

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b)  
OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996  
AND SECTIONS 8(1) AND 8(2)(b)(i) OF THE PUBLIC PROTECTOR ACT,  
1994**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**REPORT NO 10 OF 2008/09**

**REPORT ON AN INVESTIGATION INTO THE CAUSES OF DELAYS IN THE  
ADMINISTRATION OF CRIMINAL APPEALS LODGED BY PRISONERS**

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**(a) EXECUTIVE SUMMARY**

1. The Office of the Public Protector receives numerous complaints on a regular basis from prisoners around the country regarding criminal appeals. These complaints mainly relate to alleged:
  - 1.1 Lack of communication from the courts;
  - 1.2 Long and undue delays in determining hearing dates; and
  - 1.3 Insufficient support to prisoners with the prosecution of their appeals.
  
2. As complaints from prisoners regarding their appeals account for a significant number of matters dealt with by the Office of the Public Protector it was resolved to conduct a systemic investigation into the matter in terms of section 6 of the Public Protector Act, 1994. The aim was to determine whether the complaints relating to appeals could be attributed to systemic deficiencies in the appeal process.
  
3. The investigation team from the Office of the Public Protector consulted with various stakeholders in this process, including prisoners, court officials, officials of the Legal Aid Board and Justice Centres, officials from the Department of Correctional Services, the National and Deputy National Directors of the National Prosecuting Authority, and senior officials of the Department of Justice and Constitutional Development.
  
4. In the process it was noted that the National Prosecuting Authority and Offices of the Directors of Public Prosecution (DPP) have initiated a number of strategies, together with other stakeholders, to address the backlog of appeals in their offices and to reduce the turnaround time for the finalization of appeals.
  
- 5. The main findings made from the investigation were that:**

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- 5.1 There were inordinate delays of up to several years in the processing of criminal appeals involving prisoners.
- 5.2 These delays constitute a serious infringement of the rights of the appellants to speedy and fair administration of justice as contemplated in section 35(3) of the Constitution; place an unnecessary burden on the administration of the correctional facilities by the Department of Correctional Services, as well as the capacity of these facilities, and impact negatively on the administration of justice in the courts.
- 5.3 This situation is not compatible with the Constitutional dispensation of this country and it is indeed of grave concern that the concerns raised by different Judges and Courts of Appeal have not been taken seriously by the Department of Justice and Constitutional Development and the officials concerned.
- 5.4 The communication between officials of the courts and the DPP offices on the one hand and the Department of Correctional Services and the prisoners on the other hand, is appalling to say the least. It is unacceptable that the appellants (and the Department of Correctional Services as go-between) are expected to wait for the years that it sometimes takes for the applications and appeals to be processed, without any information on the status, process, or outcome of their appeals.
- 5.5 There are various areas of administration of appeals in the lower courts that are defective and are contributing to the undue delays. These areas include -
- 5.5.1 Logistical problems and the insufficient level of performance by some of the service providers responsible for the transcription of the recordings;
- 5.5.2 The need to reconstruct records because of lost and damaged recordings as a result of inadequate record keeping and security arrangements;
- 5.5.3 A lack of - and outdated - task directives and rules on the duties and obligations of the different court officials involved in the administration of appeals, including the presiding officer, the Public Prosecutor and the Clerk of the Court;
- 5.5.4 The lack of capacity to deal with the assigned workload;

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- 5.5.5 The ineffective management and supervision of the leave-to-appeal process and the subsequent preparation and submission of the court records to the DPP/Registrar; and
- 5.5.6 The failure by the Department of Correctional Services to keep the clerks informed of the transfer and movement of prisoners,
- 5.6 In the Divisions of the High Court the allocation of hearing dates is affected by –
- 5.6.1 Delays in the submission of the court records by the court officials of the trial courts;
- 5.6.2 Incorrect or incomplete court records;
- 5.6.3 The failure by the appellant or Legal Aid Board representative to timeously file proper heads of argument and/ or power of attorney;
- 5.6.4 A lack of judicial capacity to deal with the number of pending appeals;
- 5.7 Delays were also caused by the time that it took the Legal Aid Board and Justice Centres to trace unrepresented appellants for the purposes of legal representation;
- 5.8 The situation is aggravated by the fact that neither the Prosecuting Authority who is tasked with the set down of the matters, nor the trial court officials, who are responsible for the preparation of the court records, is taking responsibility for the monitoring and expeditious administration of the appeals process subsequent to the granting of leave to appeal; and
- 5.9 The available resources and structures within the prisons to assist prisoners with appeals were insufficient. A lack of knowledge and information on the part of prisoner appellants who represent themselves, is resulting in deficient, incomplete or misdirected applications or petitions that do not reach the correct forum, or cannot be registered or enrolled for adjudication.

**6. The Public Protector recommended that:**

- 6.1 The Department of Justice and Constitutional Development must:

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- 6.1.1 Consider extending the current initiative by the NPA to determine and deal with the backlog of appeals, to the Magistrates Offices. It is imperative that this exercise include an audit of lower court appeals that have not yet reached the offices of the DPPs.
  - 6.1.2 Prioritise the administration of criminal appeals in the lower and the High Courts in the strategic and operational plans of the Department;
  - 6.1.3 Develop a clear strategy to deal with the current situation to address the causes for delays identified in this report and in terms of the Department's own assessment;
  - 6.1.4 Review the Rules of Court to ensure that the duties of the Clerks and the Registrars in respect of the administration of criminal appeals are aligned to the current law;
  - 6.1.5 Consider a policy or directive or manual to guide, inform and supplement the duties of the relevant court officials with regard to the processing of appeals;
  - 6.1.6 Address capacity limitations and human resource problems in the courts;
  - 6.1.7 Take steps to ensure compliance with the constitutional requirements of fair administration and the principles of *Batho Pele* in the processing of appeals, in particular communicating the progress, status and outcome of appeals to the relevant parties;
  - 6.1.8 Ensure compliance with the agreed standards and timeframes by external service providers responsible for the transcription of court records and investigate the appointment of specific and dedicated transcribers to deal exclusively with appeals from prisoners, in particular those who are not represented;
  - 6.1.9 Improve control over the storage, movement and safekeeping of the recordings and records of criminal trials;
  - 6.1.10 Address the lack of filing and storage systems and facilities at some courts;
  - 6.1.11 Extend the current initiatives for the electronic tracking and management of cases in the courts to include post-trial proceedings, to enable the appeals process to be managed and monitored electronically;

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- 6.1.12 Consult with the National Prosecuting Authority on its role in the monitoring of the appeal process in the Magistrates' and High Courts from the time that leave to appeal was granted;
- 6.1.13 Establish and implement a proper complaints management system and procedure to deal with prisoner complaints in respect of the administration of their appeals; and
- 6.1.14 Consider the establishment of a forum consisting of representatives (including judicial officers) from the lower courts, High Courts, the offices of the Directors of Public Prosecutions, as well as representatives from the Department of Correctional Services and Legal Aid Board, to deal with the issue of delays in the processing of criminal appeals.
- 6.2 The Department of Correctional Services must:
- 6.2.1 Determine what is required to provide prisoners adequate, effective and meaningful assistance in all matters dealing with access to the courts, including:
- 6.2.1.1 Assigning specific duties in this regard to designated officials in the records or administration offices;
- 6.2.1.2 Ensuring that such designated officials have the necessary skills and training to provide prisoners with information and assistance to facilitate proper access to the courts (excluding the providing of legal advice); and
- 6.2.1.3 Developing minimum operational and performance standards in respect of these duties in line with international standards and best practice to ensure-
- 6.2.1.3.1 Access to his/ her lawyer or the Legal Aid Board if required by the prisoner;
- 6.2.1.3.2 Access to any prescribed forms and legal documents necessary to lodge an application for leave to appeal; and

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- 6.2.1.3.3 The assistance of a trained and dedicated person within the prison to provide the prisoners with legal, procedural information (not legal advice) required to lodge an application for leave to appeal to the correct forum.
- 6.2.2 Provide prisoners with an education brochure or booklet on the appeal process and the administrative procedures and steps that are taken to prosecute an appeal; and
- 6.2.3 Set up a complaints mechanism together with the Department of Justice and Constitutional Development at regional level where complaints from prisoners about inaction, delays or lack of response from the Clerks of the Court and/ or Registrars of the High Court could be referred.

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# **REPORT OF THE PUBLIC PROTECTOR ON AN INVESTIGATION INTO THE CAUSES OF DELAYS IN THE ADMINISTRATION OF CRIMINAL APPEALS LODGED BY PRISONERS**

## **CHAPTER 1: INTRODUCTION AND BACKGROUND**

### **1.1 Introduction**

This report is submitted to:

1.1.1 The National Assembly and National Council of Provinces;

1.1.2 The Minister of Justice and Constitutional Development;

1.1.3 The Minister of Correctional Services;

1.1.4 The Director-General of the Department of Justice and Constitutional Development;

1.1.5 The National Commissioner of Correctional Services;

1.1.6 The Acting National Director of Public Prosecutions; and

1.1.7 The Chairperson and Chief Executive Officer of the Legal Aid Board;

in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and sections 8(1) and 8(2)(b)(i) of the Public Protector Act, 1994. It relates to an investigation into systemic causes of delays in the administration of criminal appeals lodged by prisoners.

### **1.2 The nature of complaints of prisoners regarding the prosecution of their appeals**

1.2.1 Since its inception in 1995, the Office of the Public Protector (the OPP) has received numerous complaints from prisoners relating mainly to alleged delays in the processing of their appeals to the High Courts.

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- 1.2.2 These complaints relate to a wide range of matters, including, but not limited to the following issues:
- 1.2.2.1 Applications for leave to appeal are sent to the Clerks of the Magistrates' Courts or the Registrar of the different Divisions of the High Court, but the receipt of such applications is not always acknowledged or responded to by the relevant officials;
  - 1.2.2.2 Long after the submission of an application for leave to appeal (in some cases up to 5 years later) the applicants (prisoners) still have not been informed of the date of the hearing of the application in the trial Court;
  - 1.2.2.3 Similar delays are experienced with the determination of a date for the hearing of appeals in the High Court after leave to appeal has been granted;
  - 1.2.2.4 When enquiries are made with the Clerks of the Criminal Courts or the Registrars of the High Court the correspondence is hardly ever responded to;
  - 1.2.2.5 The inaction of and lack of assistance provided by officials of the Department of Correctional Services discourage prisoners from pursuing their right to appeal;
  - 1.2.2.6 There is a perception that the administration relating to appeals is deliberately delayed until it is time for the determination of parole dates, in which case the affected prisoners are obliged to withdraw their applications for appeal;
  - 1.2.2.7 Prisoners perceive the attitudes of the Clerks of the Courts to be negative and they hold the view that the Clerks deliberately do not process their applications;
  - 1.2.2.8 Prisoners are not requisitioned to attend courts on the hearing dates of their appeals, with the result that their cases are often struck off the court rolls;
  - 1.2.2.9 Some Judges refuse to hear appeals unless the appellants are legally represented;
  - 1.2.2.10 There is a perception that candidate attorneys employed by the Legal Aid Board at the Justice Centres, are inexperienced;
  - 1.2.2.11 Practising attorneys appointed by the Legal Aid Board are allegedly not committed to their clients because they are not adequately compensated for their services;

- 1.2.2.12 Where appeal matters are heard in the absence of the appellants, the outcome thereof is not always communicated to them in time or not at all; and
- 1.2.2.13 In some cases where prisoners require transcriptions of the case records court officials refuse to provide them with copies free of charge.

### **1.3 Dealing with the complaints**

- 1.3.1 With the establishment of provincial offices of the OPP, a steady stream of complaints relating to appeals began to manifest itself to the extent that for the years 2003 and 2004 it accounted for 17% of the total of complaints received. The manner in which the OPP has been dealing with these complaints seems to have encouraged more prisoners to approach the Public Protector. Currently it is estimated that these complaints account for about 20% of the total of complaints lodged with the OPP.
- 1.3.2 However, given the number of complaints and the fact that these complaints have been attended to on a complaint-by-complaint basis, it was not possible to determine whether or not there was indeed an undue delay in the processing of every appeal, as well as the causes for such delays. Investigators would in most cases lodge enquiries with the Clerks of the Courts or the Registrars of the different Divisions of the High Court to resolve one issue, only to receive further complaints from the same prisoner a few months down the line.
- 1.3.3 The OPP is not the only institution approached by prisoners with complaints regarding the processing of appeals. According to the 2006 annual report of the Inspecting Judge, the Judicial Inspectorate of Prisons, and more specifically the Independent Prison Visitors, received 33 033 complaints relating to the subject of appeals during 2005.<sup>1</sup> The Clerks of the Courts with whom investigators of the Public Protector consulted during the investigation referred to in this report, also confirmed that they were regularly approached by the Presidency, the South African Human Rights Commission,

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<sup>1</sup> Inspecting Judge of Prisons *Annual Report 2005/2006* 11-12

and the Ministry and Director-General of Justice and Constitutional Development, with enquiries relating to such complaints from prisoners. The Registrar of the Constitutional Court is apparently also frequently approached.

## **1.4 The challenges faced by prisoners and the prison authorities**

1.4.1 The Constitution established the fundamental rights of people incarcerated in prisons. Section 35 specifically provides that detained, arrested and accused persons have the right to:

- 1.4.1.1 Be informed promptly of the reason for detention;
- 1.4.1.2 Be detained under conditions that are consistent with human dignity;
- 1.4.1.3 A legal practitioner;
- 1.4.1.4 Communicate with, and be visited by, a spouse or partner, next of kin, religious counsellor and medical practitioner of the prisoner's own choice; and
- 1.4.1.5 Challenge before a court of law the lawfulness of his or her detention.

1.4.2 The Correctional Services Act, 1998 provides that *"the duties and restrictions imposed on prisoners to ensure safe custody ... must be applied in such a manner that conforms to their purpose and do not affect the prisoner to a greater degree or for a longer period than necessary"*. It goes on to state that *"the minimum rights of prisoners entrenched in this Act must not be violated for disciplinary or any other purpose"*.<sup>2</sup>

1.4.3 The said annual report of the Inspecting Judge of Prisons indicates that despite legislative support for the protection of inmates' rights, the State frequently fails to meet the basic constitutional standards that have to be applied in respect of detainees.<sup>3</sup> However, this failure does not *"correlate with the infrequency with which section 35(2) rights appear in the law reports"*.<sup>4</sup>

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<sup>2</sup> Section 4(2)

<sup>3</sup> Inspecting Judge of Prisons *Annual Report 2005/2006* 11-12

<sup>4</sup> Iain C & J De Waal *The Bill of Rights Handbook* 5th ed (2005) 773

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- 1.4.4 The reality, however, is that imprisonment is a severe punishment and persons who are deprived of their liberty by arrest or detention are as a consequence deprived of certain rights and privileges. To this extent they:
- 1.4.4.1 Are confined to prison and lose their liberty and freedom to move around as they please, to consult with lawyers at their own time, to purchase or have access to books and resources of their choice, as well as unlimited access to things normally taken for granted, such as pen and paper. They are unable to earn an income and are in most instances dependent on assistance or resources from publicly funded sources;
  - 1.4.4.2 Have only limited and regulated contact with the outside world, and have to rely on permitted visits from family, friends or lawyers. Access to telephones is usually restricted or limited by either the prison authorities or by their own circumstances of not being able to afford a telephone call. They cannot buy an envelope and stamp at their nearest post office and drop a letter in the mailbox;
  - 1.4.4.3 Are subject to prison discipline and have to follow certain prescribed routes and channels for all their needs, under sanction of losing credits or privileges in cases of contravention.
- 1.4.5 While it could be argued that these limitations and restrictions are necessary and serve a legitimate purpose, there are conditions and circumstances that are not necessarily commensurate with the ordinary consequences of incarceration, in particular when it comes to the issue of overcrowding.
- 1.4.6 According to the said annual report of the Judicial Inspectorate the South African prisons housed 157 402 prisoners on 31 December 2005, of whom 46 327 were awaiting trial and 111 075 were serving sentences.
- 1.4.7 A resolution was adopted on 16 September 2005 at the *Conference on Strategies to Combat Overcrowded Prisons* to the effect that “*the current chronic overcrowding in*

*most South African prisons constitutes a gross infringement of the basic human rights of prisoners and prison staff..."* The Inspecting Judge referred to a statement by Prof Dirk van Zyl Smit that "*Prison overcrowding is caused by only two things: people being sent to prison for periods that are too long, and **people not being released timeously.***"<sup>5</sup> (Emphasis added.)

1.4.8 Despite efforts to reduce the number of prisoners, there are numerous prisons that are still severely overcrowded. While 74 prisons had less than 100% occupation, 161 prisons exceeded their occupation capacity by a 100%. Of the 161, 72 were more than 150% occupied, including 38 that were more than 175% occupied. Private prisons were 100% occupied.<sup>6</sup> The high overcrowding levels place considerable strain on both the human and capital resources of the Department of Correctional Services when managing the prisons, and when rehabilitating the prisoners in their care. According to the Department, overcrowding has an adverse effect on offenders, staff and the safe custody of prisoners.<sup>7</sup> In addition, delays in the timeous release of sentenced prisoners place a considerable financial burden on the Department of Correctional Services. It costs hundreds of millions of Rand to construct a reasonably sized prison in South Africa. In 2003 a prisoner cost the Department R111 per day.<sup>8</sup>

1.4.9 A number of measures have been suggested as mechanisms to address overcrowding, including pre-trial diversion; increased utilization by the South African Police Service of its powers to release offenders on bail; more frequent application of admission of guilt procedures that would enable offenders to pay a fine instead of appearing in court; a more intense focus on plea bargaining; and alternatives to imprisonment such as

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<sup>5</sup> In an address on "A New Sentencing Framework" delivered at the *Conference of Strategies to Combat Overcrowded Prisons*

<sup>6</sup> Inspecting Judge of Prisons *Annual Report 2005/2006* 17

<sup>7</sup> Department of Correctional Services' presentation to the Select Committee on Security and Constitutional Affairs, Cape Town (7 June 2000)

<sup>8</sup> Kahn(SC) F W & T L Heunis *Report on a Review of the Administrative Recess System in the High Court* (Oct 2003)

correctional supervision.<sup>9</sup> While these measures focus on efforts to decrease the number of awaiting-trial prisoners, the options to address overcrowding in respect of sentenced prisoners have so far been limited to efforts initiated by legislation, the parole policy or the granting of periodic amnesty. General amnesty may provide relief in the short term to reduce gross overcrowding. However, amnesty and other such temporary solutions come at the price of gradually undermining legal certainty and public confidence in the criminal justice system.<sup>10</sup>

1.4.10 According to the Legal Aid Board, it is estimated that up to 33% of criminal appeals succeed against sentence and 28% against conviction.<sup>11</sup> Information furnished by the National Prosecuting Authority (NPA) indicates that there is a huge backlog in most Divisions of the High Court in the processing of criminal appeals from the lower courts. In some Divisions the average waiting period for appeals from the lower courts is 2 to 3 years. This means that a number of prisoners, with a prospect of appealing successfully against their sentence of imprisonment, remain incarcerated for several years before the finalisation of their appeals.

