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ASPIRANT PROSECUTOR PROGRAMME

STUDY GUIDE FOR ENTRY EXAMINATION

2023

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This is a study guide which is compiled for the purpose of allowing applicants to prepare for the Aspirant Prosecutor Programme, entry examination.

This is not an academic work and cannot be used as an academic reference.

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INTRODUCTION:

The purpose of this study guide is to prepare you with the basic principles required to ensure that every criminal case is properly presented before a criminal court.

The triad consisting of Criminal Law, Criminal Procedure and Law of Evidence is the foundation to achieve the success of presenting Evidence.

- Criminal law provides for offences and lays the foundations as to what elements are required in respect of specific offences.
- Criminal procedure lays down the procedure to follow in respect of the evidence secured for presentation.
- Law of Evidence deals with the admissibility and relevance of the evidence to be presented at court.

From the onset is important to note that these aspects are interlinked and cannot work in isolation. Throughout this guide there will be multiple references to the linkage between these three facets of law.

PART I

INTRODUCTION TO CRIMINAL LAW

BASIC PRINCIPLES OF CRIMINAL LAW

1. Requirements for Legality

When dealing with criminal liability the first question that needs to be asked in determining somebody's criminal liability is whether the conduct that forms the basis of the charge is recognised in our law as a crime, as such conduct that maybe seen as morally wrong is not necessarily legally wrong.

As such in simple terms:

- the law must recognise the act/conduct as a crime in clear terms
- before the conduct took place.

It must also not be necessary to interpret the words in the definition of the crime broadly in order to cover the conduct of the accused. In essence, the type of conduct must be recognised by the law as a crime, be clear and be set out before the act occurs. This principle is known as the "**principle of *legality***".

2. Conduct and Voluntariness

Once it is clear that the law regards the conduct as a crime, the next step is to determine whether there was conduct on the part of the person charged with the offence. Any act in the legal sense must be voluntary, however, the concept of a voluntary act should not be confused with the concept of a deliberate act.

To establish whether there was an act, the question is whether the act was voluntary. As an act need not be only a deliberate or wilful act, act may be negligent and that is sufficient for it to be a punishable criminal act.

An act will be involuntary where it occurs as the result of the application of superior force upon the body of a person. A distinction is drawn between absolute force and relative force.

The distinction between absolute and relative force is that in the case of absolute force a person is unable to subject his bodily movements to his will and so there is no voluntary act

on his part. In the case of relative force, it is possible for a person to not commit the prohibited act.

Another way in way an action will be seen to be involuntary is where there is evidence of automatism. Automatism is separated between sane and insane automatism. Sane automatism occurs where the accused relies on the defence that he did not commit a voluntary act as he acted as an automaton. In the case of insane automatism, the accused will rely on the defence of mental illness, this concept was discussed above in sections 77, 78 and 79 of the Criminal Procedure Act 51/1977.

The distinction between the two is relevant as in the case of sane automatism the onus is on the state to prove that the act was performed voluntarily.

In terms of sane automatism, the hallmark of the characterisation is that there be no evidence of premeditation, this was espoused in **S v Matjane (CC122/2016) [2018] ZAGPPHC 956** the conduct of the accused indicated voluntary goal-directed behaviour and she was held to be criminally liable and duly convicted of both counts of murder.

- **Act (positive conduct)**

Since the criminal law does not punish mere thoughts, criminal liability will arise only where the human being concerned has carried out an 'act' or an omission.

- **Omission (failure to act)**

An omission is a less common basis of criminal liability than a positive act. An omission is punishable only if there is a legal duty to act positively. Such a legal duty arises if the legal convictions of society demand it.

There are **seven legal duties** that have been noted in our law they are as follows:

1. **Contractual Duty** - An example of a duty to act in a contractual setting was dealt with in the English case of **Pittwood (1902) 19 TLR 37** wherein a level-crossing keeper failed in breach of his contract of employment to close the gate when a train was approaching, resulting in the death of someone on the crossing. The accused was

convicted of culpable homicide despite the contractual obligation being only owed to the railway company.

2. **Act or Statute** - A statute may place a duty on somebody to act positively, in terms of the Income Tax Act there is an obligation placed upon a taxpayer to file their Income Taxes timeously in terms of the law.

3. **Dangerous Object** - duty may arise where a person accepts responsibility for the control of a dangerous or a potentially dangerous object, and then fails to control it properly. **Fernandez v S 1966 (2) SA 259 (A)**, herein Fernandez kept a baboon and failed to repair its cage properly, with the result that the animal escaped and bit a child, who later died. Fernandez was convicted of culpable homicide.

4. A duty may arise where a person stands in **a protective relationship** towards somebody else. A parent or guardian has a duty to feed a child, this is espoused in both the Children's Act as well in the case of **Chenjere v S 1960 (1) SA 473 (FC)**, in this matter a partner to the parent of the child had a legal duty to care for their child failed to feed the child and the child died as a result he was convicted of Murder.

5. A duty may sometimes arise by virtue of the fact that a person is **the incumbent of a certain office,** such as a medical practitioner or a police official. In **Minister van Polisie v Ewels 1975 (3) SA 590 (A)** it was held that a policeman on duty who witnesses an assault has a duty to come to the assistance of the person being assaulted.

6. A duty may arise from a **previous positive act.** The omission follows upon a commission or positive act which has created a duty to act positively. **S v Van Aardt 2009 (1) SACR 648 (SCA)**, in this matter the accused severely assaulted the victim, then as opposed to obtaining medical attention for the victim he left him to succumb to his injuries. Accused was convicted of murder.

7. A legal duty may arise by virtue of **an order of court**. If a court orders the person to pay monthly maintenance in terms of a divorce decree, and the person fails to pay the said maintenance he may be charged with contempt of court.

3. Causation

Crimes may be divided into two groups, that being formally and materially defined crimes.

In formally defined crimes, a certain type of conduct is prohibited irrespective of the result of such conduct. In materially defined crimes, on the other hand, it is not specific conduct which is prohibited, but any conduct which causes a specific condition.

When dealing with materially defined crimes, it is essential to establish whether a causal link or nexus exists between the conduct of the accused and the prohibited result. The basic principle is that to establish causation there needs to be a causal link between the act of the accused and the outcome.

The courts (**Daniels v S 1983 (3) SA 275 (A)** and **S v Tembani 2007 (1) SACR 355 (SCA)**) have confirmed that in order to determine whether certain conduct has caused a certain prohibited condition, two requirements must be met: firstly, one must determine whether the conduct was a **factual cause** of the condition and secondly one must determine whether the conduct was also the **legal cause** of the condition.

The ***conditio sine qua non*** test, this test deals with the **factual cause**: Where the conduct in question takes the form of a positive act, the question is asked whether; but for the accused's conduct, the consequence in question would not have occurred at all or when it did. If the answer to this question is in the affirmative, then the accused's conduct is a factual cause of the consequence.

When dealing with the **legal causation** we deal with several different theories of legality, first of which is ***proximate cause*** – in that the accused persons actions were a close or an approximate cause of the condition so caused. In **Daniels v S 1983 (3) SA 275 (A)** Daniels shot the victim in the back with a rifle and the victim fell to the ground, severely wounded. The victim's injuries were severe enough to result in his death should he not receive medical treatment within around half an hour. Soon after the shooting a third party arrived on the scene and shot the victim in the ear, this immediately caused the death of the victim. There had been

no prior agreement between Daniels and the second shooter. The second shooter's actions were the immediate cause of the victim's death.

A causal link was therefore established. The question was whether Daniel's had also caused the death of the victim. His conduct was a *conditio sine qua non* of the death as well as the legal cause. The judges also submitted that there were no policy considerations to exonerate Daniels. The second shooter's act was not a *novus actus* and Daniel's criminal liability cannot necessarily be said to be based on proximate cause.

Secondly, we look at the theory of ***adequate causation*** – an act is a legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that type of situation. In **S v Counter 2003 (1) SACR 143 (SCA)** The accused shot and wounded the deceased who died in hospital due to side-effects from the gunshot wound as septicaemia had set in. The deceased's resistance was severely weakened and death ensued. The Court held that the accused should be held responsible for the consequences of his actions which caused the deceased's death by stages entirely predictable and in accordance with human experience.

Finally, we look at a ***Novus actus interveniens.*** This means 'a new intervening event' and demonstrates a break in the chain of causation. An act will meet with this requirement only if it constitutes an unexpected, abnormal, or unusual occurrence. The act must deviate from the normal course of events and must not be regarded as a probable result of the initial act. However, an act will not qualify as a *novus actus* if the accused previously knew or foresaw that it might occur. In **S v Tembani 2007 (1) SACR 355** the accused shot the deceased. The wound would in the ordinary course have caused the death of the deceased. The hospital staff negligently failed to intervene appropriately. Appropriate intervention would have rendered the wound non-fatal. The original wound remained the operating and substantial cause of death. The Court held that medical negligence, even gross medical negligence, cannot be a *novus actus interveniens*. Thus, the act of the accused was the legal cause of death.

4. Unlawfulness

Unlawfulness may be described as conduct that is unjustified and as such is prohibited conduct. As such a justified act cannot be seen to be unlawful. An act is therefore either lawful or unlawful.

There are a number of cases or situations; where an act which matches the definitional elements is nevertheless not regarded as unlawful. Unlawfulness is excluded because of the presence of grounds of justification.

Defences excluding unlawfulness:

- **Private Defence**

A person acts in private defence, if he uses force to repel an unlawful attack which has already commenced, or which immediately threatens his or somebody's else's life, bodily integrity, property or other interest that ought to be protected by the law, provided the defensive action is necessary to protect the threatened interest, is directed against the attacker and is no more harmful than necessary to ward off the attack and as such his conduct is therefore lawful.

Requirements of the attack:

1. Be unlawful - **Papu 2015 (2) SACR 313 (ECB)** wherein at para 10 the court held that; "*It is self-evident that in those circumstances the deceased's actions, in firing a shot at what he believed to be intruders on his property, were clearly not unlawful" A*s a result the accused was convicted of murder.
2. Against interests which should be protected – **Teixeira v S 1980 (3) SA 755 (A) 765 A**; wherein the court found "*The only conduct really relevant to the issue of self-defence is that relating to appellant's reaction to the deceased's threat to assault him with the bottle. It was suggested to appellant that he could have called for help. I do not appreciate how a call for help could possibly have availed appellant when (on appellant's version) the deceased advanced towards him evincing a clear intention of striking him with the bottle. It was suggested that appellant "had enough time and place to get himself out of the dilemma". In my opinion, the circumstances indicate the contrary. Even on an armchair approach, it appears that, with the deceased being less than a metre*

away from him, it would have been an act of folly on appellant's behalf to have attempted to seek safety in flight. In my opinion, the State failed to prove beyond any reasonable doubt that appellant's conduct in killing the deceased was not justified, i.e., that he had acted unlawfully." Resultantly the accused was acquitted of the murder charge.

