminal conviction and the confiscation order, it is apt that the discretion conferred upon the sentencing court by s 18 be considered for the purposes of appellate jurisdiction in the same light as the imposition of sentence' (para [67]). This determination will be interfered with by an appellate court only if the court is satisfied that the court below acted unjudicially or misdirected itself, or where the appellate court is of the view that the amount confiscated is disturbingly inappropriate (ibid).

A court considering what will constitute an appropriate amount to be confiscated as contemplated in section 18 must first have regard to all the circumstances of the specific criminal activity, and then consider what will be appropriate in terms of the definition of the 'proceeds of unlawful activities' in the Act. (The definition actually makes it possible for a court to confiscate property that has not directly been acquired through the commission of crimes, and also makes it possible to confiscate property that has been acquired not through crimes of which the defendant has been convicted but through related criminal activity.) One of the key considerations is the extent to which the property to be confiscated derived directly from the criminal activities. In this regard, courts should also take cognisance of the methods criminals use to disguise the profits of their crime. The nature of the crimes that fall within the express contemplation of the Act constitutes a third consideration relevant to determining what constitutes an 'appropriate' amount — the closer the crimes or criminal activity concerned to the ambit of organized crime, the more likely that the appropriate amount constitutes all the proceeds of the unlawful activities defined in the Act (paras [69]–[71]).

Forfeiture

In *National Director of Public Prosecutions v Vermaak* 2008 (1) SACR 157 (SCA), the respondent had been convicted on two counts of driving while under the influence of alcohol. The appellant consequently applied to the High Court for an order that the motor vehicle of the respondent be declared forfeit to the State in terms of the POCA. The court refused the application. It held that the POCA did not apply to the offence in question and that a motor vehicle cannot be described as 'instrumental' to an offence.

Previously, in *National Director of Public Prosecutions v Van Staden & others* 2007 (1) SACR 338 (SCA), the Supreme Court of Appeal held that the POCA did apply to individual criminal wrongdoing and that its provisions went beyond the boundaries of 'organized crime' (here, offences that had an organizational feature of some kind) (also *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA)). However, in *Mohunram & another v National Director of Public Prosecutions & another (Law Review Project as amicus curiae)* 2007 (4) SA 222 (CC), the Constitutional Court was unable to find that the POCA (and chapter 6 in particular) applied to individual criminal wrongdoing, and a majority of the bench expressly left the question open (also *National Director of Public Prosecutions v Van Staden & others* 2007 (1) SACR 338 (SCA)).

It is well established that an order for forfeiture can be made only if the deprivation in a particular case is proportionate to the aims of the Act. An order of forfeiture operates as both a penalty and a deterrent, with its primary purpose being remedial. Forfeiture is aimed at crippling or inhibiting criminal activity, and it is in this light that the discretion to order forfeiture should be exercised. Forfeiture is most likely to have its greatest remedial effect where crime has become business. But where the offence was not committed in the course of ongoing criminal activity, the ordinary criminal remedies are quite capable of serving the purpose of deterrence. And, if the sentences that are available to serve that purpose are inadequate, it is open to Parliament to remedy that defect (paras [9]–[12]).

With regard to driving under the influence of intoxicating liquor, the available sentences are quite capable of having the necessary deterrent effect. While it is true that without the vehicle the offender cannot again commit the offence, the reality is that forfeiture in this context functions as little more than an additional penalty. Only in very special circumstances would the forfeiture of a vehicle in such circumstances be proportionate to the commission of the offence (para [14]). In the present case, the Supreme Court of Appeal found that the circumstances did not justify a forfeiture order. The core of the respondent's problem was not reckless conduct or deliberate defiance of the law but rather alcohol abuse. Accordingly, forfeiture of the vehicle in this

instance would function as no more than an additional penalty (para [19]).

Restorative Justice and Notions of African Customary Law

In *S v Maluleke* (supra), the sentencing of the accused, a woman convicted of murdering a young man who broke into her house, provided for an interesting new approach to sentencing, one that involves notions of restorative justice and African customary law. The accused was responsible for the death of the victim by actively participating in a sustained assault upon the deceased after having apprehended him in her home. The accused lived in a very small, close-knit community in a rural area in Limpopo and the deceased, a member of her extended family, was well known to her. The sentencing of the accused posed particular problems as the accused was the primary care giver of four minor children. She was unemployed and her only income was a child grant.

The court found that the accused was not a person against whom society had to be protected — she showed remorse for her actions, there was no real danger that her crime would be repeated, and she was not normally a violent person. During evidence in mitigation, the defence also investigated the question whether the accused had, prior to the trial, complied with the traditional custom of her community of apologizing for the taking of the deceased's life by sending an elder member (or members) of her family to the deceased's family. When she was asked whether she had complied with this traditional custom, she answered in the negative. (According to custom, failure to offer such an apology would normally be regarded as adding insult to the injury to the victim's family (para [18]).) During cross-examination and when the defence enquired from her whether she would be prepared to receive such an apology, the victim's mother indicated that she would actually be willing to accept the apology if the accused also explained to her why she had killed her son (para [19]). The court saw this affirmative answer as an opportunity to involve the community in the sentencing and rehabilitation process of the accused. The court sentenced the accused to eight years' imprisonment, all of which was suspended for three years on condition that the accused apologized, according to custom, to the mother of the deceased and her family within one month of the imposition of the sentence (para [22]).