## 1.5 Concerns raised by the courts

1.5.1 In the case of *Heslop v the State*<sup>12</sup> the appellant was sentenced on 5 November 1996 to **6 years' imprisonment** for culpable homicide. On the same day that sentence was imposed, leave to appeal and bail pending the appeal were sought and granted. The Registrar of the Supreme Court of Appeal (SCA) only received the appeal records on 19 May 2005. The Court expressed serious concern about the inordinate delay of more **than nine and a half years** and ordered an investigation into the matter.

<sup>9</sup> Inspecting Judge of Prisons *Annual Report 2002/2003*

<sup>10</sup> Van Zyl Smit D "Imagining the South African prison" *Valedictory Lecture* University of Cape Town, Rondebosch (20 October 2005) – Prof Van Zyl Smit was Professor of Criminology from 1982 to 2005, and Dean of the Faculty of Law from 1990 to 1995

<sup>11</sup> Statistical data collected by Adv K van Veenendal: Pretoria Justice Centre

<sup>12</sup> [2006] SCA 155 (RSA)

1.5.2 In *Liebenberg v the State*<sup>13</sup> the accused was convicted and sentenced on 22 September 1995. The appeal to the High Court was dismissed on 9 February 1996. He struggled for 4 years to obtain legal aid and only managed to bring an application for leave to appeal to the High Court on 22 May 2002. The appeal was only heard on 19 May 2005 (almost ten years after conviction) and the conviction and sentence were set aside.

1.5.3 In *S v Sheppard*<sup>14</sup> the Court also expressed a serious concern about the growing number of cases where delays are experienced:

*“Unfortunately this seems to be the fate of many appeals these days and may be due to the number of matters waiting to be heard and the inability of the system to process such large volumes. The fact is, however, that the delay in casu has been unduly lengthy and has not been caused by the fault of the appellant.”*

1.5.4 In *Thusukula Senatsi & another v the State*<sup>15</sup> leave to appeal was granted by the Judge President of the Cape High Court to the first appellant on 18 March 1996. This was **more than 10 years prior to the hearing of the appeal in the Supreme Court of Appeal** (SCA). Upon the enrolment of the appeal for hearing in this court, the President of the SCA directed the Registrar to enquire from the Director of Public Prosecutions (DPP) why there had been a delay in presenting the appeal. On 29 March 2006 the DPP responded that his office had been unaware that leave had been granted. The State assured the court that steps have subsequently been taken in the DPP’s office to ensure that appeals, especially those lodged by unrepresented accused, are not lost in the system. The court observed that *“one can imagine the prejudice that would have occurred if the appeal by the two appellants had been upheld or sentences of less than the period they have already served had been imposed. **Such delays***

<sup>13</sup> SCA case number 156/03 (delivered 31 May 2005)

<sup>14</sup> 2003 JDR 0469 (W)

<sup>15</sup> [2006] SCA 61 (RSA)

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***deny justice to the persons concerned by preventing a speedy disposal of their cases.*** Sadly this is not the first time this has occurred. In *S v Joshua 2003(1) SACR 1 (SCA)* at par 35 this court had to deal with a case in which there was a delay of six years before the appeal was heard. Fortunately the accused was out on bail in that case. Not so in the present matter. ***Such delays are to be avoided at all costs.***” (Emphasis added.)

## **1.6 Decision to institute a systemic investigation**

In view of the observations made about the administration of appeals it was resolved to launch an own initiative investigation, into this matter in terms of section 6 of the Public Protector Act, 1994. The purpose of the investigation was to determine whether the relatively high number of complaints relating to the alleged undue delay in the processing of appeals could be attributed to systemic deficiencies in the appeal process.

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## CHAPTER 2

### POWERS AND FUNCTION OF THE PUBLIC PROTECTOR TO INVESTIGATE SYSTEMIC DEFICIENCIES IN THE ADMINISTRATION OF APPEALS

- 2.1 The institution of the Public Protector was established under Chapter 9 of the Constitution. The Public Protector Act, 1994, provides for its additional powers and operational requirements.
- 2.2 The Public Protector is an official who is independent of government and any political party. He/she receives complaints from aggrieved persons against government, government departments, agencies and officials. The Public Protector has powers to investigate matters referred to him/her, recommend corrective action and issue reports to the National Assembly.
- 2.3 Section 182(1) of the Constitution provides for the legal mandate, powers and functions of the Public Protector:

*“The Public Protector has the power, as regulated by national legislation -*

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action.”*

- 2.4 In terms of sections 6(4) and (5) of the Public Protector Act , the Public Protector shall be competent to investigate on his/her **own initiative** or on receipt of a complaint, any **maladministration in connection with the affairs of government at any level**. He or she has jurisdiction to investigate any complaint against any person

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performing a public function, or against public entities or any institution in which the State is the majority or controlling shareholder.

- 2.5 It therefore follows that the investigation referred to in paragraph 1.6 falls within the jurisdiction and powers of the Public Protector.

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## CHAPTER 3

### THE LEGAL FRAMEWORK REGULATING THE PROCESS OF APPEALS BY PERSONS CONVICTED OF CRIMES AND SENTENCED TO IMPRISONMENT

#### **3.1 The relevant Constitutional provisions**

##### 3.1.1 The right of appeal

##### 3.1.1.1 In terms of section 35(3) of the Constitution:

*“Every accused person has a right to a fair trial, which includes the right –*

*...*

*(o) of appeal to, or review by, a higher court.”*

##### 3.1.1.2 The Constitutional Court has reaffirmed this principle in both the *Steyn and Shinga* cases:

##### a) *S v Steyn*<sup>16</sup>

*“The effect of a criminal conviction on the liberty and dignity of the individual makes it imperative that adequate procedural checks and balances limit wrong convictions and inappropriate sentences to the barest minimum. **The right to appeal is, accordingly, of considerable importance in the achievement of a fair criminal justice system.** A leave to appeal procedure which does not enable an appeal Court to make an informed decision on the application, and which does not adequately protect against the possibility of wrong convictions and inappropriate sentences constitutes a serious limitation of the right to appeal.”* (Emphasis added.)

##### b) *Shinga v the State*<sup>17</sup>

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<sup>16</sup> 2001(1) SACR 25 (CC); 2001(1) BCLR 52 (CC); 2001(1) SA 1146 (CC)

<sup>17</sup> CCT case no 56/06 (delivered 8 March 2007)

*"In determining the requirements for fairness of an appeal, it must be borne in mind that the accused person in prosecuting an appeal exercises a right which inures consequent upon leave to appeal having been granted either by the Magistrates' Court or two judges of the High Court. **In exercising this right to appeal, the accused person exercises the right to review or appeal conferred by the Constitution.** A fair appeal must require that every accused person and the prosecution be given an opportunity to advance their case in every reasonable way they can."* (Emphasis added.)

### 3.1.2 The right to speedy and fair administration of justice

#### 3.1.2.1 Section 35(3)(d) of the Constitution provides that:

*"Every accused person has a right to a fair trial, which includes the right ... to have their trial begin and conclude without unreasonable delay;"*

#### 3.1.2.2 In *Moeketsi v Attorney General Bophuthatswana*<sup>18</sup> it was held that the right to a trial within a reasonable time was "*indissolubly associated with the canon of fair trial and that an inordinate long and unexplained delay negated the concept*".<sup>19</sup>

#### 3.1.2.3 While the Constitution deals with the right to a fair and speedy **trial** the legal authorities on the subject are in agreement that these rights do not end with judgment and sentencing, but also include a "*fair appeal*".<sup>20</sup> In the *Shinga* case<sup>21</sup>, the Constitutional Court confirmed that "*... there can be no doubt that section 35(3)(o) contemplates that the review or appeal it guarantees is **as fair as the trial itself must be***". (Emphasis added.)

<sup>18</sup> 1996(1) SACR 675 (B)

<sup>19</sup> Also see *Sanderson v Attorney General* 1998(1) SACR 227 (CC) and *Wild v Hoffert* 1998(2) SACR 1 (CC)

<sup>20</sup> *S v Mantsha* 2006 JDR 0161 (C): "*The constitutional recognition of the right to a fair trial requires criminal trials to be conducted in accordance with 'notions of basic fairness and justice' and courts hearing criminal trials or appeals have to give content to these notions - S v Phiri 2005 JDR 0459 (T)*"

<sup>21</sup> *Supra*

3.1.2.4 In criminal cases, delay causes hardship to accused persons, particularly those in custody. An innocent person may end up serving punishment for an offence he/she never committed, before the case is concluded on appeal. This erodes confidence in justice and the presumption of innocence.<sup>22</sup>

3.1.2.5 From a human rights perspective, delay erodes three key rights: The right of access to justice, the right to an effective remedy and the right to a fair hearing. Legally defined, "access to justice" or "access to court" is the right to have a charge, allegation or civil dispute examined by a competent judicial authority.<sup>23</sup> The failure to address the problems of backlog and delay in many court systems could constitute a denial of access to justice.<sup>24</sup>

### **3.2 Appeals against convictions and sentences in the lower courts: Section 309 of the Criminal Procedure Act, 1977**

3.2.1 Prior to 28 May 1999, an appellant in a criminal appeal, except the so-called prisoner or jail appeals had an automatic right of appeal against decisions of the lower Courts. Save for the jail appeal, it was not necessary to obtain leave to appeal in order to lodge an appeal against a decision of a lower court.

3.2.2 According to some writers<sup>25</sup>, this unrestricted right led to an untenable situation. Court rolls became clogged with unmeritorious appeals. The Legislature intervened in 1997 and amended the Criminal Procedure Act by introducing certain limitations. However, the Constitutional Court declared these amendments invalid in *S v Steyn*.<sup>26</sup>

<sup>22</sup> Bassiouni M "Human Rights in the context of criminal justice: Identifying International procedural protections in national constitutions" (1993) 3 *Duke Journal Contemporary & International Law* 235, 285

<sup>23</sup> Stormorken B & L Zwaak *Human rights terminology in international law: A thesaurus* (1988) 21

<sup>24</sup> Chodosh H & others "Egyptian civil justice modernisation: A functional and systematic approach" (1996) *Michigan Journal of International Law* 24

<sup>25</sup> Tarantal W B "The Right Of Appeal: Exercising The Right of Appeal from the Lower Courts" *LLM Thesis* University of the Western Cape (Aug 2005)

<sup>26</sup> *Supra*

- 3.2.3 The Criminal Procedure Act was again amended (by the Criminal Procedure Amendment Act 42 of 2003) to address the declaration of invalidity and to introduce the following leave to appeal and petition procedures in respect of decisions of lower courts:
- 3.2.3.1 All convicted persons (except for unrepresented children below 16 years and all children under the age of 14 years) must, within 14 days after being sentenced, apply to the trial Magistrate for leave to appeal to the High Court (section 309B). The Magistrate may condone the late submission of an application for leave to appeal "*on application and on good cause shown*". [Section 308B (1)(ii)]
  - 3.2.3.2 An application for leave to appeal must be heard by the trial Magistrate or if he/she is not available, by a Magistrate to whom it is assigned for hearing. [Section 309B (2) (a)]
  - 3.2.3.3 If the application is to be heard by a Magistrate other than the trial Magistrate, the Clerk of the Court must submit a copy of the record of the trial proceedings (judgment or full record if so requested) to the Magistrate hearing the application. [Section 309B (2)(b)]
  - 3.2.3.4 The Clerk of the Court must give notice of the date of the hearing of the application to the accused (applicant) and the Director of Public Prosecutions (the DPP). [Section 309B (2)(d)]
  - 3.2.3.5 Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal. If the accused applies for leave to appeal orally immediately after conviction and sentence, he/she must state such grounds, which must be recorded and form part of the record. [Section 308B (3)(a) and (b)]
  - 3.2.3.6 In the event of leave to appeal being granted, the Clerk of the Court must order the transcription of the record. The original record, as well as three copies thereof, has to be forwarded by the Clerk of the Court to the Registrar of the High Court. [Section 309B (4)(a)]

- 3.2.3.7 The Registrar opens an appeal file, assigns a reference number and provides the DPP with one copy of the record, free of charge.
- 3.2.3.8 The DPP then enrolls the appeal for hearing by the High Court. The person in the DPP's office responsible for enrolling appeals checks that the record is complete.
- 3.2.3.9 Previously, an appeal could be disposed of by a High Court Judge in chambers on the written argument of the parties or their legal representatives, unless the he/she was of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the court regarding the appeal - see section 309(3A)(a). This provision was, however, declared invalid by the Constitutional Court and appeals must now be dealt with in an open court.<sup>27</sup>
- 3.2.3.10 If a lower court refuses any application for condonation or for leave to appeal, the accused may by petition apply to the Judge President of the High Court having jurisdiction to grant any one or more of the applications in question. [Section 309C].
- 3.2.3.11 An accused that submits a petition to the Judge President must at the same time give notice thereof to the Clerk of the Court where the application for leave to appeal or for condonation was refused. [Section 309C(3)(b)]
- 3.2.3.12 When receiving the above-mentioned notice, the Clerk of the Court must, without delay, submit the following to the Registrar of the High Court concerned:
- a) The application that was refused;
  - b) The Magistrate's reasons for refusal of the application; and
  - c) The record of the application proceedings in the Magistrate's Court.
- 3.2.3.13 The petition must be considered in chambers by a Judge (or in exceptional circumstances, two Judges), designated by the Judge President. The Judge(s) may

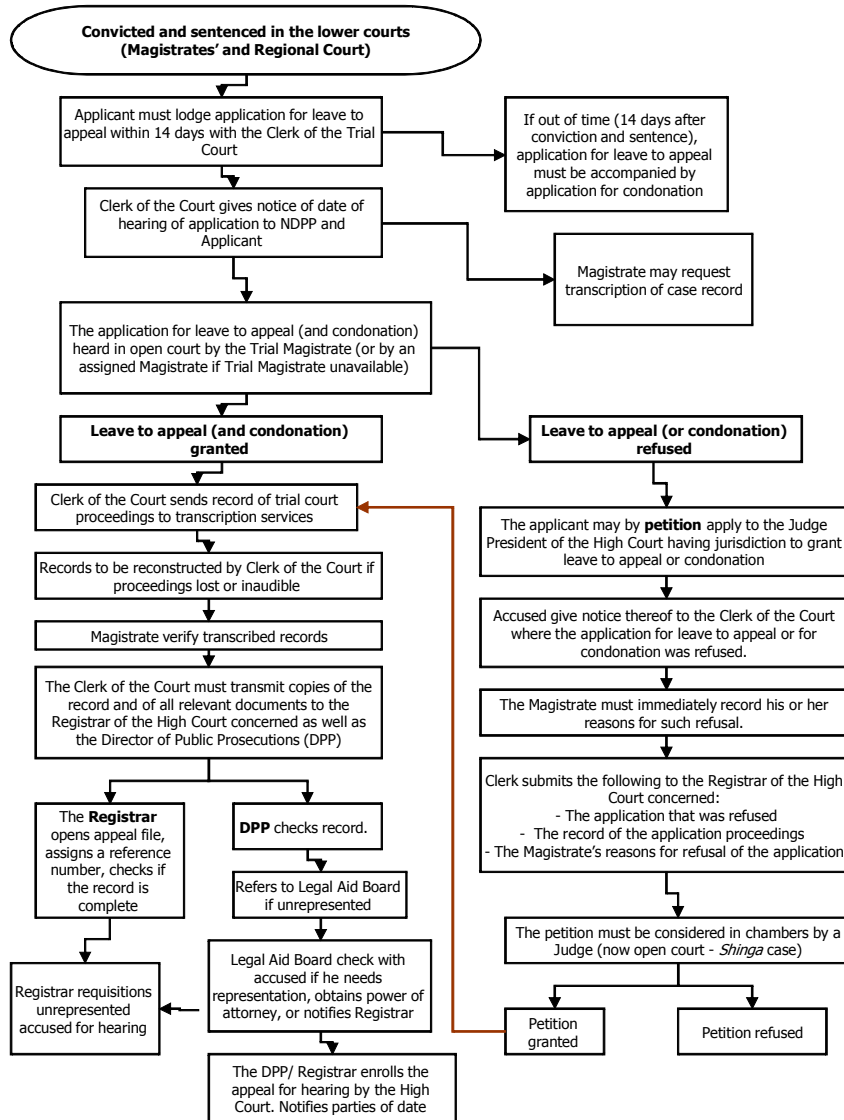
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<sup>27</sup> *Shinga v the State* supra

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call for further information, including the rest of the record of the proceedings, or order that the petition be argued before him/them. [Section 309 C(5)]