3. The attack must be imminent but not yet completed - **Mokgiba 1999 (1) SACR 534 (O) 550** – The court held that once the attack is completed one cannot act in self-defence or private defence. Private defence is not a means of exercising vengeance, neither is it a form of punishment.

Requirements of the defence

1. Directed against the attacker
2. Be necessary - The defensive act must be essential in order to protect the interest threatened –in **S v Engelbrecht 2005 (2) SACR 41 (W)** the court held that "*The basic idea underlying private defence is that a person is allowed to "take the law into his own hands", as it were, only if the ordinary legal remedies do not afford him effective protection he is not allowed to claim the functions of a judge and a sheriff. On the other hand, a threatened person need not accept the threats or actual violence merely because he will be able to claim damages afterwards.*"
3. There must be a reasonable relationship between the attack and the defensive act – **Ngobeni v S 2014 ZASCA 59**.
4. Be taken while the defender is aware that he is acting in private defence

The test for private defence is an objective one. A person cannot rely on private defence if it appears that he was not exposed to any danger, but merely thought that he was.

- **Necessity**

A person acts in necessity, and her act is therefore lawful, if she acts in protection of her own or somebody else's life, bodily integrity, property or other legally recognised interest which is endangered by a threat of harm which has commenced or is imminent and which cannot be averted in another way, provided the person is not legally compelled to endure the danger and the interest protected by the protective act is not out of proportion to the interest infringed by

the act. It is immaterial whether the threat of harm takes the form of compulsion by a human being or emanates from a non-human agency such as force of circumstance.

These two grounds of justification known as necessity and private defence are closely related to each other. In both cases a person protects interests which are of value to him or her, such as life, bodily integrity, and property, against threatening danger. The differences between these two grounds of justification are the following:

(1) Private defence always stems from and is always directed at an unlawful attack; necessity, on the other hand, can stem from either an unlawful act or from chance circumstances, such as acts of nature or even an animal.
(2) In cases of necessity it is directed at the interests of another innocent party.

- **Impossibility**

Impossibility may justify failure to comply with a positive legal obligation. The defence of impossibility is relevant where it is impossible for the accused to comply with a positive ruling of the law. **Canestra v S 1951 (2) SA 317 (A) 324**

- **Superior orders**

The defence of obedience to orders arises in the context of obedience to military and police commands. This question arises mostly with reference to the conduct of subordinates in the defence force and the police but is not limited to soldiers and policemen. A soldier is compelled to obey an order only *if the order is manifestly lawful*. If it is manifestly unlawful, he may not obey it; and if he does, he acts unlawfully. In **S v Mostert 2006 (1) SACR 560 (N)** the court held that the requirements of the defence are:

1. The order must emanate from a person lawfully placed in authority over the accused.
2. The accused must have been under a duty to obey the given order.
3. The accused must have done no more harm than was necessary to carry out the order.

- **Consent**

Consent by the person who would otherwise be regarded as the victim of an accused person's conduct may, in certain cases, render the otherwise unlawful conduct lawful. Consent as a ground of justification in criminal law is possible only to a limited degree, since consent can operate as a ground of justification in respect of certain crimes only, and then only under certain circumstances.

- **Entrapment**

Entrapment is not a ground of justification, the mere fact that the accused person was entrapped and then committed conduct that is punishable by law does not mean that his conduct is justified; however, he may in certain circumstances escape liability because the court may hold that evidence regarding the entrapment is not admissible against the accused person – **S v Nortjé 1996 (2) SACR 308 (C.**

- ***De minimis non curat lex***

If the accused person commits an act which is unlawful but the degree in which he contravenes the law is minimal, that is, of a trifling nature, a court will not convict him of the crime in question. The principle that comes into play here, is that embodied in the maxim *de minimis non curat lex*, which means "the law does not concern itself with trifles". *De minimis non curat lex* is not a defence which excludes the unlawfulness of the accused's conduct, but rather a decision of a court to allow unlawful conduct to go unpunished on account of its triviality. **Kgogong v S 1980 (3) SA 600 (A) –** The appellate division refused to uphold a conviction of theft of a piece of wastepaper as this was a triviality.

- **Official Capacity**

An act which would otherwise be unlawful is justified if a person is entitled to perform it by virtue of the office she holds, provided it is performed in the execution of her duties. As such a SAPS clerk who transfers drugs from the SAP 13 store to the Forensic Services Laboratory, he will not be in unlawful possession of drugs. In **S v Huyser 1968 (3) SA 490 (NC)** the agricultural official had been entitled to shoot a wounded buck since he, by implication, had the required authorisation where such an action was necessary for the prevention of disease.

- **Presumed Consent or *Negotiorum gestio***

An act that infringes upon the interests of another and the person meets all of the definitional requirements of the crime, however their actions are justifies in that they further the interests of the person against whom the alleged crime is committed. An example of this would be breaking the burglar proofing to a person's burning home in order to rescue the homeowner. As such whilst the crime of malicious injury to property was committed, the actions were justified by the circumstances.

- **Disciplinary Chastisement**

In the common law it was a ground of justification to raise a defence of disciplinary chastisement where the punishment of a child, learner, spouse or employee was reasonable and moderate. Over time the justifications regarding a spouse and employee fell away. As did that of a school learner in the Constitutional Court decision of **Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)**.

Finally, in the Constitutional Court decision of **Freedom of Religion South Africa v Minister of Justice and Constitutional Development 2020 (1) SACR 113 (CC)** the court ruled that parental chastisement of their children was unconstitutional and that chastisement was not a ground of justification.

As a result, in South African law chastisement is not a ground of justification.

5. Criminal Capacity

Every person that is prosecuted as an accused must have criminal capacity before they can stand trial. Criminal Capacity is a two-legged test. Firstly, a person must have the ability to understand and appreciate the wrongfulness of his/her conduct and, secondly, he/she must conduct themselves in appreciation of the wrongfulness of their conduct and understand the consequences of their actions. Criminal Capacity must exist at the time of the committal of the offence. If one or both legs of this test are amiss the accused cannot be prosecuted. Please see the matter of **S v Eadie 2002 (1) SACR 663 (SCA)**. The appellant was found guilty of murder in a lower court after he killed a motorist in an act of road rage. His plea was one of non-Pathological criminal incapacity. After he was found guilty the appellant appealed his conviction to the Supreme Court of Appeals. Part of the appellant's grounds of appeal was that he had dealt with a similar incident prior in his life and further that he was provoked to

such an extent that the element of unlawfulness lacked during this incident. After looking at all the factors involved the Supreme Court of appeals found that the appellant did not lack criminal capacity and his appeal was dismissed.

The Child Justice Act 75 of 2008 was amended by the Child Justice Amendment Act 28 of 2019 regulating criminal capacity of a child under this act.

In the past a child below the age of 10 years was presumed to lack criminal capacity. And children between the ages of 10 years and 14 years was presumed to have criminal capacity but the State still has to prove that such criminal capacity was present at the time of the commissioning of the offence.

With the new amendments to the Child Justice Act it is now presumed that a child below the age of 12 years lacks criminal capacity and children between the ages of 12 and 14 has criminal capacity but the State must still prove that such capacity was present at the time of the commissioning of the offence.

6. Fault / Culpability

Fault is an element of every crime. It takes the form of either intention (dolus) or negligence (culpa). All common-law crimes require intention, apart from culpable homicide and contempt of court committed by an editor of a newspaper, for which negligence is sufficient. Statutory crimes require either intention or negligence.

It is a firmly established principle of criminal justice that there can be no liability without fault. In other words, the general rule is that, in order for an accused to be held liable, in addition to unlawful conduct and capacity, there must be fault on the part of the accused. There is also a presumption of statutory interpretation that the legislature intended some form of fault as a requirement for liability under the statute in question. In the matter of **S v Dube (CC03/22) [2022] ZAMPMBHC 28 (3 May 2022)** the Court defined the different means of fault or as otherwise known Culpability.

7. Participation in crime

So far, we have dealt with the criminal liability of a person who has satisfied him/her with the definitional elements of the crime (the perpetrator). However, more than one person may be involved in the commission of a crime, and we now need to consider how the law assigns liability to such persons.

Participation can be divided into three categories.

1) **Perpetrators** – A perpetrator is a person whose conduct considering the circumstances as well as their fault/culpability satisfies all the elements of a crime and or where a person acted together with one or more other persons and their conduct taken into account the circumstances and the fault on the side of the person satisfies all the elements of an offence. Please see the case of **Everts v S (A497/10) [2011] ZAWCHC 246 (31 May 2011)**. The appellant in this matter was charged with rape with 5 other co-accused of which one passed away before the trial started. The facts were as follows; the accused held the complainant's hands and shone a torch on her private parts while his co-accused raped her. He was found guilty of Rape as a participant and not an accomplice. The accused appealed against both his conviction and sentence. He was unsuccessful in his appeal against both conviction and sentence and the forms of participation were discussed as well as when a person can be charged as an accomplice.

2) **Accomplices** – An accomplice is a person whose actions unlawfully and intentionally further, facilitates and or makes possible the commission of a crime by another person. An accomplice's conduct does not satisfy all the elements of the offence, but his/her conduct makes it possible for the main perpetrator to commit the offence. Please see **S v Williams 1980 (1) SA 60 (A) 63** the appellant was charged as an accomplice to murder. The appellant was on a train with his co-accused. One of his co-accused stabbed the deceased with a knife while the appellant held the deceased by the neck. In his appeal there was a discussion if the accused should have been charged with the main count of murder as a co-perpetrator or was the Court correct of conviction of accomplice. The conviction was upheld but this judgement has been criticized on numerous occasions by different authors including Snyman stating that the accused should have been charged as a participant and not an accomplice.

3) **Accessory** – An Accessory after the fact does not comply with the definition of participation since it is clear that the conduct of a perpetrator or an accomplice promotes the commission of an offence before it is completed. An Accessory after the fact is a person that after the commission of the offence assists the perpetrator and or the accomplice to escape liability for the offence that was committed. For Example, A commits murder and then B assists A to get rid of the murder weapon. A is the perpetrator and B is the accessory after the fact. In the unreported matter of **S v Norman Nwasheng RC312/14 heard in the High Court of the Gauteng Local Division, judgement date 29/09/2022** the appellant applied for leave to appeal on her conviction as an accessory after the fact. The appellant's husband was implicated in a number of murder cases. The police were looking for the appellant's husband and in the process of wanting to arrest the appellant's husband the appellant blocked all communication with the police even though it was a well-known fact that the appellant's husband was residing with her at the time of him committing the offences. Due to her actions, it took months for the police to trace the suspect and have him arrested. Her application for leave to appeal was dismissed against the conviction since the Court found that there is no reasonable chance that a Court of higher authority will come to a different conclusion than the trial court.