In this case, the court used principles of restorative justice and notions of African customary law. It held that the introduction of traditional, indigenous legal principles in at least part of the criminal justice system will extend the existing alternatives to punishment and specifically imprisonment (para [39]). The incorporation of restorative justice principles will also contribute significantly to combat recidivism and may become an important tool in reconciling victim and offender, and the community and the offender (para [34]).

See also *S v Shibulane* 2008 (1) SACR 295 (T).

Retrospective Effect of Criminal Law Amendment Act 105 of 1997

In *S v Shaik & others* 2008 (1) SACR 1 (CC), the first applicant was convicted on two counts of corruption and one of fraud in terms of the Corruption Act 94 of 1992. He was sentenced to an effective fifteen years' imprisonment (the minimum sentence in terms of section 51(2)*(a)*(i) of the Criminal Law Amendment Act 105 of 1997). It was contended, inter alia, that the prescribed sentencing provisions of the Criminal Law Amendment Act ought not to have been invoked, as the initial commission of the particular crime predated the advent of that legislation.

The Constitutional Court recognized that a complaint against the alleged retrospective application of the minimum-sentence legislation clearly raised a constitutional issue (para [71]). It also held that a proper approach to sentencing required that the historical context of all the relevant circumstances be considered. From the evidence before the court it was evident that both the High Court and the Supreme Court of Appeal had due regard to the first applicant's personal circumstances. He became involved in criminal activities after the dawn of democracy and continued with his criminal activities long after legislation had been enacted that furthered the interests of parties who had previously suffered discrimination. It was held that South Africa's oppressive and discriminatory past could not be used as an excuse for the commission of crime, or to justify a reduction in an otherwise appropriate sentence, except under rare and exception circumstances. The court accordingly held that there were no prospects of success on appeal on this ground (paras [75]–[77]).

With regard to the alleged retrospective application of the minimum-sentence legislation, the first charge of corruption concerned the giving of benefits to a particular person over a period of time that transcended the commencement of the

Criminal Law Amendment Act. Also, corruption is generally regarded as an ongoing offence, and as the offences committed after the commencement of the Act exceeded the statutory threshold of R500 000, there was no logical reason why the minimum-sentence legislation should not apply. There were consequently no prospects of success on appeal on this ground (paras [81] and [82]).

Right to Adduce Evidence

After the accused in *S v Mbhele* 2008 (1) SACR 123 (N) was convicted of assault with the intent to do grievous bodily harm, he elected to address the court in mitigation of his sentence in terms of section 272(2) of the Criminal Procedure Act. The accused called his brother and mother as witnesses, but the magistrate dominated the questioning and the accused was not given an opportunity to put questions to these witnesses and elicit such evidence as he wished. The magistrate asked the two witnesses what sentence they would like the court to impose, and merely asked the accused whether he confirmed the testimony of each of the witnesses.

A mere invitation as to whether an accused confirms the evidence of his or her witnesses was found to be improper and to fall far short of the right of an accused to adduce evidence on sentence, in terms of section 274 of the Criminal Procedure Act. Denying an accused the opportunity to elicit from his witnesses whatever evidence the accused believed his witnesses could contribute was a serious irregularity, infringing an accused's rights in terms of section 274, as well as an accused's right to a fair trial (s 35(3) of the Constitution) (para [5]). It is further undesirable and improper for a presiding officer to enquire from lay witnesses what they would like the court to impose by way of a sentence. Any answer to such a question was described by the appeal court as irrelevant and inadmissible opinion evidence. The matter was consequently referred back to the magistrate for sentence to be imposed afresh (para [6]).

Weighing of Factors

In *S v Blignaut* 2008 (1) SACR 78 (SCA), the appellant pleaded guilty to and was convicted of one count of robbery with aggravating circumstances, and one count of kidnapping. He was sentenced to fifteen years' imprisonment on the first count and to five years' on the second; the two terms were to run

concurrently. The Supreme Court of Appeal found that the regional magistrate had erred in several respects in his approach to sentence. In the first instance, he had stated without elaboration or specificity that there were aggravating circumstances. The Supreme Court of Appeal disagreed. Secondly, the regional magistrate wrongly characterized the appellant's conduct as an attempt to perpetrate 'a popular crime'. He also emphasized the community interest and deterrence, generally, but did not mention the other traditional aims of sentencing, such as personal deterrence, rehabilitation, and reformation. Thirdly, the many mitigating factors present did not receive appropriate recognition by the regional magistrate, and they were not balanced against the perceived aggravating factors (para [6]). The appeal was upheld and the sentence of fifteen years' imprisonment set aside and substituted by a sentence of five years' imprisonment.

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