### 3.3 Schematic illustration of appeal process from the lower courts



### **3.4 Appeals against conviction and/or sentence in the High Court**

- 3.4.1 Any accused person (except for children below 16 and 14 years) may, within 14 days after conviction and sentence, apply to the trial Court for leave to appeal against the conviction and/or sentence. [Section 316(1)(a)]. The Court may condone the late submission of an application for leave to appeal "*on application and for good cause shown*". [Section 316(1)(b)]
- 3.4.2 An application for leave to appeal must be made to the trial Judge or if the case was heard by a circuit court not in sitting or the trial Judge is not available, to any other Judge of the High Court concerned. [Section 316(2)(a)]
- 3.4.3 If the application is to be heard by a Judge other than the trial Judge, the Registrar of the High Court must submit a copy of the judgment of the trial Judge (including the reasons for the conviction and sentence, and the full record of proceedings if so requested) to the Judge hearing the application [Section 316(2)(b)]
- 3.4.4 The Registrar must give notice of the date for the hearing of the application to the accused (applicant) and the DPP. [Section 309B(2)(d)]
- 3.4.5 Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal. If the accused applies for leave to appeal orally immediately after conviction and sentence, he/she must state such grounds, which must be recorded and form part of the record. [Section 316(4)]
- 3.4.6 In the event of leave to appeal being granted, the Court or Judges granting the application may direct that the appeal does not merit the attention of the Supreme Court of Appeal (the SCA) and that it could be heard by a full court (full bench) of the High Court from which the appeal originated. [Section 315(2)]
- 3.4.7 The Registrar of the High Court would forward the record of proceedings to the transcriber service. If the appeal is to be heard by the full bench of the High Court from which the appeal is made, the Registrar must prepare a copy of the record or

such parts of the record as may be agreed upon by the DPP and the accused, or required by the Judges of the full court. [Section 316(7)(b)]

- 3.4.8 If the appeal is to be heard by the SCA, the Registrar of the High Court must notify the Registrar of the SCA without delay, prepare a copy of the record or parts thereof as agreed or required, and transmit the record to the Registrar of the SCA. [Section 316(7)(a)]
- 3.4.9 The Registrar opens an appeal file, assigns a reference number and provides the DPP with one copy of the record free of charge. The DPP then enrolls the appeal for hearing by the full court of the High Court. The person in the DPP's office responsible for enrolling appeals checks that the record is complete. In the event of it being incomplete, he/she will refer the matter, in writing, to the attorney concerned detailing the defects in the record. The Registrar is also provided with a copy of this letter so that he/she is aware of the reason for the failure to enroll the appeal.
- 3.4.10 If the appeal is to be heard by the SCA, the record must be lodged with the Registrar of the SCA within three months of the lodging of the notice of appeal. This period may be extended for not more than two months. If the record is not lodged within the prescribed or extended period, the appeal shall lapse.<sup>28</sup>
- 3.4.11 If the Judge or Court hearing the application for leave to appeal refuses the application for condonation or for leave to appeal, the accused may, within 21 days of such refusal, by petition apply to the President of the SCA to grant any one or more of the applications in question. [Section 316(8)]
- 3.4.12 An accused who submits a petition to the President of the SCA must at the same time give notice thereof to the Registrar of the High Court where the trial took place. [Section 316(9)(b)]

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<sup>28</sup> Rule 8 of the *Rules of the Supreme Court of Appeal*

- 3.4.13 When receiving the above-mentioned notice, the Registrar of the High Court must submit the following to the Registrar of the SCA:
- 3.4.13.1 The application or applications that were refused;
  - 3.4.13.2 The trial Court's reasons for refusal of the application; and
  - 3.4.13.3 The record of the application proceedings in the trial Court. [Section 316(10)]
  - 3.4.13.4 The petition must be considered by two Judges of the SCA designated by the President of the SCA. If the Judges differ in their opinions, the President of the SCA shall also consider the petition, or he/she may refer it to another Judge. [Section 316(11)] The Judges may call for further information, including the rest of the record of the proceedings, or order that the petition be argued before them. [Section 316(12)] If leave to appeal or condonation is granted, the appeal proceeds in the full bench of the High Court or the SCA as described above (paragraph 3.4.6 and further).
- 3.4.14 All applications contained in a petition must, as far as possible, be disposed of simultaneously and as a matter of urgency, where the accused was sentenced to imprisonment that was not wholly suspended. [Section 316(14)]

### **3.5 Recent legal development: The hearing of an appeal in open court**

- 3.5.1 In terms of section 309(3A)(a) of the Criminal Procedure Act, an appeal must be disposed of by a Judge of the relevant High Court in chambers, on the written argument of the parties or their legal representatives, unless he/she is of the opinion that the interests of justice require that the parties or their legal representatives submit oral arguments to the Court regarding the merits of the appeal.
- 3.5.2 This provision, and the provisions of section 309B and 309C of the Criminal Procedure Act, were recently the subject of proceedings in the Constitutional Court,

in the matter of *M K Shinga v the State*.<sup>29</sup> The Court had to decide, *inter alia*, whether or not the provisions that allow appeals to be determined behind closed doors (instead of in an open court), and on written arguments as opposed to oral presentations, were consistent with the Constitution.

3.5.3 The Court observed that:

*"Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based.*

*The importance of criminal appeals being argued and heard in open court cannot thus be gainsaid. The survivors of crime, those accused of it and the broader community have a right to see that justice is done in criminal matters. ... Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate.*

*It is true, of course, that the principle of open justice is not without exception. This Court has held that leave-to-appeal procedures may be heard in chambers, but this is an exception to the general rule of open justice permitted only to ensure that judicial resources are preserved for deserving cases."*

3.5.4 The Court also stated that:

*"A fair appeal must require that every accused and the prosecution be given an opportunity to advance their case in every reasonable way they can. To deny the accused or the prosecution the right to present oral argument in open court is fundamentally unfair ...";*

and:

*"In the circumstances the provisions of section 309(3A) must be held to be inconsistent with the Constitution."*<sup>30</sup>

The Court therefore declared the provisions of section 309(3A)(a) invalid.

<sup>29</sup> Supra

<sup>30</sup> *Shinga v the State* supra at par 30 and par 31

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## **CHAPTER 4**

### **INVESTIGATION AND METHODOLOGY**

- 4.1 When the decision was taken to institute a systemic investigation into the administrative delays in the finalisation of criminal appeals, a project team was established, consisting of investigators from the National as well as Provincial Offices of the Public Protector.
- 4.2 A project plan was prepared by the team and approved by the Public Protector. It provided, *inter alia*, for:
- 4.2.1 The identification of the details and nature of complaints received by the OPP regarding the administration of criminal appeals;
  - 4.2.2 The identification of the courts/institutions complained against;
  - 4.2.3 Consultation with key stakeholders in the appeals process, including:
    - 4.2.3.1 Prisoners lodging the appeals;
    - 4.2.3.2 Court officials;
    - 4.2.3.3 Officials of the Legal Aid Board and Justice Centres;
    - 4.2.3.4 Officials of the Department of Correctional Services;
    - 4.2.3.5 The National and Deputy National Directors of the National Prosecuting Authority; and
    - 4.2.3.6 Senior officials of the Department of Justice and Constitutional Development.
  - 4.2.4 The identification of the relevant legal framework (legislation) and scrutiny of the administrative directives applicable to the various government agencies involved in the administration of appeals.
- 4.3 A large number of the complaint files relating to appeals, dating back to 2003, were perused, both at the National and Provincial Offices of the Public Protector, with a view to determine the general trend of complaints and the courts which are mostly involved,

the prisons where the complaints originate, the nature of the complaints and the responses of the Clerks of the Courts to enquiries by investigators.

- 4.4 Investigators consulted with Court Managers of the identified courts, as well as the Clerks of the Courts and Registrars of various Divisions of the High Court, to obtain their responses to the general allegations gathered from the said survey, as well as their inputs on the challenges that they face. The National Prosecuting Authority and some of the Justice Centres were also consulted.
- 4.5 The Department of Justice and Constitutional Development and the Department of Correctional Services were furthermore, formally informed of the systemic investigation and meetings were held with several officials of these Departments. Presentations were also made to the Development Committee of the Crime Prevention and Security Cluster (JCPS), as well as to the Committee on the National Initiative to Combat Overcrowded Correctional Institutions, chaired by Judge E Bertelsman.
- 4.6 In October 2006, the Free State Provincial Office of the Public Protector hosted a workshop on criminal appeals, in association with the Department of Correctional Services, the Department of Justice and Constitutional Development, the Legal Aid Board and the GSL Correction Centre. The participants included the Registrars of the SCA, and of the Free State Division of the High Court, and the High Court Manager of the Legal Aid Board. The workshop was attended by 90 officials of the Department of Correctional Services from the Free State and the Northern Cape provinces, as well as officials from the Mangaung Private Prison in Bloemfontein.
- 4.7 The investigation focused primarily on the issues raised in the complaints relating to the alleged undue delay in the processing of appeals from the lower courts and the High Court and the apparent lack of communication by the various Courts. It did not include a review of the legislation that governs the appeal process or of the relevant decisions of the Courts, which fall outside the ambit of the jurisdiction of the Public Protector.

## CHAPTER 5

### LEAVE TO APPEAL PROCEDURE

#### 5.1 Introduction

5.1.1 As indicated above, an accused person who wishes to appeal against his/her conviction and sentence is required to first apply for leave to appeal from the trial Magistrate (if convicted in the District or Regional Court), or the trial Judge (if convicted in the High Court).

5.1.2 The duties of the accused, officials and Departments/institutions involved in the leave-to-appeal process, are set out below:

<p>Accused person (applicant)</p>	<ul style="list-style-type: none"> <li>• May apply orally for leave to appeal immediately after the passing of the sentence in the trial court; or</li> <li>• Must submit a written application for leave to appeal to the Clerk of the Court or the Registrar of the High Court where he/she was convicted, within 14 days after sentence, if the application is not made immediately after the passing of sentence.</li> <li>• If out of time, must submit an application for condonation together with the application for leave to appeal.</li> <li>• Applications for leave to appeal must include the grounds for appeal.</li> </ul>
<p>Clerk of the Court/ Registrar</p>	<ul style="list-style-type: none"> <li>• Registers the application for leave to appeal in the Appeal Register.</li> <li>• Determines if the trial Magistrate/Judge is available.</li> <li>• If another Magistrate/Judge is designated to hear the application(s), causes the full record or judgment of the trial proceedings to be transcribed.</li> <li>• Allocates a hearing date for the application(s).</li> <li>• Notifies the applicant or his/her attorney and the DPP of the hearing</li> </ul>

	<p>date.</p> <ul style="list-style-type: none"> <li>• If the accused is unrepresented and in prison, requisitions the accused to court for the hearing date.</li> </ul>
Legal Aid Board	<ul style="list-style-type: none"> <li>• If accused is represented by the Legal Aid Board at the trial the Board will continue to represent him/her for the purposes of lodging an appeal if he/she indicates the same to the legal representative immediately after the passing of sentence.</li> <li>• If a person was not represented by the Legal Aid Board, or initially elected not to appeal against the conviction and sentence, he/she needs to apply for legal aid for purposes of an appeal.</li> </ul>
Department of Correctional Services	<ul style="list-style-type: none"> <li>• Takes custody of an accused person after sentencing.</li> <li>• Facilitates communication/enquiries between the accused and the Legal Aid Board, or the court - for purposes of an application for legal aid or for the submission of applications for condonation and for leave to appeal.</li> </ul>
DPP/Prosecution	<ul style="list-style-type: none"> <li>• Argue their position on the application for leave to appeal/condonation before the court hearing the application(s).</li> </ul>
Magistrate/Judge	<ul style="list-style-type: none"> <li>• May request a transcription of the record of the trial proceedings.</li> <li>• Hears the application for condonation and/or leave to appeal.</li> <li>• Grants/refuses the application(s).</li> </ul>

5.1.3 From a perusal of the above-mentioned duties, it will be noted that the Clerks of the Courts and the Registrars of the different Divisions of the High Court play a pivotal role in the application for leave-to-appeal process. Consequently, most of the complaints relating to delays are directed at or leveled against, the Clerks of the Courts and the Registrars.

5.1.4 The allegations include, *inter alia*, that:

5.1.4.1 They fail to acknowledge receipt of the applications for leave to appeal (and condonations); or

- 5.1.4.2 There is an inordinate delay before responding to such applications, and informing prisoners about the progress made;
- 5.1.4.3 In some provinces the Registrar(s) would allegedly not accept an application for leave to appeal if the accused person is not legally represented;
- 5.1.4.4 The Clerks/Registrars fail to place the applications on the court rolls for hearing, or fail to notify the accused or the Department of Correctional Services of the hearing date; and
- 5.1.4.5 The determination of a hearing date is unreasonably delayed. (An example of such a case brought to the attention of the Public Protector includes an instance where an accused was convicted on 28 January 2004, submitted an application for leave to appeal to the Clerk of the Court on 3 February 2004, but only appeared before the trial Magistrate for the hearing of the application three years later - on 28 March 2007.)

## **5.2 Consultation with the Clerks of the Court/Registrars**

- 5.2.1 As far as individual complaints about failure or delays in responding to applications for leave to appeal are concerned, it was noted that there were a number of cases where the Clerks of the Courts/Registrars could not find any record of the lodging of such applications.
- 5.2.2 When this issue was raised with the Clerks/Registrars, they advised that applications for leave to appeal are not always directed or submitted to the correct forum/office. All applications must be submitted to the Clerk or the Registrar of the trial Court. Prisoners who wish to appeal against a conviction and/or sentence of a District or Regional Court would, for instance, submit a letter protesting their innocence and setting out their grounds for appeal directly to the nearest High Court, without approaching the trial Court first for leave to appeal. In the same manner accused persons convicted in the High Court would approach the SCA directly without obtaining leave to appeal from the

High Court. One of the Registrars indicated that although it is not his duty, he would communicate with the prospective appellant and refer the application to the court *a quo*. But, because of time constraints and a lack of capacity, it is not always possible to do so.

- 5.2.3 It was also explained that a number of the letters received by the Clerks of the Courts and the Registrars, as well as complaints to the various institutions, are “smuggled” out of prisons through a relative or friend and do not arrive under cover of a letter from the Department of Correctional Services. As a result, there is no record of such correspondence on the prisoner’s file at the Department. Such letters are mostly sent by ordinary mail. It is therefore thought that a number of applications for leave to appeal submitted in this manner never reach the Clerks of the Courts and cannot be traced, as they are not sent by registered mail.
- 5.2.4 According to some court officials, a large number of prisoners simply write ordinary letters indicating that they want to appeal against their convictions and/or sentences, and consider themselves to have properly lodged appeals, when they have not done so. If the correspondence from the prospective appellant is so defective that it cannot be presented to the trial Magistrate as an application for leave to appeal, the relevant Clerk of the Court or Registrar does not register an appeal, but instead provides the prisoner with the correct forms to re-submit a proper application. In one jurisdiction the situation has deteriorated to such an extent that the Judge President issued instructions that correspondence/applications would not be considered if it does not comply with the court rules, or are not submitted via the official channels of the Department of Correctional Services.
- 5.2.5 In some offices the Clerk of the Court would duly record the correspondence from a prisoner purported to constitute an application for leave to appeal, in the Appeal Register and allocate a CA (criminal appeal) number, even if it does not comply with the prescripts. The prisoner and the Head of the Prison where he/she is held are informed

of the CA reference number. The CA number is recorded in the prisoner's file and if he/she is transferred, the information that the prisoner lodged an appeal is therefore conveyed to the officials of the next prison.

- 5.2.6 Sometimes applications for leave to appeal are lodged long after the prisoners had been convicted and sentenced, thus making it almost impossible to trace the records of the cases.
- 5.2.7 The Clerks/Registrars furthermore advised that the leave to appeal process is frustrated by the fact that they are not informed when prisoners are transferred from one prison to another after the registration of an appeal. This causes delays as correspondence and notices to the prisoners do not seem to reach them or take long to do so, and there are difficulties in tracing prisoners to requisition them to court for the hearing of their applications.
- 5.2.8 In general, Judges of the High Court prefer that the appellant is legally represented and in some jurisdictions the presiding Judge would request counsel to act *amicus curiae* for an appellant who for some reason does not have legal representation. In the lower courts, Magistrates do not insist on the appellant being legally represented during the hearing of the application for leave to appeal and where condonation is requested. While not a new phenomenon, the incidence of appellants who attempt to prosecute their appeals from prisons without legal representation or legal assistance, does present particular challenges for the legal system.
- 5.2.9 The Clerks and the Registrars alluded to the fact that the administration involved in the processing of unassisted prisoner appeals places an additional demand on their capacity and available resources in terms of dealing with the volume and frequency of written and telephonic enquiries from prisoners. They also have to deal with enquiries from institutions that prisoners have complained to, provide the correct documentation and information to prisoners, and often trace them. The enquiries may at times be voluminous and often do not contain the reference numbers of the Court, with the

result that manual searches have to be conducted to establish the correct reference number and to locate the appeal file before the enquiry could be replied to.

5.2.10 In the High Court in Bloemfontein the Appeals Clerk in the Office of the Registrar deals with civil appeals, criminal appeals as well as petitions. In addition to dealing with appeals and petitions, he/she also attends to approximately 20 letters of enquiry from prisoners per day, as well as in the region of 10 telephonic enquiries.

5.2.11 The Office of the Clerk of the Court at the Johannesburg Magistrate's Office, is responsible for the administration of appeals of 16 courts in Soweto, together with 8 District and 15 Regional Courts in Johannesburg. It receives between 700 and 800 appeals per year, 50% of which are reportedly carried over to the next year. One Appeal Clerk is designated only to deal with correspondence and enquiries relating to appeals.

5.2.12 Two Appeal Clerks and one supervisor occupy the Criminal Appeals section at the Magistrate's Office, Pretoria. They deal with appeals from 21 Regional Courts and 16 District Courts, as well as appeals from other offices, such as Bronkhorstspuit. In addition, they receive approximately 10 telephone and 50 written enquiries from prisoners per day. According to them, they respond to all the enquiries although it is a time-consuming task to trace all the files, follow up on the status of the application or appeal, and report back to the enquirer.