Doctrine of Common Purpose

Where two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of the crime is imputed to the others. For perpetrators to be found guilty in terms of the doctrine of Common Purpose it does not have to be proved that there was prior conspiracy. The doctrine is applicable to all offences. The doctrine of common purpose does not require each participant to know or foresee in detail the exact way in which the unlawful result will be brought about. Please see the unreported matter of **Sithole and Another v S (A777/15) [2017] ZAGPPHC 169 (20 February 2017)** which was referred to the High Court for an appeal on conviction and sentence by the Appeals Court after the trial court refused the appellant's application for leave to appeal. The appellant in this matter was found guilty of murder, attempted murder, housebreaking with the intent to steal and robbery with aggravating circumstances and was sentenced to life imprisonment with a further 40 years' direct imprisonment. The facts were that the appellant planned the housebreaking with his co-perpetrators, and he was stationed

as the watch man. Upon the return of the complainant and the deceased he notified his co-perpetrators that the complainant and the deceased arrived back at the house by whistling. He heard gun shots and he ran away after hearing the gun shots. The trial court found him guilty with his co-perpetrators stating that he had a common purpose with his co-perpetrators to break into the house and must have foreseen the consequences that could follow after such a break in. The High Court dealing with the appeal held that there was insufficient evidence to conclude beyond a reasonable doubt that there was a meeting of the minds in relation to his co-perpetrators shooting and killing the complainant and the deceased and that on these facts the doctrine of common purpose could not be stretched that far. His appeal against his convictions on murder and attempted murder was upheld but his appeal against the charge of Housebreaking with the intent to steal and robbery with aggravating circumstances was dismissed.

Possession/Joint Possession

For a person to possess an item there is a two-legged question that must be asked;

1) Did the person have physical control over an item? This test is objective in nature.
2) Did the person have the intent to exercise control over the item? This test is subjective in nature.

If both of these elements are not present it cannot be said that a person possessed an item. The size and nature of an item must be taken into account for example a fire-arm and a vehicle. A fire-arm is smaller and much easier for a person to have physical control over in relation to a motor vehicle. But being able to steer a vehicle by which way ever still places a vehicle in the physical control of a person. The second leg is to determine with what intent a person has physical control over an item. A person can possess a fire-arm but that person will have a license for that fire-arm and thereby negating the second leg of the test. He/She is in the lawful possession of the fire-arm. However, if a person is in possession of a fire-arm and that person does not have a licence to possess such fire-arm the second leg becomes relevant and a person can be charged under the Firearms Control Act, 2000.

For joint possession the State must prove that both or more parties had both the control and the intent to possess an item. In the matter of **S v Masilo 1963 (4) SA 918 (T)** the driver of a motorcar picked up a passenger, whilst knowing that the passenger was in possession of dagga. Both of the accused were found guilty for possession of the dagga.

In the matter of **S v Mbuli 2003 (1) SACR 97 (SCA)** where the court held that Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case. The issues which arise in deciding whether a group possessed firearms or explosives must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a court that (a) the group had the intention to exercise possession of the guns through the actual detentor and (b) the actual detentors had the intention to hold the guns on behalf of the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors. Mere knowledge by the others that one of the accused had been in possession of a hand grenade, and even acceptance by them in its use for fulfilling their common purpose to commit robbery, was not sufficient to make them joint possessors for purposes of the Act. The evidence did not establish which of the accused had been in possession of the hand grenade and they had been entitled to be acquitted.

Executive Statements:

Statements made in execution of conspiracy or common purpose have been admitted against co-conspirators. The judgment of Squires J in **S v Shaik 2007 (1) SACR 247 (SCA) at 168-169** allows an executive statement to be received in evidence, but unfortunately does not deal in detail with the legal principles or reconcile the principle with constitutional values. Although it is not entirely clear, the SCA in the *Shaik* appeal seems to say that executive statements which are adduced to prove the truth of their contents should be dealt with under the statutory law relating to hearsay evidence.

An executive statement can be seen as an exception to the hearsay rule. The only admissibility requirement is that the statement made was done so voluntarily.

SPECIFIC OFFENCES

A. COMMON LAW CRIMES

- *Public Violence*

Public Violence is defined as the unlawful, intentional commission, together with a number of people, of an act or acts which constitute a serious breach of the public order or peace and tranquillity.

Resultantly public violence is not constituted by a protest, it must be punctuated with actual or serious threats of violence and must be committed by more than one person to be an offence – **Cele v S 1958 (1) SA 144 (N)**.

- *Contempt of Court*

Contempt of court consists of unlawfully and intentionally violating the dignity, reputation or authority of a judicial officer in their judicial capacity

OR

by publishing information/comment concerning a pending judicial proceeding which may constitute a real risk of improperly influencing the outcome of the proceedings or to the prejudice of the proper functioning of the administration of justice in those proceedings – **Midi Television (PTY) Ltd v DPP: Western Cape 2007 (3) SA 318 (SCA) at para 19** - In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place.

Contempt of court may occur *in facie curiae* or *ex facie curiae*. The difference is simple, *in facie curiae* refers to conduct that infringes on the court whilst in the presence of the presiding officer. This means it occurs in "open court" – **R v Magerman 1960 (1) SA 184 (O)**. Whereas contempt of court, *ex facie curiae,* will occur not in the presence of the presiding officer. Intention in the form of *dolus eventualis* will suffice in cases of contempt of court – **S v Nel 1991 (1) SA 730 (A)**.

- ***Defeating or Obstructing the Course of Justice***

The above-mentioned crime consists of the unlawful and intentional engagement of conduct which amounts to the course justice being defeated or obstructed.

The is a marked difference between defeating and obstructing the course of justice, a person can only be convicted of defeating the course of justice if it is proven beyond a reasonable doubt that justice has been defeated by the conduct of the accused, whereas in the case of obstructing the State must prove that the course of justice was merely obstructed or subverted. It has been held that the course or administration of justice refers to a process which is destined to end up in a court case – **S v Bazzard 1992 (1) SACR 302 (NC)**

- ***Perjury***

Perjury consists of the unlawful and intentional making of a false statement in the course of judicial proceedings, by a person who has taken the prescribed oath or has made an affirmation before a person or judicial officer who is competent to administer and/or accept the oath, affirmation or admonition.

The false statement referred herein may consist of either a verbal statement or an affidavit - **S v Ncamane [2019] ZAFSHC 220 at para 5**.

Perjury can only be committed if the statement was made during the course of judicial proceedings - **S v Carse 1967 (2) SA 659 (C)**. The courts (**R v Beukman 1950 SA 261 (O)** *and* **Carse** *supra*) have held that the term judicial proceedings are not confined to proceedings in a court of law. As such a false affidavit affixed to civil proceedings will qualify for a charge of perjury, however a statement made on oath to the police in which a false criminal charge is laid will not – (**Beukman** *supra)*.

- ***Murder***

Murder is the unlawful and intentional causing of the death of another human being.

The causing of a death of another human may be caused by either an act or an omission. The death caused must be of another human being, as such suicide or attempted suicide is not a crime in law.

As explained in **Director of Public Prosecutions, Gauteng v Pistorius [2015] ZASCA 204** at para 26 - In cases of murder, there are principally two forms of intention which arise: *dolus directus* and *dolus eventualis*. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased.

Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to *dolus directus*, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed.

It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act 'reckless as to the

consequences' (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been 'reconciled' with the foreseeable outcome.

Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.

- ***Culpable Homicide***

Culpable Homicide is the unlawful, negligent causing of the death of another human being.

Culpable Homicide and murder differ in only one sense, namely the form of *mens rea.* For purposes of conviction the court must ask itself the following:

(a) whether a reasonable person in the same position and circumstances of the accused would have foreseen the possibility that the deceased's death may result from his conduct;

(b) whether the reasonable person would have taken steps to guard against this possibility

(c) whether the conduct of the accused differed or deviated from the conduct of a reasonable person in the circumstances

There can be no attempt to commit Culpable Homicide, this is because a person cannot intend to be negligent. As intention is a requirement for an attempt, one cannot attempt to commit culpable homicide.

- ***Assault***

Assault consists of the unlawful and intentional impairment of another person's bodily integrity either directly or indirectly, or: the unlawful and intentional inspiration of a belief in another person that such an impairment of their bodily integrity will take place immediately.

The slightest contact is sufficient for purposes of the definition - **R v Herbert (1900) 10 CTR 424)**

- ***Assault with the intent to do Grievous Bodily Harm***

Assault with the intent to do grievous bodily harm consists of the unlawful and intentional application of force on another human being with the intention of causing grievous bodily harm.

Whether the accused actually causes grievous bodily harm to the victim is irrelevant in determining liability for the offence. This is so because assault with intent to do grievous bodily harm can be committed without complainant having sustained any injury - **S v Dube 1991 (2) SACR 419 (ZS) at 422 d-g**.

- ***Crimen Iniuria***

Crimen Iniuria consists of the unlawful and intentional serious violation of another person's dignity or privacy.

The interests of the victim of this crime that are protected are found under the broad Latin term *dignitas* – this term covers all objects protected by the rights of personality, other than reputation and bodily integrity. This may include both a person's dignity – **S v Jana 1981 (1) SA 671 (T)** - wherein the court found that *dignitas* included "*that valued and serene condition in his social and individual life which is violated when he is, either publicly or privately,*

subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt".– **R v Holliday 1927 CPD 395** – here the court found that watching another person undressing without that person's awareness will be an infringement of their right to privacy.

When dealing with crimes committed against the dignity of another person we would use the subjective test to determine whether there has been an infringement of that person's dignity. The subjective test is the following: In instances of infringement of dignity the victim must:

(a) Be aware of the accused's offending behaviour

(b) Feel degraded or humiliated by it

The objective test is used when dealing with violations of privacy, the objective standard being the accused persons conduct must be of such a nature that it would offend at least the feelings of a reasonable person. If the victim happens to be so timid or oversensitive that he takes offence at conduct that would not affront a reasonable person, the law should not presume that a crime has been committed.

- ***Criminal Defamation***

Criminal Defamation consists of the unlawful and intentional publication of a matter concerning another which tends to injure their reputation **- Hoho v The State (493/05) [2008] ZASCA 9 at para 23**

In a unanimous judgement the court in **Hoho** *supra* held that the crime had not ceased to exist due to disuse, that there are also no good reasons why it should not exist anymore and that furthermore the existence of the law is compatible with the constitution. The court further held that the violation of other people's reputations is criminal. The court also held that the *de minimus rule* may be applied in less serious cases.

This crime may only be committed if publication occurs, without publication the accused may only be tried for *crimen Iniuria*.

- ***Kidnapping***

The offence of kidnapping consists of the unlawful and intentional deprivation of a person's freedom of movement, an/or if the victim is under the age of 18, the legal custodians of the said child, of their control of the child.

A parent cannot commit the crime in respect of their own child – **S v Hoffman 1983 (4) SA 564 (T)**. However, if there is a parenting plan that has been made an order of the court and the said parent acts contrary to that order he may be charged with contempt of court.

The duration which the victim is held in respect of the kidnapping is not relevant to the commission of the offence. As such deprivation of freedom of movement for a few hours has been held to be sufficient for purposes of the offence - **S v F 1983 (1) SA 747 (O)** wherein the court held that the kidnapping of only 40 minutes was sufficient for the offence to have been regarded as completed.

- ***Theft***

Theft is defined as the unlawful and intentional appropriation of another person's corporeal or incorporeal property with the intention to permanently deprive that person of their property permanently.

An act of appropriation in respect of theft is where the accused person:

(i) Deprives the lawful owner or possessor of his property; and

(ii) Acts or exercises the rights of the property as though he is the owner of the said property – In **Nkosi v S 2012 (1) SACR 87 (GNP)** states at para 20 - the principle that a mere assumption of control over the property is not yet sufficient to constitute theft, but it should further be required that the owner effectively be excluded from his property.

Incorporeal property is property that is capable of being stolen as per Section 12(1) of the **Cyber Crimes Act 19 of 2020** - The common law offence of theft must be interpreted so as not to exclude the theft of incorporeal property.

The Supreme Court of Appeal held in **Boesak v S 2000 (1) SACR 633 SCA at para 97 –** The intention to steal is present where a person;

(1) intentionally effects an appropriation
(2) intending to deprive the owner of his property permanently
(3) knowing that the property is capable of being stolen
(4) knowing that he is acting unlawfully when taking the property

- ***S36 of the General Law Amendment Act 62/1955***

S36 of the act as mentioned above was enacted in order to alleviate some issues that the State encountered when trying to prove theft or receiving property knowing it to have been stolen.

S36 consists of a failure by any person to give a satisfactory account for any goods other than stock or produce, in regard of which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account for such possession, shall be guilty of an offence.

The offence can only be committed if a person is found in possession of such goods at the time or moment that the goods are found by the police. Furthermore, the police must have a reasonable suspicion that the goods have been stolen. The test used is that of a reasonable man.

The accused person must furthermore fail to give a satisfactory account for his possession of the property. This will only be determined if the State can prove the first two parts of the offence. A satisfactory account would include (a) is the explanation reasonably possible (b) the belief that the possession of the goods was *bona fide.* Generally, this means that the accused must state where he received the goods from or as to how they came to be in his possession.

- ***Robbery***

The crime of robbery consists of the unlawful and intentional taking of another person's property whilst using violence or the threats of violence in order to take the said property.

As such the crime of Robbery is intermingled with that of Assault and Theft, as it is a combination of the two crimes to form Robbery. Resultantly robbery is often referred to as "Theft by Violence" – **Benjamin v S 1980 (1) SA 950 (A)**.

The property that is taken must be obtained by the accused as a result of the violence or the threat of violence. As such if the accused takes property that is in the possession of a victim and thereafter assaults the victim, he would have committed two separate offences.

The converse would hold true if the accused assaults the victim and thereafter by chance notices that some the property belonging to the victim has fallen down, he then decides to steal the property of the victim. He would be guilty of assault and theft.

- ***Fraud***

Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or potential prejudice to another person.

In this situation an accused makes a representation about a fact or facts which in reality do not exist, as such he makes a misrepresentation. The misrepresentation may take the form of spoken or written words, other conduct may also be sufficient, such as a nod of the head – **Mdantile v S 2011 (2) SACR 142 ZAFSHC at para 29** - The first requirement for fraud is that there must be a misrepresentation or, as it has been expressed, 'a perversion of the truth'. The accused must represent to the complainant that a fact or set of facts exists which in truth does not exist.

Usually, the misrepresentation takes place by means of spoken or written words, but it can also take place by conduct.

Prejudice may consist of wither actual or potential prejudice. The prejudice suffered need not be accompanied by monetary or patrimonial loss. Potential prejudice means that there is a reasonable prospect of prejudice being suffered it must not be a remote or fanciful prospect - **Mnggibisa v S (2007) SCA 119 (RSA) at para 12** – "*I am therefore satisfied that potential prejudice was shown on the facts before us which was neither too remote nor fanciful. It is of no assistance to the appellant that he subsequently told the truth. Potential prejudice is occasioned at the time of making the false representation and this must be determined on the facts of each case."*

- ***Forgery and Uttering of a forged document***

Forgery consists in the unlawful and intentional making of a false document to the actual or potential prejudice of another.

In this way forgery may be seen as species of fraud, herein the only way to commit forgery is by the falsification of a document. Apart from this all of the requirements for the crime of fraud must be present.

A document is not forged merely due to the fact that it contains false statements, in other words a lie reduced to writing does not become a forgery. The falsification must relate to the document itself, by either an alteration, substitution, addition, or erasure.

Uttering consists of unlawfully and intentionally passing off a false document to the actual or potential prejudice of another person.

Uttering is also another species of fraud. In most cases the person who forged the document is also the person who utters the forged document. In such a situation they will be charged with both forgery and uttering. In the case of a person not being the person who forged the document they will solely be charged with uttering.

- ***Malicious Injury to Property***

Malicious injury to property consists of the unlawful and intentional damaging of another person's property.

The crime may be committed in respect of one's own property provided that the victim has a substantive right in that property or is in lawful possession of the said property with a right of retention.

Damage as per the definition is understood to mean either total or partial destruction of the property, however the damage may not be trivial – wherein a person cuts the grass of a neighbour without consent, that would be deemed to be a triviality.

With regards to intention, there is no need for the State to prove malice, rather the ordinary principles of criminal law dealing with intention apply to the accused – **Biyela v S (2021) ZAKZPHC 20 at para 45** - The form of *mens rea* required for this crime is intention and the ordinary principles of criminal law relating to intention apply.

- ***Arson***

Arson may be defined as the unlawful and intentional setting of fire to immovable property belonging to another or to his own immovable property with the intention to injure another person or to defraud another person

The second part of the definition above is directly taken from **Mavros v S 1921 AD at para 22** - *'In my opinion, therefore, we should sanction that procedure by holding that the crime of brandstichting (Roman-Dutch law) is committed by a man who sets fire to his own house wrongfully, maliciously and with intent to injure or defraud another person.'* This was confirmed by the full bench of the Supreme Court of Appeal in **Dalindyebo v S (2015) ZASCA 144**.

The property that is damaged or destroyed must be immovable property, setting fire to movable property would amount to Malicious Injury to Property.

- ***Housebreaking with intent to commit a crime***

Housebreaking with the intent to commit a crime consists of the unlawful and intentional breaking into and entering a building or structure with the intention to commit a crime inside the said building or structure.

Housebreaking alone is not a crime, although the act may constitute other crimes (malicious injury to property or Contravention of the Trespass Act). The housebreaking must be accompanied by the intention of the accused of committing another crime as well.

In principle charges of Housebreaking with the intent to commit any crime is competent in law – as per **S v M 1989 (4) SA 718 (T)**, however care must be taken by the prosecutor when formulating charges such as these when dealing with offences in which a minimum sentence may be imposed – In **S v Maswetsa (2013) ZAGPJHC 122** the court cautioned the State ***at para 8 -*** It would consequently be desirable that, because of the provisions of the Criminal Law Amendment Act, charges be framed in such a manner in order to separate the allegations of housebreaking with intent to commit an offence from substantive charges such as robbery and all other charges where a minimum sentence is prescribed upon conviction.

It is also sufficient for the state to charge the accused person for Housebreaking with the intent to commit a crime unknown to the prosecutor – S262 and S263 of the Criminal Procedure Act 51/1977 which is confirmed in **Bam v S (2020) ZAWCHC 68 at para 25 -** Thus, the crime is charged as one of housebreaking with intent to commit a specific offence, or in the event that the offence is unknown to the prosecutor, the accused may be charged in such terms.

The act is then separated into two aspects, namely (1) Breaking and (2) Entering. For breaking to occur no actual damage to the structure needs to occur, breaking will consist of any removal or displacement of any obstacle which may prevent access or entry to the structure itself, and it must also form part of the structure itself. However, walking through an open door will not

constitute breaking. Entering or entry is complete the moment that the accused has inserted any part of his body or any instrument into the property or structure.

- ***Trespassing***

Section 1(1) of the Trespass Act 6 of 1959 provides that any person who without the permission –

(a) of the lawful occupier of any land or any building or part of a building; or

(b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,

enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.

The conduct of an accused person that is being punished is the unlawful and intentional entering of another person's property (land or building) or being upon the property (land or building) without the consent of the owner or lawful possessor.

Entry in this definition means the physical boundaries of the land or property of the victim. The accused must be physically present on the property to constitute entry. The accused does not commit the offence if he has lawful reason to enter or be on the land or building or part of the building.

B. STATUTORY OFFENCES

- ***Unlawful possession of firearms (Firearms Control Act, 2000)***

Offences in relations to the Firearms Control Act are contained in section 120 and the penalties are contained in section 121. It must also be noted that minimum sentences also apply to certain offences as per the Firearms Control Act and is discussed below.

Section 3;

"*Any person who has in his possession any firearm, unless licensed to possess such firearm, commits an offence. The onus of proving that the accused was licensed, permitted by permit or authorized to possess the firearm rests on the accused and it is thus not necessary for the prosecution to allege and prove such lack of licence*" - Section 250(1) of the Criminal Procedure Act 51 of 1977.

The elements of this offence are: that the accused (i) unlawfully (ii) possessed (iii) a firearm (iv) mens rea (Intent).

The Act defines the word 'firearm' to mean any

"(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);

(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;

(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of (a) or (b);

(d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6mm or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or

(e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c), or (d), but does not include devices that are not regarded as firearms in terms of section 5 of Act 60 on 2000."

In applying this Act, it must be distinguished between Common Purpose and Joint Possession of a Fire-Arm. Please see **S v Makhubela 2017 (2) SACR 665 (CC)** where it was confirmed that the principles of common purpose do not apply where firearms were used in the course of robbery or housebreaking, but rather joint possession.

Also see **S v Nkosi 1998 (1) SACR 284 (W)**. On 286 g the court discussed the principle involved as follows:

"*The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answers to the question whether the State has established facts from which it can properly be inferred by a court that:*

(a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and

(b) the actual detentor had the intention to hold the guns on behalf of the group."

Section 4 of the Act reads as follows:

"*4. (1) The following firearms and devices are prohibited firearms and may not be possessed or licensed in terms of this Act, except as provided for in sections 17, 18(5), 19 and 20(1)(b):*

(a) Any fully automatic firearm;

(b) any gun, cannon, recoilless gun, mortar, light mortar or launcher manufactured to fire a rocket, grenade, self-propelled grenade, bomb or explosive device;

(c) any frame, body or barrel of such a fully automatic firearm, gun, cannon, recoilless gun, mortar, light mortar or launcher;

(d) any projectile or rocket manufactured to be discharged from a canon, recoilless gun or mortar, or rocket launcher;

(e) Any imitation of any device contemplated in paragraph (a), (b), (c) or (d);

(f) any firearm-

(i) the mechanism of which has been altered so as to enable the discharging of more than on shot with a single depression of the trigger;

(ii) the calibre of which has been altered without the written permission of the Registrar;

(iii) the barrel length of which has been altered without the written permission of the Registrar;

(iv) the serial number or any other identifying mark of which has been changed or removed without the written permission of the Registrar."