5.2.13 The Office of the Registrar of the High Court, Pretoria, is reportedly dealing with 40 to 50 letters from prisoners per day.

### **5.3 Consultation with prisoners**

5.3.1 Investigators interacted with prisoners from 7 prisons. Questions were posed to them to try and determine whether it is correct that some of them do not submit their applications for leave to appeal to the Records Office at the prison to be forwarded to the Clerks of the Courts or the Registrars, and, if so, what the reasons might be. Some

of the groups stated in no uncertain terms that they do not trust the structures within the Department of Correctional Services that are intended to channel their applications for legal aid to the Legal Aid Board, as well as their correspondence to the courts to lodge and pursue an appeal. If they do not get a response from the Legal Aid Board or the courts to their applications, or if there are inordinate delays in this regard, they suspect that the Department of Correctional Services failed to deal with the correspondence in a prompt and correct manner.

- 5.3.2 Some of the prisoners prefer to deal with the Legal Aid Board and the courts directly in order to prevent the Department of Correctional Services from having record of the fact that they have lodged an appeal. Apparently, the Parole Board would not consider the determination of a parole date for the release of a prisoner while an appeal is still pending. As a result prisoners are allegedly obliged to withdraw their appeals once they are entitled to be considered for parole. However, they want to be able to revive the appeal if they are not satisfied with the outcome of the parole process. In order to avoid having to withdraw their appeals, they try and pursue an appeal “off the record” of the Department of Correctional Services.
- 5.3.3 A substantial number of prisoners (in some prisons estimated at about 40%) claim to have no or very limited knowledge of the legal aid that is available as well as the appeal process. In some cases prisoners are, upon entering the prison for the first time, apparently furnished with forms to enable them to apply for legal aid, leave to appeal and for condonation. However, no or little educational material or information in this regard is apparently available and they have to rely mainly on the knowledge and experience of fellow inmates for assistance to complete and submit the necessary forms. In one of the prisons that is over 300% overcrowded, prisoners noted that in such circumstances the Department of Correctional Services might not have the capacity to provide the necessary assistance and support to those who wish to appeal.

## **5.4 Consultation with officials from the Department of Correctional Services**

- 5.4.1 The officials of the prisons visited advised that all applications for leave to appeal, as well as related correspondence and enquiries, are dealt with by the Records Offices. This Office provides prisoners who wish to appeal with the necessary forms to apply for legal aid and/or to lodge an application for leave to appeal. In some prisons, the Records Office offers assistance to prisoners with the completion of the forms, but generally the officials would merely receive the forms or letters from prisoners, record the appeal in the Appeal Register and forward the correspondence to the addressee. In certain prisons the applications for leave to appeal are forwarded to the Clerks of the Courts or the Registrars by registered mail under cover of a letter from the Records Office and the prisoner is provided with a copy of the registration slip to show that it was indeed forwarded to the court. Copies are kept on the prisoner's file.
- 5.4.2 The fact that a prisoner has lodged an appeal is also electronically recorded in the system or database of the Department, and this information is shared within the Department if the prisoner is transferred.
- 5.4.3 The Records Offices assist prisoners to make enquiries with the courts about the status and progress of their appeals, but the officials indicated to investigators that their correspondence is often not replied to. They ensure that correspondence to and from the courts are properly recorded, that the contents are conveyed to the prisoners and that they are provided with copies. If there are delays on the part of the courts, the prisoners are however, inclined to assume that their correspondence and enquiries were not duly forwarded or properly dealt with by the Department.
- 5.4.4 Officials performing duty in the Records Offices advised that they have not received any formal or internal training on the appeal process. There are no directives or training manuals available to guide them on the assistance that they should render to prisoners with the processing of their appeals.

- 5.4.5 Some of the court officials consulted by investigators clearly expect the officials in the Records Offices not only to forward correspondence from prisoners to the courts, but also to check whether the correspondence, by means of which a prisoner wishes to lodge an appeal, is in fact in the correct form and that an application for condonation is included in appropriate cases. There is, however, no directive informing officials in the Records Office whether, and to what extent, they are required to scrutinize the contents of the correspondence to the Clerk of the Court to verify whether or not it constitutes an application for leave to appeal, or whether or not it is accompanied by an application for condonation, when required. It is not even clear whether or not officials of the Department of Correctional Services are required to check against the warrant of detention if the correspondence is directed to the correct Clerk of the Court or Registrar. The workshop held with the officials of the Department of Correctional Services in the Free State and Northern Cape provinces<sup>31</sup> highlighted the uncertainty in respect of their role and obligations, as well as the need for structured and formalized training of officials involved in the processing and administration of appeals.
- 5.4.6 The officials furthermore advised that the rendering of assistance to prisoners with their appeals is one of many functions of the Records Office. The impression was therefore gained that there are no resources dedicated specifically to this task. The level and quality of assistance rendered to prisoners is therefore largely dependent on the level of commitment and diligence of the individual, as there are no prescribed or minimum standards of performance in this regard. As a result, officials tend to adopt their own practices and rules, for instance about the timeframes within which prisoners are allowed to enquire about the status of their applications for leave to appeal after the documents have been forwarded to the Clerk of the Court. In some instances they would not entertain any enquiries unless 6 months have expired after the application was lodged.

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<sup>31</sup> See par 4.6 above

- 5.4.7 The nature and level of assistance rendered to prisoners by officials of the Records Offices vary from one prison to another. Not all Records Offices would, for instance, submit the initial application for leave to appeal under cover of a letter or by registered mail. In one prison, the official at the Records Office did not know what investigators were referring to when enquiries were made to establish if the details of an appeal are also electronically recorded on the system of the Department of Correctional Services. Some offices refuse to assist prisoners to make enquiries about the status of their appeals if the application for leave to appeal was not initially submitted via the Records Office and recorded in their files.
- 5.4.8 It was also confirmed that a Parole Board would indeed not consider the determination of a parole date if the prisoner's appeal has not yet been finalized. The parole date depends on the terms of imprisonment imposed by the Court during sentencing, and would be affected by a subsequent change to the term of imprisonment. The parole process is a time consuming exercise, also involving the community and the victims of crime, and Parole Boards are reluctant to waste resources by determining a date if there is a possibility that the sentence could be amended on appeal, or that the term of imprisonment could be set aside.

## **5.5 Consultation with the Legal Aid Board and Justice Centres**

- 5.5.1 Officials of the Legal Aid Board confirmed that it is not necessary for an accused person who was represented by a legal aid-appointed representative during the trial, to re-apply for legal aid for the purpose of proceeding with an appeal. The accused is, however, required to inform the legal representative of his/her wish to appeal immediately after the passing of sentence. It is the responsibility of the legal representative conducting the trial to obtain the accused's instructions on whether or not he/she wished to appeal against conviction and/or sentence. The accused must further confirm his/her decision in this regard in writing. The legal aid mandate of a legal representative is not discharged until the practitioner has obtained the accused's

instructions and the Board will not consider any account for payment until this has been attended to.

- 5.5.2 If the accused elects to appeal, his/her legal representative must apply for leave to appeal from the trial Court immediately after sentencing or within the prescribed time limits.
- 5.5.3 If an accused person elected not to appeal after the conclusion of the trial, but later changes his/her mind, or if he/she did not have legal aid during the trial, he/she will have to apply for legal aid.
- 5.5.4 An accused person wanting to appeal is entitled to legal representation at state expense, where a substantial injustice would otherwise result. In terms of the directives of the Legal Aid Board<sup>32</sup> there will be substantial injustice in an intended criminal appeal if legal representation is not made available to the accused at state expense in a case where:

*“1.3.1 The accused is unable to afford the cost of his/her own legal representation for the appeal; and*

*1.3.2 The accused has been sentenced to imprisonment with an unsuspended portion of more than 3 months, and given the option of a fine, the fine is unpaid 2 weeks after the date of sentence; and*

*1.3.3 Where leave to appeal has not been requested timeously and there is a reasonable chance that condonation for the late filing will be granted taking into consideration the reason for the delaying in applying for leave to appeal and the chances of success on appeal.”*

- 5.5.5 The Legal Aid Board is represented in each Magisterial District, save where the Board has a Justice Centre or Branch Office, by an official appointed by the Department of

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<sup>32</sup> Circular 2 of 2006

Justice and Constitutional Development as a Legal Aid Officer. In practice, the Legal Aid Officer would receive an application for legal aid from the prisoner directly or via the Department of Correctional Services and forward it to the relevant Justice Centre or Branch office for consideration. According to the Legal Development Executive of the Legal Aid Board, a decision by the Justice Centre or Branch Office on an application for legal aid should not take longer than 7 to 10 working days. Currently, the Pretoria Justice Centre reportedly takes one day to reach a decision. Delays in the finalisation of an application for legal aid would therefore mainly occur during the transmission of the application to the Legal Aid Officer and from the Legal Aid Officer to the Justice Centre or Branch Office.

- 5.5.6 In view of the fact that legal aid is readily available to convicted persons sentenced to imprisonment, investigators ventured to establish why some prisoners who wish to appeal would choose not to apply for legal representation at state expense. Concerns about delays and the alleged failure by the Department of Correctional Services to transmit applications for legal aid to the Legal Aid Officers, were noted as factors contributing to the number of unrepresented prisoners on appeal. However, there were quite a number of prisoners who indicated that they choose not to apply for legal aid, not because the legal representation is at state expense and they are suspicious about conflict of interests, but because they are of the opinion that the legal aid practitioners are inexperienced ("student lawyers") and not adequately compensated to ensure that they are committed to their clients.
- 5.5.7 Officials of the Legal Aid Board further explained that legal representation is rendered through the Judicare System (by which the Board offers legal aid instructions to legal practitioners in private practice), as well as the Justice Centres (offices where the Board makes available the services of salaried legal practitioners - attorneys, candidate attorneys and paralegals in the employment of the Board). Currently only about 10% of legal aid instructions are issued in terms of the Judicare System and the aim is to

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restrict its application to specialist legal aid work for which the Justice Centers do not have the capacity.<sup>33</sup>

5.5.8 It was emphasized that legal practitioners representing accused persons, whether in the employment of the Legal Aid Board, or appointed in terms of the Judicare System, are expected to offer the best possible defense to their clients, both during trial and on appeal. The Board has implemented quality control mechanisms, which include the monitoring of the outcome of the proceedings, as well as directives to obtain written instructions from clients after sentence has been passed. An accused person who is dissatisfied with the services of a legal practitioner appointed by the Legal Aid Board is at liberty to direct any complaints in this regard to the Board.

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<sup>33</sup> Legal Aid Board *2002 Legal Aid Guide* as updated

## 5.6 Observations and discussion

### 5.6.1 Clerks of the Courts

- 5.6.1.1 It emerged as a major source of concern that an application for leave to appeal from a convicted person in prison could take between 6 months and 3 years, sometimes longer, to be heard by the trial Court.
- 5.6.1.2 The factors that contribute to such delays have been noted, and it is acknowledged that these factors are not always within the control of the Clerks of the Courts. However, officials of the Department of Correctional Services expressed their frustration about the fact that the actions and duties of the Clerks of the Courts in this regard do not seem to be clearly regulated, and linked or limited to certain timeframes that would enable prisoners as well as the Department to know what to expect from the leave-to-appeal processes.
- 5.6.1.3 Apart from the legal procedures and requirements contained in the Criminal Procedure Act, 1977, the duties of a Clerk of the Court in respect of criminal appeals are informed by Rule 67 of the Magistrates' Courts Rules of Court<sup>34</sup>, and the Codified Instructions: Clerks of the Court (Code: Clerk of the Court) issued by the Department of Justice and Constitutional Development.
- 5.6.1.4 It was noted with concern that the last time that Rule 67 was amended was by Government Notice R569 of 1999. That amendment was to provide for time limits and the procedure to be followed where an accused wishes to apply for leave to appeal in terms of the then section 309B(1) of the Criminal Procedure Act, 1977. The Rules Board for Courts of Law confirmed that Rule 67 of the Magistrates' Courts Rules of Court has not yet been updated to align its contents with the appeal process as amended in 2003 by the changes to the Criminal Procedure Act, 1977.

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<sup>34</sup> Issued by the Rules Board for Courts of Law, with the approval of the Minister of Justice and Constitutional Development

Amendments have reportedly been drafted by the Rules Board for Courts of Law in 2004 and have apparently been approved. The updated Rules were, however, not yet promulgated at the time of the conclusion of the investigation. (confirmed by Rules Board Secretariat on 24 April 2008)

- 5.6.1.5 Similarly, the Code: Clerk of the Court does not reflect the current legal position, and does not appear to have been updated for some time. Instead of dealing with the current procedure relating to the application for leave to appeal, paragraph 230 of the Code, for instance, still provides that "*an accused shall within 15 days ... from the date of conviction, sentence or order submit a written **notice of appeal** to the Clerk of the Court.*" (Emphasis added.)
- 5.6.1.6 In terms of the current Magistrates' Court Rules of Court, as well as the Code: Clerk of the Court, time limits only apply in respect of the following:
- The accused or his/her attorney and the prosecution must be notified of the hearing date of the application for leave to appeal at least 10 days before the date fixed for the hearing;
  - When leave to appeal is granted and the transcribed record is available, a copy must be submitted to the presiding officer, who has 15 days to furnish the Clerk of the Court with a statement with his/her reasons for the findings in respect of the issues raised in the grounds of appeal;
  - The Clerk of the Court shall transmit the records, together with 3 copies thereof, to the Registrar of the High Court within 10 days after receipt of the Magistrate's statement.<sup>35</sup>
- 5.6.1.7 In terms of the Code: Clerk of the Court, the Clerk of the Court must enter the necessary particulars in the Register of Appeals in Criminal Cases (J117) upon receipt of the notice of appeal (now the application for leave to appeal), and keep the entries in the Register up to date to reflect the different steps taken in the

<sup>35</sup> Rule 67(2), (7) and (15) of the *Magistrates' Courts Rules of Court*

appeal case. After registration of the appeal in the J117 there is however, no prescribed timeframe within which a Clerk of the Court is obliged to determine a date for the hearing of the application for leave to appeal.

- 5.6.1.8 There appears to be no directive to guide a Clerk of the Court as to what would constitute, in terms of the current legal position, an application for leave to appeal for an appeal to be registered in the J117. The dilemma is that if letters from prisoners who wish to appeal were not registered in the J117 because they do not comply with the minimum requirements of the Criminal Procedure Act, 1977, it would mean that an appeal file would not be opened. These letters would then merely be filed as correspondence, and there would not be any record of such efforts on the appeal files once they have been opened. On the other hand, if all letters purported to constitute applications for leave to appeal are registered in the J117 and appeal files are opened, there would be a delay in the processing of the application if the Clerk had to request the correct documents and forms. In the absence of clear directives and guidance in this regard to the Clerks of the Court, there is no consistency in the manner in which Clerks are responding to defective applications for leave to appeal, or in the manner in which appeals are initially registered.
- 5.6.1.9 Further on the issue of defective applications for leave to appeal, it is not clear what is expected from the Clerks of the Court in terms of assistance to unrepresented accused.
- 5.6.1.10 Challenges arise when self-represented litigants make their first contact with the court system. The reality is that the legal system is not really designed to serve individuals without legal representation. Confusing language, or “legalese,” and complicated rules and procedures can alienate litigants representing themselves in court.<sup>36</sup> Court officials, presiding officers and the prosecuting authorities often share the frustration experienced by an appellant. Most of the court officials consulted by

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36 *Shinga v the State* CCT case no 56/06 (delivered 8 March 2007)

investigators were in agreement that the majority of appellants have only a rudimentary education and could accordingly not prepare, present and argue their cases effectively. Lacking the legal skill to understand the required statements and averments in an application for leave to appeal that are “sufficiently specific” to satisfy the provisions of section 308B(3)(a) of the Criminal Procedure Act, prisoners without skilled counsel are at risk of summary dismissal of their applications.

- 5.6.1.11 Unassisted appellants impose additional burdens and demands on court staff and resources compared to legally represented appellants. The former require assistance to understand and follow appropriate procedures, and to correct mistakes caused by their lack of legal training and experience.<sup>37</sup> Court officials often have to deal with procedural deficiencies such as lack of specificity, lack of factual statements and failure to comply with procedural rules that are often not well understood. While the appellants’ right of access to the courts are duly observed and it is recognized that an appellant is entitled to represent himself/herself in person in the appeal process, the Clerks of the Courts are simply unable to process letters that do not constitute a proper application for leave to appeal, or which are, in appropriate cases, not accompanied by an application for condonation.
- 5.6.1.12 Self-representation presents particular challenges to the neutral role of presiding officers. When dealing with self-represented appeals, Magistrates and Judges must walk a fine line between two competing considerations - impartiality versus access to the courts. On the one hand, if the Court treats the self-represented party as if he/she is legally represented, it runs the risk of effectually impeding his/her access to justice. On the other hand, if the Court is too lenient, the presiding officer’s impartiality may be questioned by the State.<sup>38</sup> Presiding officers are independent and are expected to play the traditional role of arbiter in court, anticipating that both

<sup>37</sup> Nair R “Introduction: When Punishment Exceeds Accountability” vol 2 *Track Two: Prison Transformation in South Africa*

<sup>38</sup> Task Force on Pro Se Litigation *Guidelines For Best Practices In Pro Se Assistance* (1 October 2004)

parties will understand and use established rules for disposing of cases. Unassisted litigants often cannot meet these expectations.