It is important to note that even a home-made firearm will classify as a firearm provided that one of the requirements of section 3 is met. For purposes of this study 3 different firearms are mentioned;

1. A semi-automatic firearm, also called a self-loading or auto loading firearm is a repeating firearm whose action mechanism automatically loads a following round into the chamber and prepares it for subsequent firing, but requires the shooter to manually actuate the trigger in order to discharge the shot. These firearms include pistols.
2. An automatic firearm is also a self-loading firearm, but continuously chambers and fires rounds when the trigger mechanism is actuated. These firearms include what is commonly referred to as machine guns.

The difference between the two is simply that a semi-automatic firearm fires one shot every time the trigger is pulled whereas the automatic weapon fires continually until the trigger is released.

3. The third category is then those firearms that are not semi-automatic or fully automatic such as revolvers.

In layman's terms Section 3 prohibits the possession of a firearm that has a serial number, without a licence. Section 4 (prohibited firearms) prohibits the possession of a firearm without a serial number. Section 4 further provides that an automatic firearm is a prohibited firearm, irrespective of whether it has a serial number or not.

It is obvious that firearms without serial numbers cannot be licenced and Section 4 thus deals with firearms for which a licence to possess cannot be issued and includes automatic firearms. (automatic firearms are usually used by SAPS or the defence force and a private individual cannot obtain a licence for it)

The contravention of section 4 – possession of a prohibited firearm – is thus always applicable for the unlawful possession of an automatic firearm.

If the person was unlawfully in possession of either a ‘’normal’’ firearm (neither automatic or semi-automatic) such as a revolver or a semi-automatic firearm that has a serial number, section 3 of the Act is applicable. In other words, the person was found in possession of a firearm that **may be licenced**, but the possessor did not have a licence to possess such firearm.

If the person was unlawfully in possession of either a ‘’normal’’ firearm (neither automatic or semi-automatic) such as a revolver or a semi-automatic firearm that has no serial number, section 4 of the Act is applicable. In other words, the person was found in possession of a firearm **that may not be licenced**.

It is important to note that the Act does not provide for a separate offence relating to semi-automatic firearms and just as in the case of a ‘normal firearm” the only decision the prosecutor is faced with is whether section 3 or section 4 is applicable. It is however of the utmost importance to note in the charge sheet that a semi-automatic firearm is involved because minimum sentences are applicable to semi- automatic firearms.

When a person is in possession of a firearm without a serial number, that person is in possession of a prohibited firearm and at the same time also in possession of the firearm without a licence. As such, the application of section 3 and section 4 overlap in these circumstances. Although the court in **Sehoole (730/13) [2014] ZASCA 155 (29 September 2014)**, ruled that the state, as *dominus litis*, is entitled to charge the accused with any one of the two sections, it is imperative to charge under section 4 where applicable because the Firearms Control Act, 2000, provides the court with sentencing jurisdiction of up to 25 years in the case of prohibited firearms.

The best way of proving that the particular arm has the qualities defined in the definitions would be to involve the experts of the Forensic Laboratories of the South African Police Services. Their evidence contained in affidavits in terms of section 212(4)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) must be submitted to a court and such evidence will be **prima facie** proof of the issue. Please see the discussion of section 212 of the Criminal Procedure Act 51 of 1977.

- ***Unlawful possession of ammunition (Firearms Control Act, 2000)***

Section 90;

"*Any person who unlawfully possesses any ammunition commits an offence. 1 The elements of this offence are: that the accused (i) unlawfully (ii) possessed (iii) ammunition (iv) mens rea (Intent).*

Possession of ammunition is considered unlawful only were the accused did not lawfully possess either a firearm capable of discharging that ammunition; 2 or possessed a permit or licence for such ammunition or was otherwise authorised to be in the possession of such ammunition. A lawful reason to possess ammunition exists only where the accused is duly licensed or falls within one of the exceptions created in the Act, namely (a) holding a licence in respect of a firearm capable of discharging that ammunition; (b) holding a permit to possess ammunition; (c) holding a dealer's licence, manufacturer's licence, gunsmith's licence, import, export or in-transit permit or transporter's permit issued in terms of this Act; or (d) otherwise being authorised to do so. The Act defines ammunition as a primer or complete cartridge. A 'cartridge' is in turn defined as a complete object consisting of a cartridge case, primer, propellant and bullet. Lead pellets discharged from an air-rifle are thus not ammunition for purposes of the Act."

Offences and Penalties;

As mentioned above the offences for this Act are created in section 120 and the penalties in section 121 which reads as follows;

"*Any person convicted of a contravention of or a failure to comply with any section mentioned in Column 1 of Schedule 4, may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in Column 2 of that Schedule opposite the number of that section*"

Section 3, 4 and 90 as discussed above all falls within Schedule 4 column 1.

The maximum sentences as per column 2 of Schedule 4 for the three offences as discussed are as follows;

Section 3 – Maximum period of imprisonment 15 years

Section 4 – Maximum period of imprisonment 25 years

Section 90 – Maximum period of imprisonment 15 years.

Minimum Sentences applies in relation to the possession of automatic or semi-automatic firearms as they form part of the offences as listed in Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

Section 51(2) of the Criminal Law Amendment Act 105 of 1997 read with Part II of Schedule 2 of the same act reads as follows;

"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 25 years.

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years……"

In **Tshabalala 2006 (1) SACR 120 (WLD)**, the court remarks as follows with reference to contraventions of section 4: " *The Legislature could not have intended providing for a fine to be imposed as an alternative to any of these very heavy sentences*." but adds "*It follows that the words ' a fine or….imprisonment' in s 121 do not mean that a fine must always be imposed, or that imprisonment alone may not be imposed*."

In the matter of **Motloung 2016 (2) SACR 243 (SCA)**, the Supreme Court of Appeal ruled that the Firearms Control Act 60 of 2000 has not impliedly repealed s 51(2) of the Criminal Law Amendment Act 105 of 1997. The National Director of Public Prosecutions can elect whether to prosecute under the Firearms Control Act or the Criminal Law Amendment Act 105 of 1997, or both when it comes to sentencing purposes.

- *Drugs and Drug Trafficking Act, 1992*

Manufacture and supply of scheduled substances

"**Section 3** provides as follows: "*Manufacture and supply of scheduled substances. No person shall manufacture any scheduled substance or supply it to any other person, knowing or suspecting that any such scheduled substance is to be used in or for the unlawful manufacture of any drug.*"

The punishable act in this case consists of the "*manufacture*" or "*supply*". Without limiting the general meaning of "*manufacture*", section 1 defines it as: *"..., in relation to a substance, includes the preparing, extraction or producing of the substance.*"

"*Scheduled substance*" as defined in section 1 means: "*any substance included in Part I or II of Schedule 1.*" Schedule 1, as mentioned, lists substances useful for the manufacture of drugs and includes the salts of the substances. Evidence as to the chemical composition of the substance will in all likelihood have to be presented in order to prove that the alleged substance is a schedule I substance.

A qualifying element is added in the prohibition, that is, it must also be proved that the accused person knew or suspected that the scheduled substance was to be used for the unlawful manufacture. "*Drug*" is defined in section 1 as meaning "*any dependence producing substance, any dangerous dependence producing substance or any undesirable dependence producing substance.*" The possible reason for this qualification is that some of the scheduled substances, acetone for example, is freely available, for instance, from a paint supplier. Proof of this particular element, because of the subjective nature thereof, could be difficult and would probably, in the majority of instances, be provided by way of circumstantial evidence. Please see **S v Nkosi (CA156/06) [2008] ZAGPHC 85 (5 March 2008)** where the appellant in the matter appealed her conviction based on the fact that the trial court found her guilty on circumstantial evidence only. The appellant worked as a security officer at a premise where the police found a functioning Mandrax Laboratory. There was no direct evidence against the appellant that she was linked to the Laboratory. The State therefore presented circumstantial evidence which the trial court found sufficient beyond a reasonable doubt to convict the appellant. On appeal the Court found that for each piece of circumstantial evidence that the State presented the appellant had a reasonable explanation and even though the trial court found the appellant not to be credible that, that should not be the only consideration for a conviction. The circumstantial evidence should be of such a nature that the only conclusion that the Court can draw is that the appellant is guilty of the offence. The appellant's appeal was upheld and the conviction against her was set aside.

Note must be taken of **Minister of Justice and Constitutional Development and others v Prince and others 2019 (1) SACR 14 (CC)**.

Use and possession of drugs (Drugs and Drug Trafficking Act, 1992)

Section 4 provides as follows: "*Use and possession of drugs. No person shall use or have in his possession*

(a) any dependence producing substance; or

(b) any dangerous dependence producing substance or any undesirable dependence producing substance,

unless

(i) he is a patient who has acquired or bought any such substance

(aa) from a medical practitioner, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder; or

(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, dentist or practitioner, and uses that substance for medicinal purposes under the care or treatment of the said medical practitioner, dentist or practitioner,

(ii) he has acquired or bought any such substance for medicinal purposes

(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or

(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,

with the intent to administer that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;

(iii) he is the Director General: Welfare who has acquired or bought any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(iv) he, she or it is a patient, medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer, of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to administer, supply, sell, transmit or export any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation;

(v) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to supply, sell, transmit or export any such substance in the course of his employment

and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation; or

(vi) he has otherwise come into possession of any substance in a lawful manner."

Note must be taken of: **Minister of Justice and Constitutional Development and others v Prince and others 2019 (1) SACR 14 (CC)**

- ***Dealing in drugs (Drugs and Drug Trafficking Act, 1992)***

"**Section 5** provides as follows:

"*Dealing in drugs. - No person shall deal in*

(a) any dependence-producing substance; or

(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless-

(i) he has acquired or bought any such substance for medicinal purposes -

(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or

(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,

and administers that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;

(ii) he is the Director-General: Welfare who acquires, buys or sells any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(iii) he, she or it is a medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which prescribes, administers, acquires, buys, tranships, imports, cultivates, collects,

manufactures, supplies, sells, transmits or exports any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation; or

(iv) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who acquires, buys, transhipps, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation."

Note must be taken of the following: The Constitutional Court in **Minister of Justice and Constitutional Development and others v Prince and others 2019 (1) SACR 14 (CC)** declared, section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 1965 as well as sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act, 1992, inconsistent with the Constitution and invalid to the extent that they respectively prohibit the use, possession or cultivation of cannabis by an adult in private - where use, possession or cultivation of cannabis is for personal consumption by that adult in private. If an adult person is found to use and or to possess and or to cultivate cannabis in a public space, there can still be offences of which such a person can be charged with.