5.6.1.13 In *S v Jafta*<sup>39</sup> the court described this situation as follows:

*"They were for the most part out of time; they were initiated by documents that were little more than letters of complaint; there was seldom any attempt to obtain condonation for procedural defects. We adopted a lenient approach to the non-compliance with the rules. However, where a document could not even on a liberal construction be seen as a notice of appeal or an application for condonation, the accused was advised of the requirements of the rules, on a standard letter devised by the Judge President. Such accused was informed also of his or her rights to legal representation. Despite these measures, appellants often appeared in person in prison garb with a posse of warders in attendance at court. Many of them accepted the advice of the Court to apply for legal aid; others insisted on arguing their own case, which in most instances amounted to protestations of their innocence reinforced by reiteration of their evidence in the lower court."*

5.6.1.14 Our Courts have in recent years emphasized the fact that they expect all persons who approach the courts to comply with legal and procedural requirements. In *S v Mantsha*<sup>40</sup> it was, for example, stated that:

*"In matters of this kind, due allowance must of course be made for the fact that the lay accused concerned has been unrepresented for all or part of the relevant time. Consequently, purely superficial and technical imperfections and lapses in procedural steps taken by such an accused are usually more readily condoned than they would have been had he been represented by a legal practitioner throughout. However, there is a limit to the lengths to which a court of appeal can go in relaxing the rules and granting condonation to those who flagrantly fail to comply with them. **It is not, and has never been, the position in our law that whilst the relevant rules apply to appellants who are represented, they do not apply to others***

<sup>39</sup> 2004 JDR 0152 (E)

<sup>40</sup> 2006 JDR 0161 (C)

***who are not.** That would be a quite untenable and unjustifiable stance to adopt. Nevertheless, sitting in criminal appeals week after week in this Court one cannot help forming the impression from what is sometimes advanced on behalf of appellants that that, or something like that, is the stance which this Court is from time to time invited to adopt. I firmly decline the invitation. **The rules are for all litigants. They must be adhered to by all litigants.** That is the basic principle which applies.*"(Emphasis added.)

- 5.6.1.15 In view of the presiding officers having to remain impartial, it appears to be the duty of court officials to assist prospective unrepresented appellants to enroll their applications for leave to appeal before the trial Magistrate or Judge. However, the interaction and communication between court officials and unrepresented appellants may raise ethical and legal concerns, because the need for assistance "*may cross the gray line between legal information and legal advice*".<sup>41</sup> Where the letter from a prisoner does not conform to the legal requirements, the assistance provided by court officials is in the circumstances limited to making the necessary appeal forms available to enable the prospective appellant to submit a proper application for leave to appeal, and condonation where applicable. The appellant is also advised of the availability of legal aid. This would inevitably lead to a delay before the correct documents are submitted and a proper application for leave to appeal is registered.
- 5.6.1.16 In addition, the pursuance of self-represented appeals presents practical challenges for court staff in terms of effective communications and other logistical considerations. Unfortunately, "*court staff must balance the conflicting obligations to provide quality customer service, prioritize workload demands, and adhere to legal and ethical constraints concerning the unauthorized practice of law*",<sup>42</sup> and may become overwhelmed by the demands posed by unassisted appeals.

<sup>41</sup> "Minnesota's *pro bono* appellate program: A simple approach that achieves important objectives" *The Journal of Appellate Practice and Process* vol 6.2 (2004) 298

<sup>42</sup> Wisconsin Pro Se Working Group *Report: Meeting the challenge of self-represented litigants in Wisconsin* (2000) 11

## 5.6.2 The role of the Department of Correctional Services

- 5.6.2.1 During the OPP workshop held towards the end of 2006 in Bloemfontein with the Department of Justice and Constitutional Development, the Department of Correctional Services, and the Legal Aid Board, there was a suggestion from a delegate from the private sector that the Department of Correctional Services should provide legal training to the officials tasked with appeals, and even employ legally qualified people or paralegals to assist prisoners with the prosecution of appeals.
- 5.6.2.2 The delegates to the OPP workshop however shared a common view that it is not the role or duty of the Department of Correctional Services to provide prisoners with legal services in the form of representation or legal advice. The same ethical and legal concerns that were raised about the fact that the Clerk of the Court is not supposed to render a legal service are also applicable in respect of the position of officials from the Department of Correctional Services. It was emphasized that the Department would run the risk of incurring civil liability if the officials happen to provide incorrect legal advice.
- 5.6.2.3 Chapter 2 of the Constitution (Bill of Rights), *inter alia*, provides as follows:
- "Access to courts**
- 34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*
- 5.6.2.4 The courts have emphasized that the right to appeal is "*of considerable importance in the achievement of a fair criminal justice system*" because "*the effect of a criminal conviction on the liberty and dignity of the individual makes it imperative*

*that adequate procedural checks and balances limit wrong convictions and inappropriate sentences to the barest minimum.”*<sup>43</sup>

5.6.2.5 The legal system is mandated to ensure the equality of all before the law, and thus equal protection and benefit of the law.<sup>44</sup> The Bill of Rights is described as “*the cornerstone of democracy*” in South Africa.<sup>45</sup> Chief Justice Pius Langa emphasized that the Bill of Rights “*not only enshrines the rights of all people in South Africa, it also affirms the democratic values of human dignity, equality and freedom*”.<sup>46</sup> The Constitution vests the judicial authority of the Republic in the courts. Accordingly their function is principally “*to serve as the arbiter of what is and what is not legal or constitutional ... the Constitution envisages a competent and well equipped judiciary to undertake the task of adjudication*”.<sup>47</sup>

5.6.2.6 The responsibility to strengthen, support and protect constitutional democracy does not however, lie with the courts alone.<sup>48</sup> Section 165(4) of the Constitution provides as follows:

*“Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, **accessibility and effectiveness** of the courts.”* (Emphasis added.)

5.6.2.7 In *Modderklip Boerdery (Edms) BPK v President van die RSA ea*<sup>49</sup>, the High Court reiterated that section 165(4) of the Constitution places a positive duty on organs of State to ensure that the supremacy of the law is maintained. Referring to the

<sup>43</sup> *S v Steyn* supra

<sup>44</sup> Sec 9(3) of the Constitution

<sup>45</sup> O’Regan J in *S v Makwanyane and Another* 1995(3) SA 391 (CC); 1995(6) BCLR 665 (CC) at par 329

<sup>46</sup> Chief Justice Pius Langa “The role of the courts in the protection of Human Rights” *Human Rights Lecture Series* Human Sciences Research Council (7 September 2005)

<sup>47</sup> Ibid

<sup>48</sup> *In Re Certification of the Constitution of the RSA* 1996(4) SA 744 (CC) 810:

*“No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter’s words, ‘(t)he areas are partly interacting, not wholly disjointed.’”*

<sup>49</sup> 2003(6) BCLR 638 (T)

judgment in the case of *Mjeni v Minister of Health and Welfare, Eastern Cape*<sup>50</sup>, the Court held that this obligation does not only deal with the adjudication of matters and the resolution of disputes but also includes the administrative support required for the effective enforcement of court orders. The Court described the obligation in section 165(4) of the Constitution as “***the most important and fundamental obligation imposed on the State by the Constitution***”. (Emphasis added.)

5.6.2.8 The Constitutional Court,<sup>51</sup> citing the judgment in *Fose v Minister of Safety and Security*,<sup>52</sup> confirmed that appropriate relief must necessarily be **effective**:

*"Without effective remedies for breach [of rights entrenched in the Constitution], the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated."*

5.6.2.9 As far as could be established the issue of a prisoner’s right of access to the courts *vis-à-vis* the responsibility of the Department of Correctional Services has not featured in this context before the South African courts. In countries such as the USA, the courts have interpreted the constitutional right of adequate, effective and meaningful access to the court to mean that the prison authorities have an affirmative duty to facilitate that access by:

- Providing the inmate with the services of a lawyer; or
- Allowing the prisoner access to legal reference materials (law library) with the help of someone trained in law;

<sup>50</sup> 2000(4) SA 446 (Tk) 453 C-D: *"The process of adjudication and resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of the rights or obligations defined in the court order."*

<sup>52</sup> *President of the Republic of South Africa, Minister of Agriculture and Land Affairs v Modderklip Boerdery (Pty) Ltd* CCT case no 20/04

<sup>52</sup> 1997(3) SA 786 (CC)

- Providing them at state expense with pen and paper to draft legal documents, with notarial services to authenticate them, and with stamps to mail them; and
- Not placing unreasonable limitations on legal mail between a prisoner and his/her attorneys.<sup>53</sup>

5.6.2.10 The said courts were, however, careful to emphasise that these duties should not be construed as imposing an obligation on prison authorities to render legal services to prisoners.

5.6.2.11 Although it appears as if the duties of the Department of Correctional Services relating to a prisoner's access to the court have not come under the same direct scrutiny by the South African courts as it had in other legal systems, the legal principles referred to in the earlier discussion of section 34 read with section 165(4) of the Constitution<sup>54</sup> confirm that there is an obligation on the Department of Correctional Services to ensure that a prisoner's right of access to the courts are not limited more than is necessary by the duties and restrictions imposed on prisoners to ensure safe custody.

5.6.2.12 In addition to the specific constitutional rights of arrested and detained persons, the obligations of officials of the Department of Correctional Services is also guided by the principles of fair administrative action. Section 33 of the Constitution provides that "*everyone has the right to administrative action that is lawful, reasonable and procedurally fair*". In terms of section 195(1) of the Constitution, public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- A high standard of professional ethics must be promoted and maintained;
- Efficient, economic and effective use of resources must be promoted;

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<sup>53</sup> *Bounds v Smith* 430 US 817(1977)

<sup>54</sup> Par 5.6.2.3 & 5.6.2.6 above

- Public administration must be development-oriented;
- Services must be provided impartially, fairly, equitably and without bias;
- People's needs must be responded to, and the public must be encouraged to participate in policy-making;
- Public administration must be accountable;
- Transparency must be fostered by providing the public with timely, accessible and accurate information;
- Good human-resource management and career-development practices must be cultivated to maximise human potential; and
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past.

5.6.2.13 These principles, as supplemented by the *Batho Pele* principles of service delivery, determine the framework for proper administration by the Department of Correctional Services in respect of its constituency, mainly prisoners and affected members of the public. In terms of the said provisions and principles the Department must ensure that prisoners in their custody do have effective access to the courts. Effective access in this context would mean at least:

- Access to a lawyer if required by the prisoner;
- Access to any prescribed forms and legal documents necessary to lodge an application for leave to appeal; and
- The assistance of a trained and dedicated official within the prison to provide the prisoner with legal procedural information (not legal advice) required to lodge an application for leave to appeal to the correct forum.

## **CHAPTER 6**

### **PREPARATION OF THE CASE RECORD SUBSEQUENT TO LEAVE TO APPEAL BEING GRANTED**

#### **6.1 Introduction**

- 6.1.1 When an application for leave to appeal is granted in a lower court, or on petition to the Judge President of the High Court, the relevant Clerk of the Court must transmit copies of the case record and of all relevant documents, to the Registrar of the High Court concerned.
- 6.1.2 The preparation of the record entails the following:
- 6.1.2.1 If the trial proceedings have been mechanically recorded, the recordings (tapes) are sent to a service provider contracted by the Department of Justice and Constitutional Development for transcription;
  - 6.1.2.2 Once the record is transcribed, copies (or a short description) must be made of the exhibits, as well as of the duplicate bail receipt, and an index must be prepared of the witnesses, exhibits and documents;
  - 6.1.2.3 The record must be arranged in the prescribed order and bound;
  - 6.1.2.4 The record must be placed before the trial Magistrate to verify that it is correct; and
  - 6.1.2.5 The relevant Clerk of the Court must, as soon as possible, send the original record and three copies thereof by registered mail to the Registrar of the High Court, and one copy to the relevant Director of Public Prosecutions.
- 6.1.3 If the trial record, or parts thereof, cannot be transcribed because the recordings are inaudible or lost, the courts are *ad idem* that an accused cannot be compelled to undergo a re-trial to replace the record of the proceedings:

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- 6.1.3.1 In most jurisdictions the Clerk of the Court must obtain the best available secondary evidence on the contents of the record, including sworn affidavits from the witnesses and other people who were present at the trial, to prove the contents of the evidence, the plea entered by the accused, and the trial proceedings; and
- 6.1.3.2 The documents must be submitted to the accused person as well as the trial Magistrate to confirm the correctness thereof.
- 6.1.4 The duration of the period of time from the date when leave to appeal is granted to the date on which the records are submitted to the Registrar and the DPP, largely depends on the length of time that it takes for the preparation of the case record as described above. From the complaints to the OPP as well as the responses thereto by court officials, it appears that this is the period during which most delays in the processing of the appeal in the lower courts occur. Delays are allegedly caused mainly by:
- 6.1.4.1 The time that it takes for the court record to be transcribed by service providers;
  - 6.1.4.2 Lost and inaudible parts of recordings which necessitate the reconstruction of the record;
  - 6.1.4.3 The unavailability of the trial Magistrate or the Public Prosecutor to assist with the reconstruction process;
  - 6.1.4.4 A lack of adequate capacity to arrange and prepare the transcribed proceedings for transmission to the High Court;
  - 6.1.4.5 Records lost between the lower and the High Courts; and
  - 6.1.4.6 Records returned to the Clerks of the Courts by the High Courts or DPP for corrections, which are not attended to timeously.

## **6.2 The evidence of the Clerks of the Courts**

- 6.2.1 Court officials emphasized that they have little control over the time it takes for the transcription and preparation of the records where the recorded proceedings were handed over to the transcriber services. Once the record was delivered for transcription, the Clerks of the Courts have to wait until the completed transcript is received before further action could be taken on the appeal. Some records went missing in the hands of the transcribers, and in some cases it would appear that no proper records were kept of recorded proceedings referred for transcription.
- 6.2.2 All the Clerks of the Courts were in agreement that their biggest and most time-consuming (and most frustrating) problem was when court recordings were missing and had to be reconstructed. They were required to coordinate the reconstruction process with the investigating officer, to obtain copies of witness statements, exhibits, photos and reports, liaise with the Public Prosecutor and the presiding Magistrate to check their notes, and consult with the accused person's legal representative.
- 6.2.3 The Clerks of the Courts expressed their concern that there appears to be an increase in the number of instances where the records of court proceedings were lost. They referred to the fact that a number of judgments where the conviction and sentence had been set aside because of the lack of the records of the trial Court, received wide spread publicity. As a result criminal elements, in their experience, started to target the safeguarding of court records as a possible weakness in the judicial process. In other words, there was an increased possibility that records of proceedings might in fact be stolen in order to improve an appellant's prospects of a successful appeal. Some of the Clerks expressed concern over, what in their view amounts to insufficient control over the collection, filing and safekeeping of court recordings, which opens the door for criminal elements to abuse the system in order to try and achieve an acquittal on appeal.
- 6.2.4 Delays were furthermore caused by the fact that the Department of Justice and Constitutional Development did not appoint local service providers. For instance,

Magistrates' Offices in the Western Cape had to send recordings to a service provider in Durban, which was both costly and time-consuming. In terms of the new contract for the provision of transcription services, local contractors had apparently been appointed. There were complaints about delays by the transcription services in the finalization of court records, but no information was available to indicate the average waiting time for transcripts.

- 6.2.5 Not all transcripts were paid for by the Department of Justice and Constitutional Development. Prisoners paid for some transcripts, and most of them lacked the funds to pay immediately, thus resulting in long delays before the appeal process could be completed.
- 6.2.6 The Clerks complained about the fact that the reconstruction of the court records is regarded as their responsibility and that they do not receive sufficient support from the judicial staff in this regard. They have to rely on Magistrates and Public Prosecutors to assist with the reconstruction process and were powerless if these officers refused to co-operate, or in the event of delays.
- 6.2.7 The complainants approaching the OPP would, almost without exception, allege that they did not receive any responses from the Clerks of the Courts to their enquiries regarding the status of their applications or appeals, especially when the transmission of the case to the High Court was delayed by the transcription and preparation of the case record.
- 6.2.8 While most officials denied that they did not respond to correspondence from prisoners, some acknowledged that it was impossible to do so in all cases due to a lack of staff. Some of the offices reported that they received between 20 and 50 letters per day from appellants directly, enquiring about the progress of the appeal. In addition, they also received enquiries from the various institutions and offices to which appellants had complained. Some prisoners wrote almost every week enquiring about progress that might have been reported on a week or two before, thus wasting valuable time that could be better utilized attending to the actual administration of the appeals. Prisoners

are allegedly under the mistaken impression that their persistent enquiries put pressure on the officials to speed up their appeals. This has the effect of irritating the officials who in turn develop negative attitudes towards some, if not all, prisoners who appeal.

6.2.9 When enquiries are received pertaining to an appeal, the relevant Clerk of the Court has to check the Appeal Register to locate it. The Clerk will subsequently approach the transcription services, the Registrar of the High Court or the Director of Public Prosecutions to ascertain the status of the appeal and to report to the appellant. Some Clerks alleged that prisoners do not quote the correct reference numbers, dates of last appearance or case numbers.

6.2.10 The relevant staff clearly finds it impossible to attend to correspondence and to perform the administrative tasks relating to the processing of appeals. As stated earlier, in the Johannesburg Magistrate's Office, the Head of the Criminal Appeal Section had to reassign one of her clerks to deal with correspondence on a full time basis. However, in most offices there are on average two officials available to attend to appeals. Experienced staff members are often transferred to other divisions or leave the employ of the Department of Justice and Constitutional Development, thereby creating a vacuum.

6.2.11 In general, the Clerks of the Courts consulted by investigators confirmed that because of capacity constraints they were not able to communicate with appellants regularly to furnish them with progress reports regarding their appeals. It seems that they only write to appellants to inform them when the matter was referred to the High Court, when a date for the hearing of the appeal had been set, and of the outcome of the appeal. Even then there is a risk that the letter from the Clerk or the notice from the Registrar may not reach the appellant, since prisoners are regularly transferred from one prison to another, and the court staff is often not notified of such changes.

6.2.12 The Clerks were generally satisfied that they were notified of the outcome of the appeals by the Registrars of the High Court. The only exception appears to be the Johannesburg Magistrate's Court where the Clerk was concerned about incidents where

appeals were heard in May and August 2005, but he had not received any notification of the outcome by January 2006 and had to make urgent enquiries.

### 6.3 Observations and discussion

#### 6.3.1 The reconstruction of case records

6.3.1.1 As far as the role and responsibility of a Clerk of the Court in the reconstruction of case records are concerned, our courts acknowledge that:

*"(T)here is an onerous duty on the shoulders of the clerk of the criminal court. The clerk of the criminal court is the custodian of all the court records, including the cassettes, where proceedings are mechanically recorded. It is his duty to ensure that when the courts adjourn for the day, he receives from all the courts all the records. It is also his duty to make sure that when he receives a copy of the record, whether typed or transcribed, he places such a record before the relevant magistrate in order to enable him to check and to make sure that it is corrected before it is forwarded to the High Court for review."<sup>55</sup>*

6.3.1.2 The generally accepted principles and procedure have been recognized as follows:

*"It is the function and duty of the Clerk of the Court to reconstruct the lost or defective contents of the record from the best secondary evidence that he or she can obtain; it should at the outset be established that the record in fact is missing or deficient; **it would be particularly valuable if the Clerk of the Court performed this task under the direction and supervision of a magistrate, not necessarily but preferably the presiding magistrate who has the requisite knowledge of the matter but is functus officio at that stage; the cooperation and/or views and recollection of the prosecutor and of the accused's legal representative, as also the accused, who are all entitled and may be expected to participate in the process of reconstruction, should be sought**".<sup>56</sup> (Emphasis added.)*

<sup>55</sup> *S v Mahlangu* 2005 JDR 1239 (T)

<sup>56</sup> *S v Mlotswa And Another* 2005 JDR 0186 (W)

6.3.1.3 Courts also emphasised that it is the duty of the relevant Magistrate to peruse the record and correct it before he/she hands it back to the Clerk of Court, and that this duty would include the reconstruction of the records if it was incomplete.<sup>57</sup> In the *Mahlangu* case the Court referred to the responsibility of a presiding Magistrate to try and reconstruct an incomplete record as far as possible, and to record reasons when it is not possible.<sup>58</sup>

### 6.3.2 The safekeeping of and access to court records

6.3.2.1 It is also acknowledged by the courts that there seems to be an increased and deliberate threat to the safe-keeping of records and transcripts of court proceedings:

*"Bearing in mind what one sees and hears, the year 2000 has discovered that sometimes the **best defense** for some accused is that the docket or the **recording of evidence goes astray**".*<sup>59</sup> (Emphasis added.)

6.3.2.2 In recent cases the courts reiterated that *"on appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside"*<sup>60</sup>. In the *Mlotswa*<sup>61</sup> case the High Court had to deal with a matter where the record of proceedings were stolen in a partly heard matter before the lower court, and explained the legal position as follows:

*"When a judicial officer or Court other than the presiding judicial officer is called upon to consider the proceedings in a criminal trial for purposes of e.g. appeal, review, sentence or a continuation of the trial under the provisions of s 52 or 52A of Act 105 of 1997, a record of the proceedings which is adequate for such*

<sup>57</sup> *S v Mahlangu* supra

<sup>58</sup> *S v Mahlangu* supra

<sup>59</sup> Per Flemming DJP in *S v Leslie* 2000(1) SACR 347 (W) at 349h

<sup>60</sup> *Chabedi v the State*; SCA case no 497/04 (3 March 2005); see also Moosa J in *S v Solomons* CPD 23 case no A912/04 (June 2005); *S v Mahlangu* supra; *S v K* 1991(2) SACR 190 (B) and *S v Fredericks* 1992(1) SACR 561 (C)

<sup>61</sup> Supra

*purpose is obviously a prerequisite. The lack of such a record would make a just hearing of the appeal, review or sentencing proceedings impossible and thus, in any event as regards appeals and reviews, would constitute a 'technical irregularity or defect in the procedure' within the meaning of s 324 of the CPA (Criminal Procedure Act, 1977), read with s 313 thereof, and render the conviction and/or sentence liable to be set aside."*

- 6.3.2.3 The records management policy and directives of the Department of Justice and Constitutional Development are contained in the Codified Instructions: Archives. Paragraph 3 of the Code contains the following provisions in respect of the care and custody of records:

*"The duties of controlling record rooms, arranging for the binding of records locally and the disposal thereof in accordance with these instructions must be assigned to particular officers and entered on their duty sheets. Records must be neatly arranged in chronological order, labeled, handled carefully and not packed too tightly on shelves or in box files so as to hasten their mutilation. Similar records should as far as possible be grouped together to facilitate the tracing thereof at short notice. Facsimile facilities must be used most judiciously by offices, especially in matters where a permanent record is required. Type written or other high quality copies must be used for this purpose as facsimile prints on fax rolls in time become virtually illegible owing to heat and exposure to light."*

- 6.3.2.4 Access to records is regulated as follows in paragraph 5 of the Code:

*"Subject to the provisions of section 12(1)(b) and (3) of the Act, the Department considers it unwise to place confidential or secret documents at the disposal of members of the public and such action must therefore under no circumstances be permitted."*

6.3.2.5 In practice, the recordings, charge sheet and exhibits in finalized or partly heard proceedings are at the end of the court day collected from the court room by the interpreter and brought to the Clerk of the Court for filing. A number of officials have access to the safe where it is kept and there is no control mechanism to track the subsequent movement of records.

### 6.3.3 Lack of proper filing systems

6.3.3.1 Some of the courts visited by investigators do not have reliable filing systems in place. It was *inter alia*, reported that due to the fact that personnel are often transferred to other offices and/or divisions, it is not possible to maintain reliable filing systems. In some offices, the basic record-keeping and filing facilities, such as shelves and filing boxes, seem to be lacking or are deficient. In one particular instance, the appeal files were literally lying all over the office and transcribed records received from the service provider were put aside because the appeal files could not be traced. The position in the Johannesburg High Court, in particular, is a source of serious concern in this regard. It is hard to imagine that effective administration of justice is possible in such an environment.

6.3.3.2 The seriousness of inadequate filing systems was previously brought to the attention of the Minister of Justice and Constitutional Development in two reports issued by the Public Protector relating to investigations conducted at the Magistrates' Offices of Witbank and Tzaneen.<sup>62</sup>

### 6.3.4 Case management

6.3.4.1 The administration of appeals in the lower courts is managed manually by means of an Appeal Register and a corresponding appeal file in which the hard copy documents and correspondence are kept. As the different steps are taken, entries must be made in the following columns:

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<sup>62</sup> Respectively Report 40 of 2005 and Report 61 of 2006

Case no	Name of accused	Date sentenced	Date appeal noted	Indicate whether accused has been released on bail	Date submitted to Magistrate	Date received from Magistrate with reasons	Date forwarded to Registrar	Date received from Registrar	Indicate whether conviction and sentence confirmed, altered or set aside	Date gaoler notified	If accused is on bail		
											Date notice to surrender issued	Date fine paid, amount and receipt number	Date warrant issued and court orderly's signature

6.3.4.2 It was noted that the Appeal Register does not make provision for all the actions that have to be taken by the Clerks of the Courts in the processing of an appeal. The recording of the date fixed for the hearing of an application for leave to appeal, as well as the dates on which the parties are notified of such hearing, is noticeably absent. Similarly, no provision is made for the dates on which recordings are submitted and received from the transcription services. These actions or steps relate to periods during which long delays occur, yet the relevant dates are apparently not recorded for control and management purposes.

6.3.4.3 Some Clerks diarise the appeal files to enable them to check on the progress at regular intervals. Others reportedly go through the Appeal Register once a month, or at regular intervals, to establish which entries are still outstanding, and to make the necessary follow-up enquiries. Instances were found where the court records had to be returned by the Registrar to the Clerk of the Court to be rectified. Both the Clerk and the Registrar were under the impression that the records were still in the other's office. The Registrar concerned was, only prompted to pursue the matter with the

Clerk upon receipt of an enquiry, only to discover that the records had in fact been returned some time ago.

- 6.3.4.4 The Public Protector also reported on the matter of Mr L Khumalo,<sup>63</sup> whose appeal succeeded in September 2004. The warrant of liberation was however, only issued in March 2006 after the intervention of the OPP. In that case the date on which the order was received from the Registrar was duly noted and a copy pasted in the Appeal Register. However, the officials responsible for the management and the supervision of this process failed to notice that the Clerk of the Court had failed to notify the “goaler” and no entry to that effect was made in the required column.
- 6.3.4.5 Although the Clerks are generally quite efficient in the performance of their functions, information relating to appeals is still stored in the relevant appeal files and is not readily available in electronic format. As stated earlier, the handling of enquiries and the management of communication in respect of appeals is a fairly labour intensive exercise. The absence of an electronic appeal management system, correspondence tracking system and data makes it difficult to monitor the progress of correspondence. There is a risk that information necessary to process appeals could be lost, missing or misplaced. Some records disappear between the storage rooms and the transcribers, as there are no proper controls in place.
- 6.3.4.6 There is no reason to doubt that information technology applications would result in the improvement of internal efficiency. In March 2005 the Minister for Justice and Constitutional Development briefed the Parliamentary Portfolio Committee on Justice and Constitutional Development on the initiatives to improve the effectiveness and efficiency of the justice system. She, *inter alia*, referred to the issue of case flow management,<sup>64</sup> and stated that: *“As part of the transformation of the judicial system the case flow management concept is being institutionalised as a long-term*

<sup>63</sup> Report 13 of 2006/7

<sup>64</sup> Ms B Mabandla, MP, Minister for Justice And Constitutional Development *Briefing to the Parliamentary Portfolio Committee on Justice and Constitutional Development* Cape Town (10 March 2005)

*intervention to change and monitor the manner in which cases are dealt with throughout the judicial process. Central to this initiative is the delivery of effective justice expeditiously within acceptable time limits in cognisance of the known axiom that 'Justice delayed is justice denied'. The institutionalisation of the court management model and the strengthening of the offices of the Registrars of the courts are intended to provide support for the new case flow management initiatives. An e-scheduler system has been developed and will be deployed in 46 courts from 01 April 2005 to improve our case management system."*

- 6.3.4.7 The Department is reportedly busy with the rollout of Integrated Justice System (IJS) centres and a Court Management Information System, which forms the basis for the "Criminal Justice Strengthening Programme". A vital component of this Programme is the Integrated Case Flow Management System, a project launched to deal proactively with the huge backlog of both civil and criminal cases in the courts. According to the Department, this system will enable all role-players in the case management process to work together with a view to coordinating planning processes and utilisation of resources for greater impact and improved service delivery. This initiative is being strengthened by other projects, such as the Integrated Court Centre Project, the Court Management Information System Project and the Operations Centre.
- 6.3.4.8 The commitment by the Department of Justice and Constitutional Development to address and eliminate delays in the administration of justice through initiatives such as the Integrated Justice Structures and the Case Flow Management System is encouraging. From the perspective of this investigation, however, it is noted that these initiatives would appear to focus on the legal processes ending in the finalization of the initial court proceedings and that it does not address the appeal process after conviction and sentencing. The idea that the Department should consider upgrading the facilities in the e-scheduler to assist with the case management and scheduling of appeals was discussed with some of the Clerks and

Court Managers. It was noted that the office of the DPP in Mthatha developed a computerized system for this purpose, which is being implemented in other DPP offices, and that there is a proposal that it might be incorporated in the e-Scheduler. If this is feasible, the system could, and should, also be rolled out to the Magistrates' Offices where the e-Scheduler is operational, without any significant expense or increased administrative burden on the operators of the system.

### 6.3.5 Inter-sectoral communication

- 6.3.5.1 Inter-sectoral communication refers to communication between organs of State, and in this instance, more particularly to the communication between the courts, the DPP, and the Department of Correctional Services.
- 6.3.5.2 Since the Department of Correctional Services facilitates correspondence between prisoners and the courts, it is in a position to observe when court officials fail to respond. In such cases prisoners seem to prefer to approach external complaint resolution bodies such as the Public Protector and the South African Human Rights Commission.
- 6.3.5.3 The question arose whether such complaints could not more effectively be dealt with through a communications structure between the Department of Correctional Services and the Regional Offices of the Department of Justice and Constitutional Development. With the re-introduction of Regional Offices for the Department of Justice and Constitutional Development some of the responsibilities for the management and supervision of the Magistrates' Offices have been delegated to the relevant Regional Offices.

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## **CHAPTER 7**

### **THE ALLOCATION OF DATES FOR THE HEARING OF APPEALS**

#### **7.1 Introduction**

7.1.1 The High Court Rules provide that either the DPP or the Registrar of the High Court may perform the task of setting down appeals:

*"Rule 51. Criminal Appeals from Magistrates' Courts*

*(1) An appeal by a convicted person against a conviction, sentence or order made by a magistrate's court in a criminal matter in which the prosecution has been at the public instance, or an appeal by an attorney-general or other prosecutor against a dismissal of a summons or charge or other decision of a magistrate's court in such a matter, shall be set down by the attorney-general or registrar on notice to the appellant or his (sic) attorney for hearing on such day in term time or vacation as the Judge-President may appoint for such matters."*<sup>65</sup>

7.1.2 The National Prosecuting Authority confirmed that in most provinces the hearing dates are determined by the DPP in consultation with the Registrar of the High Court. In the other provinces dates are set down by the Registrar's office alone.

7.1.3 The Appeal Clerk in the office of the DPP receives all records, opens files, records date of receipt and the date of hearing. He/she also records the date set for heads of argument to be filed and checks the registers. A Deputy Director of Public Prosecutions and a Senior State Advocate in charge of appeals set down appeals and dates on the court roll and plan the roll in advance. Before a matter is set down for hearing the DPP's office checks whether:

7.1.3.1 The record is complete and correct;

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<sup>65</sup> *High Court Rules Of Court: Uniform Rules of Court* (Rules regulating the conduct of the proceedings of the several Provincial and Local Divisions of the High Court of South Africa)

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- 7.1.3.2 All the notices have been filed;
- 7.1.3.3 The accused is legally represented; and
- 7.1.3.4 There is a signed power of attorney on file.
- 7.1.4 Appeals are generally placed on the court roll without consultation with any of the appellants. Should an appellant or his/her legal representative wish to set down a matter, they contact the State Advocate responsible for the setting down of appeals and a mutually suitable date is agreed upon. The allocation of hearing dates depends on the capacity of the courts and the availability of court dates on the court roll. In most Divisions of the High Court appeals are not heard every day of the week on a permanent basis, but the Judges from criminal courts would hear appeals on the allocated dates instead of hearing criminal trials.
- 7.1.5 If the record is not complete, it is returned to the Clerk of the Court for corrections.
- 7.1.6 In some Divisions, the Judge President of the High Court insists that all appellants must be represented, unless he/she expressly prefers to appear in person. In such cases legal aid appointments must be finalised before the matter is set down, and a date has to be arranged with the appointed representative. The DPP refers the matter to the nearest Justice Centre or Branch Office of the Legal Aid Board that will attempt to trace the appellant and find out if he/she desires legal aid. If the appellant requires legal aid, he/she has to complete an application for legal aid and power of attorney in favour of the Justice Centre. Upon receipt of this documentation, counsel is appointed to prepare heads of argument and to argue the matter on the appellant's behalf.
- 7.1.7 If an appellant chooses to represent himself/ herself, the DPP and the Registrar of the High Court are notified and arrangements made to requisition the appellant from prison for the hearing of the appeal. (This procedure may change in view of the recent decision in the *Shinga*<sup>66</sup> case that appeal proceedings may no longer be disposed of in

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<sup>66</sup> Supra

chambers on written arguments of the parties, but must be held in open court with oral presentations. It is not clear whether the appellant's presence is also required if he/she is legally represented.)

## 7.2 Backlog in setting down appeals

7.2.1 In October 2006, the Department of Justice and Constitutional Development stated the following in its heads of argument in the *Shinga* matter before the Constitutional Court:

*“There is a scintilla of evidence showing the impact unmeritorious appeals have on the appeal rolls. During the 24 months preceding the commencement of 1997 Amendment Act, an automatic right of appeal prevailed. From the figures supplied by the Registrars, it appears that during that period, the number of appeals from the Magistrates Courts to the High Courts rose by more than 40%. The introduction of the leave to appeal procedure by the 1997 Amendment Act saw a notable decline in this number. Before the requirements of leave to appeal were introduced by sections 309B and 309C, 90% of the appeals were unsuccessful and had no merit whatsoever.”*

7.2.2 The Department of Justice and Constitutional Development submitted the following statistical data to the Constitutional Court regarding the backlog of appeals in the various high courts:

		December 2004	January 2005	to	December 2005	January 2006	to	March 2006
	HIGH COURTS	NO PENDING	NO OF APPEALS RECEIVED	NO FINALISED	NO PENDING	NO OF APPEALS RECEIVED	NO FINALISED	NO PENDING
1	Bisho	0	50	47	3	15	10	8
2	Bloemfontein- High Court	761	231	257	735	35	77	693
3	Bloemfontein-	38	59	32	65	12	1	76

	Appeal Court							
4	Cape Town	451	864	693	622	100	80	642
5	Durban	322	200	282	240	96	111	225
6	Grahamstown	108	201	287	22	41	22	41
7	Johannesburg	949	1132	896	1185	55	245	995
8	Kimberly	271	77	152	196	18	22	192
9	Mmabatho	0	136	8	128	28	2	154
10	Pietermaritzburg	1004	544	710	838	144	74	908
11	Pretoria	2708	1018	1242	2484	233	352	2365
12	Thohoyandou	0	91	38	53	3	0	56
13	Mthatha	0	77	67	10	7	2	15
	<b>TOTAL</b>	<b>6612</b>	<b>3662(sic)</b>	<b>3469(sic)</b>	<b>6581</b>	<b>787</b>	<b>998</b>	<b>6370</b>

7.2.3 The National Prosecuting Authority provided the OPP with the following statistics in respect of the position at the various DPP offices:

DPP office	Number of Appeals registered	Number of appeals set down	Number of appeals waiting to be set down	Turnaround times
Pretoria	1 945	260	1 642	
Johannesburg	1 088	1 041	47	12-18 months. 2004 appeals set down for end of 2006
Bloemfontein	249	77	163	
Kimberley	74	72	2	Enrolled as soon as received
Cape Town	583 (number of appeals registered, not finalised)	106 (only set down up to 15.9.06)	476	The turnaround time from receiving the record to finalisation is approximately 10

				months. Another 4 – 6 months can be added for the granting of leave to appeal to receiving the record.
Grahamstown	55	20	35	Immediate
Mthatha	139	139	20	
Mmabatho	153	31	12	
Pietermaritzburg	1 782	266	Registrar in control could not obtain information	The 2005 appeals will most probably only be set down in the middle to the end of 2007

### 7.3 Submissions by the National Prosecuting Authority

#### 7.3.1 Problem areas

7.3.1.1 A DPP receives a copy of the record from the lower Court at the same time as the Registrar at the High Court. The DPP, Pretoria, emphasised that no notice of the existence of any appeal is received at the DPP's office prior to the receipt of the said record. The DPP, Mthatha also confirmed that the failure of the Clerks of the Court to inform the DPP's office and the office of the Registrar of all applications for leave to appeal, as required by section 309B(2)(d) and (4)(a) of the Criminal Procedure Act, is a cause for concern. Unless the DPP's office is informed of such applications, matters cannot be placed for hearing.