The Constitutional Court in **Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others [2022] ZACC 35 (full bench judgement dated 29 September 2022)** dealt with the position regarding children found in possession of cannabis since the matter of **Minister of Justice and Constitutional Development and others v Prince and others 2019 (1) SACR 14 (CC)** only dealt with the position regarding adults and not that of children. The matter was referred to the Constitutional Court for confirmation after the High Court in Johannesburg made an order resulting in the decriminalisation of possession of cannabis by a child to the effect that it is still illegal for a child to use and/or possess cannabis (whether in public or private); however, that child cannot be arrested and/or prosecuted and/or sent to a diversion programme for contravening the impugned provision. The High Court concluded that there are other methods to deal with a child caught in those circumstances. This finding and order by the High Court was confirmed in the Constitutional Court. The Constitutional Court emphasised that this case did not concern the legalisation and condonation of the use and/or possession of cannabis by a child. Rather, this matter concerned the repercussions of the use and/or possession of cannabis by a child. The case rather dealt with the issue of if the criminal justice system is the appropriate mechanism to

respond to the use and/or possession of cannabis by a child or if other social systems, designed to protect and promote the rights of the child were more suitable? It is important to distinguish between legalisation and decriminalisation. In the **Prince** matter the possession of cannabis by an adult for private use was legalised. The question now was not to legalise the possession of cannabis by a child for personal use but rather to decriminalise the possession of cannabis by a child for personal use and to see if there are not alternative manners in which such cases should be dealt with other than the criminal justice system. The purpose of decriminalising section 4(b) is not to permit the use of cannabis but rather has the consequence that the use and or possession of cannabis do not result in a conviction and criminal punishment.

The order by the Constitutional Court pertaining to children found in possession of cannabis was as follows;

"*a) The order of the High Court, declaring section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 to be inconsistent with the Constitution and invalid to the extent that it criminalises the use and/or possession of cannabis by a child, is confirmed.*

b) The operation of the order in paragraph 1 is suspended for a period of 24 months to enable Parliament to finalise the legislative reform process.

c) During the period of suspension referred to in paragraph 2, no child may be arrested and/or prosecuted and/or diverted for contravening section 4(b) of the Drugs and Drug Trafficking Act insofar as it criminalises the use and/or possession of cannabis by a child.

d) A child apprehended for the use and/or possession of cannabis may be referred to civil processes, including those found in the Children's Act 38 of 2005 and the Prevention of and Treatment for Substance Abuse Act 70 of 2008.

e) Where a court has convicted a child of a contravention of section 4(b) of the Drugs and Drug Trafficking Act for the use and/or possession of cannabis, the criminal record containing the conviction and sentence in question, of that child in respect of that offence may, on application, be expunged by the Director-General: Justice and Constitutional Development or the Director-General: Social Development or the Minister of Justice and Correctional Services, as the case may be, in accordance with section 87 of the Child Justice Act 75 of 2008.

f) If administrative or practical problems arise in the implementation of paragraph (e) of this order, any interested person may approach the High Court for appropriate relief."

It is important to note that the Court cannot just take judicial notice that a "drug" is as the accused, the police or the State alleges it to be but that it is of uttermost importance that analytical examination should be done on the substance to ensure that the substance or any element or quantity of such a substance falls within the schedules as mentioned by the Act.

Please see the matter of **Viljoen 1991 (2) SACR 215 (C)**, wherein it was held that it was a requirement that the court should see the certificate. The certificate being the forensic analysis being done by the forensic laboratory on what the substance found in the possession of the accused person was and under which schedule as discussed above if fell. This certificate is done in terms of section 212(4) and can be handed in as *prima facie* evidence to prove that the substance or substances found in the accused's possession for purposes of manufacturing, possession or dealing falls within the ambit of the schedules of the Act. Please see the detailed discussion of section 212 in this guide. In the matter of **S v Paulse (208/22;29/22;15/932/2021) [2022] ZAWCHC 145; 2022 (2) SACR 451 (WCC) (29 July 2022)** the accused was arrested for possession of drugs and prosecuted for two counts in terms of section 4(b) of the Drug Trafficking Act. The accused was unrepresented and pleaded guilty. The accused admitted that she was found in possession of Tik which is methamphetamine and mandrax. The Court questioned the accused during the plea stage and found the accused guilty of 2 counts of possession of undesirable dependence producing substances. The accused was sentenced to R3000 or 90 days imprisonment which was suspended for a period of five years. This matter went for an automatic review process. The judge found that the Court erred by accepting that the accused knew what undesirable dependence producing substances as per the description was and stated in the judgement "…*that where an accused pleads guilty to a charge where one of the elements of the crime can only be proven by scientific means, the court must request the prosecutor to hand up the analysis certificate[6] in terms of the provisions of section 212 of the CPA to satisfy itself that during the s 112 (1)(b) admission was correctly made. In this case, the accused admitted to being in possession of an undesirable dependence producing substance, in contravention of section 4 (b) of the DDTA, and the court convicted the accused without satisfying itself by means of the scientific evidence in the form of the section 212 certificate that such an admission was correctly made."* The conviction of the accused as well as the sentence imposed were set aside.

Offences and Penalties:

Offences are created in section 13 and the penalties for the contravention of such penalties are listed in section 17. Section 17 must be read with section 64(a) of the same act. Section 64(a) provides that a magistrate's Court will have jurisdiction to impose any penalty in section 17 even though such penalty may exceed the punitive jurisdiction of the magistrate's Court. What this mean is that a District Court's punitive jurisdiction is increased to be able to deal with these case and to sentence accordingly. This does not apply to the minimum sentences as discussed below since the Criminal Law Amendment Act 105 of 1997 clearly directs in section 51(2) that "*Notwithstanding any other law but subject to subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence in part II of Schedule 2……*"

Section 13

Section 13(b) provides that any person contravening section 3 is guilty of an offence.

Sections 13(c) and (d) provide that any person contravening section 4 is guilty of an offence.

Sections (e) and (f) provide that any person contravening section 5 is guilty of an offence.

Section 17

Section 17(b) the penalty offence for a person found guilty in terms of sections 13(c) can be sentenced to a fine as the court deem fit or to impose imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.

Section 17(d) the penalty for a person found guilty in terms of sections 13(b) or (d) can be sentenced to a fine as the court deems fit or to impose imprisonment for a period not exceeding 15 years or to both such a fine or imprisonment.

Section 17(e) the penalty for a person found guilty in terms of section 13(f) to imprisonment for a period not exceeding 25 years of a fine as the court deems fit or to both such a fine or imprisonment.

Please note that the penalties determined in section 17 of the Drugs and Drug Trafficking Act are the maximum penalties that the court can sentence an accused to, while the Minimum sentences Act prescribes the minimum sentences that a court can sentence a person to.

Minimum Sentences in terms of the Criminal Law Amendment Act 105 of 1997 read with section 51(2) Part II of Schedule 2 are applicable where a person was found guilty in terms of section 13(f) of the Drugs and Drug Trafficking Act No 14 of 1992 if it was proved that;

(a) the value of the dependence producing substance in question is more than R50 000,00

(b) the value of the dependence producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy;

(c) the offence was committed by any law enforcement officer.

That person can be sentenced as follows;

(i) a first offender to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence to imprisonment for a period not less than 25 years.

The words of Rose-Innes J in **Mackriel 1985 (2) SA 622 (C)** must be taken into account when it came to sentencing where he stated: "*There is limited value in seeking precedent for sentence, save to ascertain the broad parameters of the sentencing practice of the courts, because no two cases are the same, and sentencing is par excellence a question of discretion in an attempt at a just and moderate approach to the necessary punishment of crime in each particular case*."

- ***Corruption (Prevention and Combating of Corrupt Activities Act, 2004)***

The general crime of corruption: definition in the Act

General offence of corruption **(section 3)** (Part 1)

"*Any person who, directly or indirectly-*

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the,

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption."

Corruption by giver and corruption by recipient.

Corruption can be committed in many ways. If one attempts to make statements about corruption which are applicable to all instances of the crime, one becomes entangled in long and diffuse formulations which are not easy to understand immediately. In order to overcome this problem, discussions of the crime usually distinguish between the two most important

ways in which the crime can be committed. These two main categories are corruption committed by the giver and corruption committed by the recipient. Corruption is committed if one party gives a gratification (benefit) to another party and the latter accepts it as inducement to act in a certain way. Both parties – the giver as well as the recipient – commit corruption. The expression “corruption by a giver” refers to the conduct of the giver, and “corruption committed by the recipient” refers to the conduct of the party who accepts the gratification. In the discussion of the crime that follows, the party who gives the gratification is referred to as X, and the party who accepts the gratification, as Y. In discussions of the previous corresponding crimes, one sometimes comes across the expression “active corruption” and “passive corruption”. “Active corruption” refers to the conduct whereby X gives a gratification to Y, and “passive corruption” to the conduct of the recipient (Y) of the gratification from X.

The word “gives” includes an agreement by X to give the gratification to Y, or the offering by X to give it to Y. The word “accepts” in turn includes an agreement by Y to accept the gratification or the offering by Y to accept it.

In the Act the legislature distinguishes between these two forms of corruption not only in the definition of the general crime, but also in the definitions of the specific crimes. In section 3, quoted above, in which the general crime is defined, corruption by the recipient is set out in the subdivision of the section marked (a), while corruption committed by the giver is set out in the subdivision marked (b). The legislature employs the somewhat illogical sequence of first setting out the crime committed by the recipient and thereafter the crime committed by the giver. In the discussion which follows, the same sequence will be adopted.

Corruption by the giver is, in principle, merely a mirror image of corruption by the recipient. The same requirements apply to both these forms of corruption, provided certain terms used in describing the one are replaced by other terms when setting out the other. In order to avoid duplication, corruption by the giver will, in the discussion which follows, not be discussed in such detail as corruption by the recipient. The emphasis will be on corruption by the recipient. It is in the discussion of this form of corruption that the different requirements or elements of the crime will be identified and explained.

General crime: corruption committed by the recipient

Elements of crime: The elements of the general crime of corruption committed by the recipient are the following: the acceptance by Y (the act); of a gratification; in order to act in a certain way (the inducement); unlawfulness; intention.

For example X (the giver) offers Y (the recipient) R10 000, 00 to intentionally overlook the fact that X does not have all the relevant qualifications as required to be appointed in a certain position.

General crime of corruption: corruption by the giver

Elements of crime: The elements of the general crime of corruption committed by the giver are the following: the giving by Y to X (the act); of a gratification; in order to influence Y to act in a certain way (the inducement); unlawfulness; intention."

Section 4 to 9 of the Act deal with offences in respect of corrupt activities relating to specific persons (Part 2).

Section 4 deals with offences in respect of corrupt activities relating to public officials;

Definition: Public Officer:

"means any person who is a member, an officer, an employee or a servant of a public body, and includes –

Any person in the public service contemplated in section 8(1) of the Public Service Act 1994 (Proclamation Act 103 of 1994):

(a) Any person receiving remuneration from public funds: or

(b) Where the public body is a corporation, the person who is who is incorporated as such, but does not include

- Member of the legislative authority
- Judicial officer or
- Member of the prosecuting authority."

Section 5 deals with offences in respect of corrupt activities relating to foreign public officials;

Definition: Foreign Public official

(a) Any person holding a legislative, administrative or judicial office of a foreign state;

(b) Any person performing public functions for a foreign state, including any person employed by a board, commission, corporation or other body or authority that performs a function on behalf of foreign state; or

(c) An official or agent of a public international organisation.

Section 6 deals with offences in respect of corrupt activities relating to agents

Definition: Agent

Means any authorized representative who acts on behalf of his or her principal and includes a director, officer, employee or other person authorised to act on behalf of his or her principal.

Section 7 deals with offences in respect of corrupt activities relating to members of legislative authority.

Definition: Legislative authority

Means the legislative authority referred to in section 43 of the Constitution.

Section 8 *deals with offences in respect of corrupt activities relating to judicial officers.*

Definition: Judicial officer

(a) Any constitutional court judge or any other judge as defined in section 1 of the Judges Remuneration and conditions employment act

(b) A judge of the Labour court

(c) The President of judge of the Land Claims Court.

(d) Any judge of the Competition Appeal Court.

(e) A judge or additional member appointed to the Special Investigative Units and or to a special tribunal.

(f) The presiding officer and or member of a marine enquiry and or the maritime court and or the court of survey of the merchant shipping act.

(g) Any presiding officer appointed to a divorce court.

(h) Any regional magistrate or magistrate appointed under the Magistrate's Act

(i) Any commissioner appointed to the small claims court.

(j) Any arbitrator, mediator or umpire who presides at an arbitration or mediation proceedings.

(k) Any adjudicator appointed under the short process courts and mediation in certain civil cases act.

(l) Any assessor who assists a judicial officer

(m) Any other presiding officer appointed to any other court or tribunal established under any statute.

(n) Any other person who presides at any trial, hearing, commission, committee or any other proceedings and who has the authority to decide causes or issues between parties and render decisions in a judicial capacity.

(o) *Any other person contemplated paragraphs (a) to (n) who has been appointed in an acting or temporary position.*

Section 9 deals with offences in respect of corrupt activities relating to members of the prosecuting authority.

It must be noted that the charges of Corruption under this Act often appear with other offences such as the common Law offence of Fraud as well as offences under the Prevention of Organised Crime Act 121 of 1998 of which some of the target areas are;

1) *to introduce measures to combat organised crime, money laundering and criminal gang activities;*
2) *to prohibit certain activities relating to racketeering activities;*
3) *to provide for the prohibition of money laundering and for an obligation to report certain information;*
4) *to criminalise certain activities associated with gangs;*
5) *to provide for the recovery of the proceeds of unlawful activity;*
6) *for the civil forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of unlawful activity.*

The abovementioned can be demonstrated in the matter of **National Director of Public Prosecutions V Botha N.O and another [2020] ZACC 6, 2020 (1) SACR 599 (CC); 2020 (6) BCLR 693 (CC) (20 March 2020)** where the accused was charged with corruption in that tender fraud was committed. The deceased passed away before the matter could be finalised but the Director of Public Prosecutions still seeked a judgement in order to apply for the recovery of the proceeds of unlawful activity.

Penalties:

Part 1 and Part 2 of the Act was discussed above. The penalties applicable to part 1 and 2 are formulated in section 26 and section 26 will only be discussed in as so far as it has reference to part 1 and part 2 of the act.

Section 26(1) Any person who is convicted of an offence referred to -

(a) Part 1, 2……is liable-

(i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life;

(ii) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years; or

(iii) in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding five years.

(b) ……

(c) ……

(2) ……..

(3) In addition to any fine a court may impose in terms of subsection (1) or (2) the court may impose a fine equal to five times the value of the gratification involved in the offence."

MINIMUM SENTENCE

Section 51(2) read with part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 is also applicable in relation to certain offences under the Prevention and Combating of Corrupt Activities Act 2004.

If an accused is found guilty of any offence relating to chapter 2 (Part 1 and 2) of the abovementioned act where the following is applicable;

(a) Involving amounts of more than R500 000,00

(b) Involving amounts of more than R100 000,00, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

(c) It if is proved that the offence was committed by any law enforcement officer –

(i) Involving amounts of more than R10 000, 00 or

(ii) As a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose of conspiracy.

he/she/they can be sentenced to the following;

(a) A first offender, to imprisonment for a period not less than 15 years;

(b) A second offender of any such offence, to imprisonment for a period not less than 20 years and

(c) A third or subsequent offender of any such offence to imprisonment for a period not less than 25 years.

Furthermore, the charge of Corruption under the Prevention and combatting of Corrupt Activities Act 12 of 2004 can also not be read in isolation but needs to be read with the Prosecution Policy Directives (version date 1 May 2019) of the National Prosecuting Authority which is applicable on all prosecutors when it comes to certain categories of persons charged with the charge of corruption specifically contained in chapter 8 which states;

PART 8: PROSECUTION OF CERTAIN CATEGORIES OF PERSONS

1. In addition to instances where statutory provisions require prior authorisation from the National Director or DPP for the institution of a prosecution, there are certain categories of persons in respect of whom prosecutors may not institute and proceed with prosecutions without the written authorisation or instruction of the DPP or a person authorised thereto in writing by the National Director or DPP (either in general terms or in any particular case or category of cases). This general rule is subject to the exceptions set out in paragraph 3 below.

2. The categories of persons in respect of whom written authorisation or instruction is required, are the following:

(a) Members of the South African Police Services ("SAPS").

(b) Members of the South African National Defence Force ("SANDF") where they assist in law enforcement activities.

(c) Members of Correctional Services.

(d) Municipal law enforcement officers (including traffic officers).

(e) Officials and employees of the Department of Justice and Constitutional Development.

(f) Prosecutors, magistrates and judges.

(g) Any person who is entitled to immunity in terms of the Diplomatic Immunities and Privileges Act, 37 of 2001, or foreign consuls general.

3. No prior authorisation or instruction is required for the prosecution of persons in the SAPS, SANDF or Correctional Services below the rank of brigadier (in the SAPS – formerly director) or equivalent rank in respect of the following categories of offences:

(a) All traffic offences.

(b) All contraventions under the South African Police Service Act, 68 of 1995, or regulations promulgated in terms thereof.

(c) All assault (common).

(d) Malicious injury to property belonging to the State.

(e) Possession of cannabis (dagga) in contravention of section 4 of the Drugs and Drug Trafficking Act, 140 of 1992.

(f) *Crimen injuria*.

(g) Offences in terms of the Maintenance Act, 99 of 1998.

(h) Contraventions of the Firearms Control Act, 60 of 2000, other than those cases involving the—

(i) unlawful possession of a firearm or ammunition;

(ii) unlawful trading in firearms or ammunition;

(iii) unlawful manufacturing of firearms or ammunition;

(iv) unlawful import or export of firearms or ammunition; or

(v) performance of unlawful work contemplated in section 59 of the said Act.

(i) Cheque and credit card fraud, where the total amount involved does not exceed ten thousand Rand (R10 000).

(j) Theft, where the total value involved does not exceed ten thousand Rand (R10 000).

4. No prior instruction is required in respect of persons referred to in paragraphs 2(d) to (f) above for prosecutions in respect of speeding and stationary traffic offences.

5. The written authorisation of the DPP is not required for the arrest and first appearance in court of the persons mentioned in the categories under paragraph 2(a) to (f) above. In sensitive or high profile matters, the DPP needs to be consulted and/ or informed.

6. Where any criminal charge involving violence or dishonesty is pending or a decision regarding prosecution is taken (including a decision not to prosecute), the prosecutor should forward a written notification thereof to—

(a) the Magistrates' Commission in respect of a magistrate;

(b) the Regional Head in respect of any official or employee of the Department of Justice and Constitutional Development;

(c) the National Director in respect of any official or employee of the NPA; and

(d) the relevant regulatory body where the suspect or accused person is a legal practitioner.

- ***Criminal Matters Amendment Act 18 of 2015 (Tampering and damage to Essential Infrastructure)***

Offence – Section 3*;*

(1) Any person who unlawfully and intentionally –

(a) Tampers with damages or destroys essential infrastructure or

(b) Colludes with or assists another person in the commission, performance or carrying out of an activity referred to in paragraph (a),

And who knows or ought reasonably to have known or suspected that it is essential infrastructure, is guilty of an offence and liable on conviction to a period of imprisonment not exceeding 30 years or, in the case of a corporate body as contemplated in section 332(2) of the Criminal Procedure Act, 1977, a fine not exceeding R100 million.

(2) For the purposes of subsection (1), a person ought reasonably to have known or suspected a fact if the conclusion that he or she ought to have reached are those which would have been reached by a reasonably, diligent person having both –

(a) The general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) The general knowledge, skill, training and experience that he or she in fact has.

To understand the offence, the definition of basic service, essential infrastructure and tamper as found in section 1 of this Act must also be understood.

*"**basic service**" – means a service, provided by the public or private sector, relating to energy, transport, water, sanitation and communication, the interference which may prejudice the livelihood, well-being, daily operations or economic activity of the public.*

*"**Essential infrastructure**" – means any installation, structure, facility or system whether publicly or privately owned, the loss of damage of, or the tampering with, which may interfere with the provision or distribution of a basic service to the public.*

*"**Tamper**" – includes to alter, cut, disturb, interfere with, interrupt, manipulate, obstruct, remove or uproot by any means, method or device, and tampering shall be construed accordingly.*

Bail – Section 4;

Schedule 5 to the Criminal Procedure Act, 1977, is amended by addition of the following items;

Theft of ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015 –

(a) If it is alleged that the offence caused or has the potential to cause –

(i) Interference with or disruption of any basic service, as defined in section 1 of the abovementioned Act, to the public; or

(ii) Damage to such essential infrastructure; or

(b) It is alleged that the offence was committed by or with the collusion or assistance of –

(i) A law enforcement officer, as defined in section 51(8) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997)

(ii) A security officer, as defined in section 1 of the Private Security Industry Regulation Act, 2001 (Act No 56 of 2001) who was required to protect or safeguard such essential infrastructure;

(iii) An employee of, or contractor appointed by, the owner or the person in charge of such essential infrastructure; or

(iv) A group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

For example, if X tampers with a cell phone tower and removes or damages cell phone batteries belonging to Vodacom, which is a privately owned company, and due to this tampering Vodacom clients (public) communication is interrupted such a person can be charged under section 3 of the abovementioned Act.