7.3.1.2 Staff at the DPP's office in Mthatha embarked on a physical check of the registers of lower courts in order to identify matters where leave to appeal had been granted,

the appellants granted bail and where neither the DPP's office nor the Office of the Registrar had been notified. These matters were brought to the attention of the acting Deputy Judge President, who instructed that the matters could be placed on the roll relying only on a copy of a notice of appeal. If the appellant then failed to prosecute the appeal, it was struck off the roll and the appellant's bail withdrawn. In addition, all prosecutors have been instructed to inform the DPP's office of all matters where leave to appeal was granted.

- 7.3.1.3 The DPP, Mthatha, has also taken full responsibility to communicate the outcome of the appeal to the relevant Magistrate's Court, Senior Public Prosecutor and the South African Police Service (SAPS).
- 7.3.1.4 Appeals are generally enrolled in the sequence in which they are received at the DPP's office. Where it comes to the attention of the advocate setting down the roll that a particular appeal took a very long time to reach this office and is in fact much older, it will be given preference and enrolled as soon as possible. Due to the enormous backlog in some offices, there are appeals of at least the last two years in the system at any given time, so that the files are simply too many to identify those that deserve preference.
- 7.3.1.5 The DPP, Bloemfontein, emphasized that as a result of various factors, appeals cannot be set down in the sequence that they are received. There are still some appeals from 2004 awaiting set down, whilst on the other hand a number of 2006 appeals have been finalised. The cycle time is therefore difficult to determine. Problems are still experienced with old appeals whereas new appeals are generally set down almost immediately after receipt. The DPP, Bloemfontein, has succeeded in almost eliminating the backlog through concerted efforts and cooperation with the Legal Aid Board and the Judge President. Despite congested court rolls and due to good organisation and administration, almost no appeals had to be postponed or struck off the roll.

- 7.3.1.6 If the record is incomplete it is returned to the Clerk of the Court with a request that it be rectified. According to the DPP, Pretoria, the responses from the Clerks of the Courts are generally poor. It takes months and an insistence on cooperation to get the records rectified.
- 7.3.1.7 Of particular concern are the many instances where records are incomplete as a result of recording cassettes, which are broken or missing. To have a record reconstructed is an almost impossible task. Seemingly, some Magistrates are very unhelpful in assisting the Clerks of the Courts in this regard. The Directors of Public Prosecutions regard this as mainly the task of Clerks of the Courts. In most offices there are no standing instructions to Public Prosecutors regarding assistance to the Clerks of the Courts. Some of the offices do not receive any indication that Clerks of the Courts are struggling to get assistance from prosecutors. The relevant Clerk of the Court will approach the trial Magistrate first for reconstruction. The Public Prosecutor and legal representative of the appellant are usually only approached to certify that the reconstructed record accurately reflects the evidence presented at the trial. Where the Public Prosecutor still has trial notes, his/her assistance will also be required. Due to long delays before appeals are enrolled, it often happens that no one is able to remember the details of the evidence or to produce their notes by the time that the appeal gets postponed for reconstruction.
- 7.3.1.8 According to the DPP, Mmabatho, the problems experienced with “prison appeals” relate to the furnishing of transcripts of the record of proceedings, particularly to prisoners who cannot afford to pay for the transcription and who are unable to convince the Registrar of the High Court to provide the record to them at the State’s expense. It was suggested that consideration should be given to providing the Justice Centres with funding to assist needy appellants in obtaining transcripts of records where the prospects of success are good.
- 7.3.1.9 Serious problems are also experienced with the processing of documents filed at the office of the Appeal Clerk situated in the Registrar’s office. Heads of argument filed

by both the appellant and the respondent often never reach the court files. Appeals are regularly postponed *sine die* as a result hereof. This problem has been brought to the attention of the Registrars.

7.3.1.10 Where the officials of the Legal Aid Board do not succeed in obtaining a power of attorney from an unrepresented appellant, they have to give notice to the Registrar and the DPP's office, in which case the appellant will be requisitioned to appear in court, in person. Such notice is, however, extremely rarely given. Very often, a Justice Centre files heads of argument at a very late stage and the appellants are thus not requisitioned as a matter of course to attend court in these instances. A large number of appeals are postponed *sine die* because the Justice Centre was unable to file any documents or appoint anyone to appear, and the Registrar had not requisitioned the applicant.

### 7.3.2 Plans to address backlogs and to extend the computerised criminal appeal system implemented in the Eastern Cape

7.3.2.1 In the Mthatha office of the DPP the following steps were taken to address the backlog:

- A physical audit of all outstanding appeal files was conducted and the data captured electronically.
- Lower court registers were perused for cases where leave to appeal was granted, but the matters were not set down for hearing in the High Court.
- The acting Deputy Judge President (ADJP) was presented with this information. He acceded to the DPP's request to take over the setting down of appeals.
- A list of all outstanding judgments was handed to the ADJP. This information was obtained from the physical audit of files.

- A list of all full bench appeals not yet heard was compiled and submitted to the ADJP with a request to provide dates.

7.3.2.2 The DPP, Mmabatho, plans to deal with prison appeals in accordance with section 309(3A)(a) of the Criminal Procedure Act, 1977. These are appeals where both the State and the Justice Centre are in agreement with regard to the conviction and the sentence to be imposed, where heads of argument have been compiled by both parties and presented to the Judge President (or a Judge designated by him), and which can be disposed of in chambers on the written arguments of the respective parties without hearing oral argument.

7.3.2.3 The NPA was considering the appointment of a Task Team consisting of Senior Public Prosecutors to visit all the DPP offices to do an intensive audit on all the available files and capture the information on a similar computerised system as the one developed in the Eastern Cape. The system will also assist with the collation of statistics regarding appeal matters so as to enable DPPs and the national office to monitor the disposal of appeals and to identify obstacles.

7.3.2.4 The project anticipated liaison with all role players, including the Legal Aid Board, Correctional Services, SAPS and members of the Bar and Sidebar, with the view to fast track either the enrolment of outstanding cases, or the removal of cases where appellants are not available/not interested in continuing with an appeal.

7.3.2.5 Meetings have also been held with the Department of Justice and Constitutional Development to integrate the new system into the Department's electronic e-scheduler.

#### **7.4 Project to reduce the backlog of criminal appeals in the Transvaal Provincial Division of the High Court**

7.4.1 A project was initiated on 26 March 2007 in the Transvaal Provincial Division of the High Court to deal with the huge backlog of appeals by:

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- 7.4.1.1 Providing for at least two additional criminal appeal courts composed of two acting Judges on each Monday in term, on the day upon which criminal appeals are heard;
- 7.4.1.2 Creating up to six additional appeal courts on each Monday in term, for the period 7 May 2007 until 3 December 2007;
- 7.4.1.3 Providing for the sitting of an appeal court on every weekday that is not a public holiday during the April 2007 and June/July 2007 recesses.
- 7.4.2 The project was initiated by Judge E Bertelsmann, Chairperson of the *National Initiative to Combat Overcrowded Correctional Institutions*, in co-operation with the NPA, the Legal Aid Board, the General Council of the Bar, the Bar Councils of Johannesburg and Pretoria, and the Department of Justice and Constitutional Development.
- 7.4.3 Senior Advocates from the Pretoria and Johannesburg Bars availed themselves on a *pro bono* basis to be appointed as acting Judges to hear these appeals. The NPA, the Legal Aid Board and its local Justice Centres made additional staff available to argue the appeals and to deal with the increased administrative burden that comes with the increased workload.
- 7.4.4 According to the Office of the DPP: Pretoria, they were able to place an extra 593 appeals on the additional roll during 2007. A number of 526 additional appeals were finalised, involving 536 appellants. In the process of preparing the appeal files to be enrolled on the additional appeal roll, the Office of the DPP: Pretoria further managed to close another 600 appeal files where the appeals were abandoned, or the appellant had been released, or passed away. As a result the number of appeals on hand has been reduced to 600 (from 2365 in June 2006).
- 7.4.5 There were indications that this initiative may be rolled out to other Divisions where major backlogs are experienced, but this has not yet realized. It would appear that the extension of the project is hampered by difficulties in the preparation of additional appeal cases. The problems relate to the availability of court records and the tracing of

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appellants to ensure that the necessary heads of argument and powers of attorney are timeously filed to verify that cases are ready to be set down.

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## **CHAPTER 8**

### **OBSERVATIONS ON THE REASONS FOR DELAYS IN THE PROCESSING OF CRIMINAL APPEALS**

#### **8.1 Blockages in the lower courts**

- 8.1.1 The majority of complaints received from prisoners about inordinate delays and lack of communication on the status of their appeals, are not without merit. With the exception of a few offices and provinces such as the Eastern Cape, of the offices, departments and institutions consulted during the course of this investigation, disputed the fact that lengthy delays are experienced in the finalization of appeals.
- 8.1.2 In the lower courts such delays are particularly evident in respect of two of the phases of the process , namely:
- 8.1.2.1 The period between the receipt of an application for leave to appeal (and an application for condonation) and the determination of a hearing date; and
- 8.1.2.2 The period between the granting of leave to appeal and the submission of the records to the DPP and Registrar.
- 8.1.3 The reasons for the initial delay to determine a hearing date for the application for leave to appeals reportedly relate to:
- 8.1.3.1 Applications never reaching the intended trial Court;
- 8.1.3.2 Applications submitted to the wrong forum (directly to the High Court);
- 8.1.3.3 Deficient or incomplete applications that cannot be put on the roll of the trial Court for hearing and have to be returned for correction;
- 8.1.3.4 The transfer and movement of prisoners, hampering the tracing of applicants for purposes of communication and requisition to court; and

- 8.1.3.5 A lack of capacity and the additional workload caused by prisoners representing themselves.
- 8.1.4 While some of the delays may correctly be attributed to the applicants for the defective manner and format in which some applications are often submitted to the respective courts, it cannot be denied that ignorance and a lack of information on the part of the prisoners contribute to this state of affairs. The information and assistance through the available structures within the prisons are simply not sufficient to allow prisoners effective access to the courts for purposes of pursuing an appeal.
- 8.1.5 Subsequent to the granting of leave to appeal, the causes of delays in the preparation and submission of the case record include (but are not limited to):
- 8.1.5.1 The level of performance by the service provider responsible for the transcription of the recordings;
- 8.1.5.2 The need to reconstruct records because of lost and damaged recordings;
- 8.1.5.3 A lack of co-operation and assistance from judicial officers and Public Prosecutors; and
- 8.1.5.4 The lack of capacity to deal with the assigned workload.
- 8.1.6 An issue that must be highlighted in this regard is the management of records and documents. There is a serious concern about the storage and safekeeping of records and documents and, in particular, control over and accountability for the movement of such records. This is aggravated by the fact that in some of the offices basic facilities for the keeping and storage of records, files and documents are lacking.<sup>67</sup>
- 8.1.7 Delays can also stem from many other different causes. It sometimes arises from a short-term resource shortage in an institution, but more commonly it results from the lack of a clear strategy within the relevant departments to ensure effective administration and to identify and address unnecessary delays. In this regard it is

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<sup>67</sup> See note 62

indeed a major source of concern that the Magistrates' Court Rules of Court, and the Code: Clerk of the Court are not kept up to date with the statutory developments and best practices. While there are factors that may contribute to delays in the administration of criminal appeals in the lower courts, such as deficient applications, capacity constraints, or the loss of records, there does not appear to be a clear and binding administrative framework to inform and supplement the statutory duties of the Clerks of the Court, or any strategy, policy or directive to ensure that delays do not occur. There is no clear guidance to Clerks of the Court for the processing of criminal appeals, and in respect of issues such as:

- 8.1.7.1 The requirements for an application for leave to appeal to constitute a proper application for the purposes of the registration of an appeal in the J117;
- 8.1.7.2 The obligations and duties of the Clerk to register, respond to or process deficient applications (letters not meeting the legal requirements);
- 8.1.7.3 Ensuring compliance with existing timeframes, such as giving notice to the applicant and the DPP;
- 8.1.7.4 Setting clear timeframes for the different steps or actions that need to be taken for the processing of the appeal, in particular:
  - The period allowed for the allocation of a hearing date for an application for leave to appeal from the date of the registration of the appeal, where the record is required, and where the record is not required;
  - The period allowed for the preparation and submission of the record to the Registrar, possibly differentiating between cases where no recordings were made, where recordings were made and are in order, and where recordings are damaged or lost;
- 8.1.7.5 The duties and obligations of the different court officials, including the presiding officer, the Prosecutor and the Clerk of the Court, in the event where recordings are lost or damaged and the records need to be reconstructed.

- 8.1.8 In addition to the more systemic deficiencies referred to above, some of the basic principles of good and fair public administration, as contained in section 195 of the Constitution, as well as the principles of *Batho Pele*, are not observed in the processing of criminal appeals.
- 8.1.8.2 One of the rights in the Bill of Rights, **the right to just administrative action**, is found in section 33 of the Constitution. It provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It also states that national legislation must be enacted to give effect to these rights. This legislation is found in the Promotion of Administrative Justice Act, 2000.
- 8.1.8.3 The principles listed in the Constitution on the quality of administrative conduct and service delivery are supplemented by the *Batho Pele* principles.<sup>68</sup>
- 8.1.9 Despite the assurances by the Clerks of the Court that they deal with, and respond to, a large volume of telephone and written enquiries on a daily basis, the lack of information on the part of the prisoners as well as the many complaints to a variety of institutions serve as confirmation of the fact that in many instances:
- 8.1.9.1 Applications for leave to appeal are not acknowledged (this is also confirmed by the Records Offices in the Department of Correctional Services);
- 8.1.9.2 Prisoners are not always notified of the hearing dates for the application for leave to appeal;
- 8.1.9.3 Prisoners are not always informed of the fact that the preparation of their cases for submission to the High Court and the DPP is delayed;
- 8.1.9.4 Correspondence and enquiries about the status of an appeal are often not responded to; and
- 8.1.9.5 Prisoners are often not informed of the outcome of their appeals and where they are informed it is not always done timeously.

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<sup>68</sup> White Paper *Transforming Service Delivery* (1997)

- 8.1.10 It is also a source of concern that the manual system of managing and monitoring the administration of appeals by means of an Appeal Register and a corresponding appeal file does not appear to be effective in preventing and dealing with delays. Certain activities, such as obtaining outstanding transcripts, reasons or corrections are not followed up on a regular basis. This happens despite the fact that the empty columns in the Appeal Register should prompt the Clerk of the Court, or the supervisor and the Court Manager, to take action.
- 8.1.11 The lack of an information technology related infrastructure to deal with both caseloads and general management of appeals in a more effective manner, clearly has an adverse impact on the ability of the court officials to manage, monitor and report on the various steps in the appeal process.

## **8.2 The allocation of hearing dates in the High Courts**

- 8.2.1 When this investigation commenced, before measures such as the allocation of additional appeal courts and the audit process were implemented, the court rolls in some of the Divisions of the High Court namely Pretoria, Johannesburg and Pietermaritzburg, were full for approximately 18 months to 2 years in advance. If it is taken into account that it may have been a while since the applications for leave to appeal were granted until the appeals are ready to be set down any lengthy or undue delay in the administration and allocation of hearing dates would aggravate a situation that constituted a gross injustice to the appellants involved and a flagrant disregard for the principle of fair administration of justice.
- 8.2.2 The backlog and the delays in the allocation of hearing dates could, to an extent, also be attributed to the fact that some appellants are not legally represented.
- 8.2.3 Delays also occur when an incomplete record is returned to the Clerk of the Court with a request for correction. In the experience of the Directors of Public Prosecution the responses from the Clerks of the Court are generally poor and in most instances it takes months and repeated correspondence to receive a corrected

record back from the Clerk of the Court. They are, however, equally concerned about issues affecting service delivery by the service providers responsible for the transcription of court records. The Department of Justice and Constitutional Development initially announced that new transcription service-providers have been appointed per province to enhance transcription services.<sup>69</sup> However, according to the DPP the problems relating to delays in the transcription of court records seem to continue because some of the service providers are not based in the province(s) for which they have been appointed (the service provider for Gauteng is reportedly based in KwaZulu Natal),

- 8.2.4 In some Divisions of the High Court the processing of documents filed at the office of the Appeal Clerk situated in the Registrar's office, appears to be problematic. It was noted by DPPs that heads of argument filed by both the appellant and the respondent often never reach the court files. Appeals are postponed *sine die* as a result thereof.
- 8.2.5 The obtaining of transcripts of the record of proceedings is problematic, particularly to prisoners who cannot afford to pay for transcription of the record of proceedings and who cannot convince the Registrar of the High Court to obtain the record for them at state expense
- 8.2.6 While the above-mentioned deficiencies do seem to play a role in the delays and the resulting backlog in some Divisions, it is also a reality that in some High Courts the judicial capacity to deal with appeals is simply inadequate. Indications are that there are not enough Judges to constitute a sufficient number of appeal courts on a regular basis to deal with the increased number of appeals that are pending.

<sup>69</sup> SA YEARBOOK 2007/08 | **JUSTICE AND CORRECTIONAL SERVICES**  
<http://www.gcis.gov.za/docs/publications/yearbook/2008/chapter14.pdf>

### 8.3 Taking responsibility for the appeal process

8.3.1 The SCA recently observed in *Carter v the State*<sup>70</sup> that:

*"Appellants in criminal cases, whether the State or an accused, are under duty to pursue their appeals with reasonable expedition. The proper administration of justice demands that they do so."*

The Court remarked that that DPP, (as respondent and responsible for the allocation of a date for the appeal) "... too owed a duty to the appellant and the public to pursue the appeal with reasonable expedition."

8.3.2 In terms of section 309B(2)(d) of the Criminal Procedure Act, the Clerks of the Court must notify the DPP (or a person designated thereto by the Director) of the date allocated for the hearing of the application for leave to appeal. According to the Clerks of the Courts, they determine the hearing date for an application for leave to appeal in consultation with the Public Prosecutor of the court concerned.

8.3.3 The offices of the DPP indicated, however, that they are only notified of the fact that an application for leave to appeal was granted when the Clerk of the Court submits the case record to them and to the office of the Registrar for the allocation of a hearing date. This might only occur long after the application for leave to appeal has been granted. In the case of *Thusukula Senatsi & Another v the State*<sup>71</sup> the Court heard from the DPP concerned that one of the reasons why appeals are "lost in the system", is because the DPPs are unaware when leave to appeal has been granted.

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<sup>70</sup> Unreported case no 535/2006

<sup>71</sup> Supra

8.3.4 The DPP is therefore only able to direct the prosecution of the appeal from the lower court once the records have been submitted and an appeal file has been opened at their offices. In such circumstances they have no control or influence over the process from the date on which leave to appeal was granted, until the date on which the records are submitted to them for the allocation of a hearing date. As a result they are unable to pursue the appeal “with reasonable expedition” until an appeal file is opened on receipt of the case records.

8.3.5 It is clearly the intention of the applicable legislation that the relevant DPP must be notified of the hearing date, and should therefore be aware of the outcome of the application for leave to appeal. The practice that the DPPs are only informed at a much later date that they must set such an appeal down for hearing was also questioned by the DPP, Pretoria. In some cases the records are only submitted to the office of the DPP two years and longer after the granting of the application for leave to appeal. This means that the DPP would only start to plan for the hearing of that case after a long period has already lapsed. In most cases the DPPs would not be aware of such delays until the case records are eventually submitted to their offices. In these circumstances the DPP cannot discharge their duties and responsibilities to ensure the reasonable expedition of the appeal, and cannot manage and plan the court roll properly since they do not know how many appeals are pending in the lower courts.

#### **8.4 Current initiatives by the Department of Justice and Constitutional Development and the NPA to improve the turn-around times for the administration of appeals**

##### **8.4.1 Additional appeal courts in the Transvaal Provincial Division of the High Court**

8.4.1.1 In view of the dramatic reduction of the backlog that was experienced that previously existed in the Office of the DPP: Pretoria, the success of the project is remarkable. Mr Justice Bertelsman, the staff members of the institutions

involved and the members of the Judiciary who have committed the additional time and effort to achieve such a considerable impact should be commended for this achievement.

8.4.1.2 Indications were that the project may initially be extended to the other High Courts where backlogs are experienced, i.e. Johannesburg and Pietermaritzburg. However, as mentioned earlier it would appear that the extension of the project is hampered by difficulties in the preparation of additional appeal cases.

#### 8.4.2 Strategy by the National Prosecuting Authority

8.4.2.1 The NPA in the Eastern Cape initiated a drive designed to address the current backlogs in the processing of criminal appeals to the High Court, and to sustain the rapid turnaround time thereafter, using a computerised system which provides necessary information to all role-players. These efforts have been so effective that the previous backlog of approximately 700 appeals in the Eastern Cape (excluding new matters coming in daily) has been completely eradicated. The turn-around time for an appeal from a lower court to be heard by the High Court has been reduced from approximately two years to about two months.<sup>72</sup>

8.4.2.2 The national office of the NPA was reportedly considering the appointment of a Task Team consisting Senior Public Prosecutors to visit all the DPP offices to do an intensive audit on all the available files and capture the information on a similar computerised system to the one developed in the Eastern Cape. The system developed will also assist with the collation of statistics regarding appeal matters to enable the DPPs and the national office of the NPA to monitor the finalisation of appeals and to identify obstacles).

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<sup>72</sup> The National Prosecuting Authority Criminal Appeal System for the High Court was joint runner up at the *2005 Innovation & Sustainability Awards*

- 8.4.2.3 The project involves liaison with all role players such as the Legal Aid Board, The Department of Correctional Services, SAPS, members of the Bar and Sidebar, as well as appellants, so as to fast track either the enrolment of outstanding cases or the removal of cases where appellants cannot be traced or are not interested in continuing with a appeal.
- 8.4.2.4 The OPP has been informed that the Department of Justice and Constitutional Development is involved in the NPA's proposed implementation of a computerised system similar to the one developed in the Eastern Cape, for the offices of the DPPs and the NPA national office. The aim of the system is to capture information in respect of appeals and to manage the process electronically by monitoring the disposal of appeals, and to be able to identify obstacles. Meetings have also been held with the Department of Justice and Constitutional Development to integrate the new system into the E-scheduler. By March 2007 the E-Scheduler, a case-management system providing case-management information to enhance case planning and scheduling – had been implemented in more than 200 courts and was being rolled out to all district courts in the country. According to the Department the system seeks to modernise the court system through greater use of information technology (IT). It allows the user to generate information on the courts that indicates at which stage the case is, including the case number, first appearance, last postponement date and the number of days per case.<sup>73</sup>
- 8.4.2.5 The lack of judicial capacity in the High Courts to deal with appeals is a major concern to all involved in the appeal process. The Department of Justice and Constitutional Development has, in the past, considered alternative measures to relieve the pressure on the judiciary in terms of capacity. The previous Minister of

<sup>73</sup>

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<http://www.gcis.gov.za/docs/publications/yearbook/2008/chapter14.pdf>

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Justice and the NPA mandated Adv F W Kahn, SC and Adv T L Heunis in 2003 to review the administrative recess system in the High Court. A report with findings and recommendations in this regard was submitted to the Department in 2003. There is no indication, however, whether or not this report was or will ever be considered.

## **CHAPTER 9**

### **KEY FINDINGS**

- 9.1 There are lengthy, inordinate delays, particularly in the lower courts, in the
- 9.1.1 registration, acknowledgment, administration and hearing of applications for leave to appeal lodged by prisoners in person and/ or via the Department of Correctional Services.
- 9.1.2 the preparation (including transcription and reconstruction) of case records and the submission of the records to the DPP and Registrar.
- 9.2 In a number of the Divisions of the High Court there are undue delays before criminal appeals are set down for hearing.
- 9.3 These delays constitute a serious infringement of the rights of the appellants to speedy and fair administration of justice as contemplated in section 35(3) of the Constitution; place an unnecessary burden on the administration of the correctional facilities by the Department of Correctional Services, as well as the capacity of these facilities, and impact negatively on the administration of justice in the courts.
- 9.4 This situation is not compatible with the Constitutional dispensation of this Country and it is indeed of grave concern that the concerns raised by different Judges and Courts of Appeal have not been taken seriously by the Department of Justice and Constitutional Development and the officials concerned.
- 9.5 One of the major reasons for the delay is attributed to a lack of knowledge and information on the part of prisoner appellants who represent themselves, resulting in deficient, incomplete or misdirected applications or petitions that do not reach the correct forum, or cannot be registered or enrolled by the clerk of the court, the Registrar of the High Court or the Registrar of the Supreme Court of Appeal for adjudication.

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- 9.6 In the lower courts the administration of criminal appeals is furthermore severely hampered by the following:
- 9.6.1 Logistical problems and the insufficient level of performance by some of the service providers responsible for the transcription of the recordings;
  - 9.6.2 The need to reconstruct records because of lost and damaged recordings as a result of inadequate record keeping and security arrangements;
  - 9.6.3 A lack of co-operation and assistance from judicial officers and Public Prosecutors;
  - 9.6.4 The lack of capacity to deal with the assigned workload;
  - 9.6.5 The ineffective management and supervision of the leave-to-appeal process and the subsequent preparation and submission of the court records to the DPP/ Registrar; and
- 9.7 The failure by the Department of Correctional Services to keep the clerks informed of the transfer and movement of prisoners obstructs the tracing of applicants for purposes of communication and requisition to court.
- 9.8 In the Divisions of the High Court the allocation of hearing dates is affected by –
- 9.8.1 Delays in the submission of the court records by the court officials of the trial courts;
  - 9.8.2 Incorrect or incomplete court records;
  - 9.8.3 The failure by the appellant or Legal Aid Board representative to timeously file proper heads of argument and/ or power of attorney;
  - 9.8.4 A lack of judicial capacity to deal with the number of pending appeals;
  - 9.8.5 Problems at the offices of some of the Registrars of the High Court with the provisioning of transcripts of court proceedings to prisoners (There is no uniformity on the payment of fees for the transcription of court records)

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- 9.8.6 The failure by the Department of Correctional Services to advise the relevant court officials of the transfer and movement of prisoners, thus hampering the tracing of applicants for purposes of communication and requisition to court;
- 9.9 The communication between officials of the courts and the DPP offices on the one hand and the Department of Correctional Services and the prisoners on the other hand, is appalling to say the least. It is unacceptable that appellants (and the Department of Correctional Services as go-between) are expected to wait for the years that it sometimes takes for the applications and appeals to be processed, without any information on the status, process, or outcome of their appeals.
- 9.10 The basic principles of good and fair public administration, as contained in section 195 of the Constitution, as well as the principles of *Batho Pele*, are sometimes not observed in the processing of criminal appeals.
- 9.11 The situation is aggravated by the fact that neither the Prosecuting Authority who is tasked with the set down of the matters, nor the trial court officials, who are responsible for the preparation of the court records, is taking responsibility for the monitoring and expeditious administration of the appeals process subsequent to the granting of leave to appeal. There is no mechanism or process to record and monitor the number of successful applications for leave to appeal that have been lodged with the lower courts in the various jurisdictions of the High Courts during a reporting period; the number of cases where the court records have already been submitted to the DPP and the Registrar, the number of cases that have not yet reached the DPP and Registrar; how long they have been outstanding and what is being done to deal with the delays.
- 9.12 The relevant provisions of the Magistrates' Court Rules of Court, and the Code: Clerk of the Court were not kept up to date with the statutory developments and best practices.

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- 9.13 There are no clear task directives on the duties and obligations of the different court officials, including the presiding officer, the Prosecutor and the Clerk of the Court, for the processing of criminal appeals, particularly on problematic issues such as the reconstruction of court records, timeframes for the preparation and submission of case records, the registration of proper appeal documents, responding to deficient documents/applications and the importance of regular and effective communication with the appellants.
- 9.13 Despite repeated complaints by prisoners to the Department, the Ministry of Justice, the Presidency, several Chapter 9 Institutions, as well as the intervention of the courts, the situation remains the same and the problems appear to be increasing.

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## **CHAPTER 10**

### **RECOMMENDATIONS**

In terms of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, 1994 the following recommendations are made:

#### **10.1 Department of Correctional Services**

10.1.1 The Department of Correctional Services must, in consultation with the Department of Justice and Constitutional Development and other role players such as the Legal Aid Board, determine what is required to provide prisoners adequate, effective and meaningful assistance in all matters dealing with access to the courts. In this regard the Department should:

- 10.1.1.1 Assign specific duties to designated officials in the records or administration offices;
- 10.1.1.2 Ensure that such designated officials have the necessary skills and training to provide prisoners with the necessary information and assistance to facilitate proper access to the courts (excluding the providing of legal advice);
- 10.1.1.3 Develop minimum operational and performance standards in respect of these duties in line with international standards and best practice to ensure-
  - 7 Access to his/her lawyer or the Legal Aid Board if required by the prisoner;
  - 8 Access to any prescribed forms and legal documents necessary to lodge an application for leave to appeal;
  - 9 The assistance of a trained and dedicated person within the prison to provide the prisoners with legal, procedural information (not legal advice) required to lodge an application for leave to appeal to the correct forum.

- 10.1.1.4 Ensure the availability of standard and acceptable forms and documents used in the appeal process, including forms for the application for legal aid, power of attorney, the application for leave to appeal, and the application for condonation;
- 10.1.1.5 Provide prisoners with an education brochure or booklet on the appeal process and the administrative procedures and steps that are taken to prosecute an appeal; and
- 10.1.1.6 Set up a complaints mechanism together with the Department of Justice and Constitutional Development at regional level where complaints from prisoners about inaction, delays or lack of responses from the Clerks of the Court could be referred.

## **10.2 Department of Justice and Constitutional Development**

- 10.2.1 The Department must consider extending the current initiative by the NPA to determine and deal with the backlog of appeals, to the Magistrates Offices. It is imperative that this exercise include an audit of lower court appeals that have not yet reached the offices of the DPPs.
- 10.2.2 The administration of criminal appeals in the lower courts and the respective Divisions of the High Courts should be prioritised in the strategic and operational plans of the Department. The Department must develop a clear strategy to deal with the current situation in terms of its own assessment, as well as the causes of delays identified in this report, including the following:
  - 10.2.2.1 Review the relevant provisions of the Rules of Court to ensure that the duties of the Clerks and the Registrars in respect of the administration of criminal appeals are aligned to the current law;
  - 10.2.2.2 Issue a task directive in the form of a policy, directive or manual to establish an administrative framework to inform and supplement the statutory duties of the Clerks of the Court regarding:

- a) The statutory requirements for an application for leave to constitute a proper application for the purposes of the registration of an appeal in the J117;
- b) The obligations and duties of the Clerk in responding to or dealing with deficient applications;
- c) Compliance with existing timeframes, such as the notification of the applicant and the DPP;
- d) The setting of clear timeframes for the different steps or actions that need to be taken for the processing of appeals, in particular:
  - o Determining the time allowed for the allocation of a hearing date for an application for leave to appeal from the date of the registration of the appeal, both where the record is and is not required;
  - o Determining the time allowed for the preparation and submission of the record to the Registrar, providing for cases where recordings are available, as well as where recordings are damaged or lost;
- e) Compliance with the constitutional requirements of fair administration and the principles of *Batho Pele* in the processing of appeals, in particular communicating the progress, status and outcome of appeals to the relevant parties;

10.2.2.3 Clarify the duties and obligations of the different court officials, including the presiding officer, the Public Prosecutor and the Clerk of the Court, in the event where recordings are lost or damaged and the records need to be reconstructed; and

10.2.2.4 Review the performance agreement framework of the Clerks of the Court, the Court Managers, as well as the Registrars, to ensure compliance with their statutory duties, as well as the standards and timeframes envisaged in the proposed policy, directives or manual.

- 10.2.3 The lack of capacity in human resources in the Magistrates' offices that are responsible for the administration of appeals from a large number of courts, must be dealt with urgently;
- 10.2.4 The Department must ensure that service level agreements with the external service providers such as the transcribers include standards and timeframes;
- 10.2.5 In view of the fact there are regular reports of missing records, the fact that delays in the preparation and transcription of court records is one of the major contributing factors in the delays of the processing of appeals, and given the volumes of appeals and reviews, the Department of Justice and Constitutional Development is urged to investigate the appointment of specific and dedicated transcribers to deal exclusively with appeals from prisoners, in particular those who are not represented.
- 10.2.6 The document and records management policy of the Department must urgently be reviewed to improve control over the storage, movement and safekeeping of the recordings and records of criminal trials. Urgent attention should at the same time be given to assessing and addressing the lack of filing and storage systems and facilities in some of the offices, including the Magistrates' Courts of Witbank and Tzaneen (as identified in the previous reports of the Public Protector) and the Johannesburg High Court.<sup>74</sup>
- 10.2.7 In view of the delays that are occasioned by the transcription and reconstruction of lost records urgent attention should be given to alternate methods of recording proceedings in court, including the digitalisation and warehousing of the recording of proceedings in the courts, which would improve the management and storage of information.
- 10.2.8 The Department must consult with the NPA to establish an electronic monitoring mechanism to monitor appeals from the time when the application for leave to appeal or for condonation is registered. It is crucial that steps be taken to share information

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<sup>74</sup> See note 62

between the various offices within the Department and the NPA, as well as externally with stakeholders such as the Department of Correctional Services and the Legal Aid Board to relieve the Clerks of the Court, the Registrars and the NPA of the huge burden of having to deal with constant enquiries about the status of appeals.

10.2.9 The establishment of a forum should be considered, consisting of representatives, *inter alia*, from the Lower Courts, High Courts, the offices of the DPPs, the regional offices of the Department, the Department of Correctional Services and the Legal Aid Board to deal with the issue of delays in the processing of criminal appeals.

### **10.3 Conclusion**

10.3.1 The OPP will monitor the implementation of the recommendations referred in Chapter 10 on a three monthly basis.

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**ADV M L MUSHWANA  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA**

**DATE:**

***Assisted by:* Mr S Keebine: Chief Investigator;  
Messrs H Samuel, T Pather, and  
N van der Merwe: Senior Investigators;  
Adv C H Fourie, Head: Special Investigations.**