Please see the case of **Mambane and Others v S (A116/2021) [2022] ZAGPPHC 223 (11 March 2022)** where the 3 appellants was convicted in the trail court under section 3 of the Criminal Amendment Act 18 of 2015 as well as theft and the appellants were sentenced to 15 years direct imprisonment as per the amendments made by Act 18 of 2015 to Criminal Law Amendment Act 105 of 1997. They appealed their conviction to the second count of theft as well as their sentence of 15 years. The judge in the said matter dealt in detail with the difference between section 3 of the Criminal Amendment Act 18 of 2015 and the common law offence of theft clearly stipulating that two different offences were committed and the

appellants appeal against their conviction on the second count of theft was dismissed. Their appeal against sentence was also dismissed.

Also see the matter of **Gwadiso and Another v S (A425/2017) [2018] ZAWCHC 33 (16 March 2018)** where the appellants were convicted of section 3 of Criminal Amendment Act 18 of 2015 and sentenced to 12 years direct imprisonment. The appellants appealed against their sentences. In the discussion of the sentences by the High Court it was stated that the value of the copper cable stolen and the damage to the infrastructure plays a vital role in aggravation of sentence and must be taken into account. The appellant's appeal was dismissed.

- ## *Domestic Violence Act 116 of 1998 read with the Domestic Violence Amendment Act 14 of 2021*

Purpose of the Act; *to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state gives full effect to the provisions of this Act; and thereby to convey that the state is committed to the elimination of domestic Violence.*

Offences: *Section 17 – "Notwithstanding the provisions of any other law, any person who*

(a) Contravenes any prohibition, condition, obligation or order imposed in terms of section 7;

(b) Contravenes the provision of section 11(2)(a);

(c) Fails to comply with any direction in terms of section 11 (2) (b); or

(d) In an affidavit referred to section 8 (4)(a), wilfully makes a false statement in a material respect,

Is guilty of an offence and liable on conviction

(i) In the case of a first offence referred to in paragraph (a)

(aa) If it is a first conviction to a fine or imprisonment for a period not exceeding five years or to both such a fine and such an imprisonment or,

(bb) If it is a second or subsequent conviction, to a fine or imprisonment for a period not exceeding 10 years and

(ii) In the case of an offence contemplated in paragraph (b), (c) or (d);

(aa) If it is a first conviction to a fine or imprisonment for a period not exceeding two years or both such fine and such imprisonment or

(bb) If it is a second or subsequent conviction, to a fine or imprisonment for a period not exceeding four years or to both such fine and such imprisonment. The granting of the protection order is done in terms of section 6 of the Act and the conditions of the protection order are listed in section 7 of the Act.

Section 7 is formulated as follows –

"(1) The court may, by means of a protection order referred to in section 5 or 6, prohibit the respondent from

(a) Committing or attempting to commit any act of domestic violence;

(b) Enlisting the help of another person to commit any such act;

(c) Entering a residence shared by the complainant and respondent: Provided that the Court may impose this prohibition only if it appears to be in the best interests of the complainant;

(d) Entering a specified part of such a shared residence;

(e) Entering the complainant's residence;

(f) Entering the complainant's workplace or place of studies;

(g) Preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in paragraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or

(gA) disclosing any electronic communication or making available any communication, as may be specified in the protection order or

(h) Committing any other act as specified in the protection order.

Definition of Domestic Violence;

(a) Physical Abuse

(b) Sexual Abuse

(c) Emotional, verbal or psychological abuse

(d) Economic abuse

(e) Intimidation

(f) Harassment

(fA) sexual harassment

(fB) related person abuse

(g) Spiritual abuse

(h) Damage to property

(hA) elder abuse

(hB) coercive behaviour

(hC) controlling behaviour

(hD) to expose a child to domestic violence

(i) Entry into the complainant's residence;

(1) Permanent or temporary residence without their consent, where the parties do not share the same residence; or

(2) Workplace or place of study, without their consent, where the parties do not share the same workplace or place of study;

(j) Any other behaviour of an intimidating threatening, abusive, degrading, offensive or humiliating nature towards a complainant.

It must be noted that this Act only has reference to parties in a domestic relationship as defined in the Act as;

(a) They are or were married to each other, including marriage according to any law, custom or religion

(b) They (whether they are of the same or the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other

(c) They are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time)

(d) They are family members related by consanguinity, affinity or adoption

(e) They are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration

(f) They are persons in a close relationship that share or shared the same residence.

Sentencing:

For purpose of sentencing as discussed above one must look at the original act, Act 116 of 1998, more specifically section 22 where it is clearly stated that a court for purposes of domestic violence, after amendment by the Jurisdiction of Regional Court Amendment Act 31

of 2008, will mean any magistrate's Court for a district as contemplated in the Magistrate's Courts Act 32 of 1944. This section was not amended by the Domestic Violence Amendment Act and therefore the district court will have increased punitive jurisdiction in order to sentence persons convicted of section 17 as amended to the sentences as discussed above.

However, on the 05/08/2022 the Criminal and Related Matters Amendment Act 12 of 2021 came into operation. Section 17(b)(b) of this Act amended Part III of Schedule 2 as far as it is applicable to domestic violence cases and created minimum sentences when the following facts are proved. That the accused was in a domestic relationship, as defined in the Domestic Violence Act 1993 as amended by the Domestic Violence Amendment Act 2021 and which was discussed above, with the victim and where the accused had the intent to do grievous bodily harm. Please see the discussion of Assault with the intent to commit grievous bodily harm in this guide. According to the wording of the Amendment Act 12 of 2021 the mere attempt on the side of the accused seems to be sufficient to invoke minimum sentences.

MINIMUM SENTENCE

If one then reads section 51(2) read with Part III of Schedule 2 as amended, the following minimum sentence will be applicable;

"(i) a first offender, to imprisonment for a period not less than 10 years;

(ii). a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii). a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years."

Minimum sentences can only apply to regional courts and the High Court as per section 51(1) of Act 105 of 1997 and in a case of an offence as discussed above the matter will have to be triad in the regional court and does the increased punitive jurisdiction of the district court not apply in these cases.

Please also note the discussion below on the topic of rape as regulated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 where minimum sentences are also applicable where rape takes place while the parties was in or is still in a domestic relationship as defined in Act 116 of 1998.

For any other relationship, other than defined in section 1 of Act 116 of 1998 as amended by Act 14 of 2021, where domestic violence is present the parties will have to apply for a harassment order in terms of the Protection from Harassment Act 17 of 2011.

It must further be noted that the Domestic Violence Amendment Act 14 of 2021 is not retrospective meaning that domestic violence offences which occurred before the 14/04/2023 will still be prosecuted under the old act without the amendments.

KV v WV 2020 (1) SACR 89 (KZP) ***"****Domestic violence — Protection orders — When to be granted — Legislature specifically excluding 'unlawfulness' and only referring to conduct causing 'harm' — Domestic Violence Act 116 of 1998, s 1 sv 'domestic violence'.*

In an appeal against the confirmation by the magistrates' court of an interim protection order issued in terms of the Domestic Violence Act 116 of 1998 (the Act), the appellant argued that unlawfulness was a necessary requirement to determine whether conduct constituted domestic violence. The court a quo rejected this argument on the basis that there was nothing in the Act to provide for this and concluded that this was not what was contemplated in said Act and the Constitution. It found that, in any event, the appellant had in his own oral evidence, admitted to pushing and pulling the respondent, leading to her falling to the floor, and this conduct constituted domestic violence in the form of physical abuse. In confirming the interim order, the court found that there was, however, insufficient evidence to conclude that there was also verbal abuse and therefore discharged the order in that regard.

Held, that, in defining domestic violence, the Act specifically excluded the word 'unlawfulness' and referred only to conduct that 'harms, or may cause imminent harm to, the safety, health or well-being of the complainant'. When the Act was enacted, the legislature was alive to the criminal and delictual principles dealing with abuse, but gave consideration to the rights protected in the Constitution, more particularly, the right to equality, freedom and security of the person, and violence against women and children. It introduced a wider form of protection by making reference to the word 'harm'. To give a more restrictive interpretation to the provisions of the Act would be to defeat the purposes for which it was passed. There was accordingly no reason to interfere with the interpretation by the court a quo. The appeal was accordingly dismissed.

And with particular, with reference to domestic abuse of a parent the court went on to say the following also in paragraph [22] "...In this case the accused attacked a vulnerable and unarmed elderly woman who was his mother. What is more concerning and serious is that the deceased, for her own reasons, did not consider seeking protection against the accused and the abuse which ultimately led to her death. This specific crime is worth mentioning with

regards to the intimidation and vulnerability of woman in domestic abuse cases. They face constant fear and guilt that makes approaching the Courts that much more difficult."

Kekana v The State (629/13) [2014] ZACSA 158 (1 October 2014) *Mathopo AJA* (as he then was), remarked at para 20 as follows: "*Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country*."

September v S (A203/2022) [2023] ZAWCHC 50 (9 March 2023), wherein the accused was convicted of two counts of assault and 1 count of the contravention section 17 of the Domestic Violence Act 116 of 1998. The two victims of the assault charges were elderly persons who tried to protect the complainant of the domestic violence order the accused's mother. The accused threatened to kill his mother which was a violation of the protection order. The Court sentenced the accused to direct imprisonment on the two assault charges and ordered that the two sentences should run concurrently. The Court sentenced the accused to an additional 12 months' direct imprisonment for the contravention of the domestic violence order. The accused spent six months in custody awaiting the finalisation of the trial. After sentence the accused appealed his sentence and stated that the court did not take his personal circumstances as well as the 6 months that he was incarcerated before the finalisation of the trial into account when he was sentenced.

During the appeal process the court of appeal reiterated the fact that all 3 complainants were elderly persons. It further took into account that the appellant had 3 previous convictions of which one of them was a conviction in 2011 of contravention of a protection order that was granted in terms of the Protection from Harassment Act 17 of 2011. The Court stated that the fact that the two elderly complainants of the assault cases did not sustain serious injuries is not a mitigating factor but the fact that they are elderly is an aggravating factor. Furthermore, that the previous convictions show the appellant's propensity to be violent to such an extent that his own mother had to obtain a protection order in terms of the Domestic Violence act against him.

The court of appeal found that the sentence as given by the trial magistrate was balanced in light of all the circumstances and the appeal against sentence was dismissed.

- ***Maintenance Act 99 of 1998:***

The purpose of this Act is to ensure that the Republic of South Africa gives the highest priority to the rights of children, their survival, Protection and development. This legislation was created to enable State Parties to take all appropriate measures in order to secure the recovery of maintenance for the child from the parents or any other person/s that have financial responsibility for a child.

Offences are created from section 31 to section 39 of the Act. The most common offence that prosecutors deal with on a day to day basis is section 31 that is formulated as follows;

SECTION 31

"(1) Subject to the provisions of subsection 2, any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine" – Please note that the penalty clause is included in the formulation of the offence.

"(2) If the defence is raised in any prosecution for an offence under this section that any failure to pay maintenance in accordance with a maintenance order was due to a lack of means on the part of the person charged, he or she shall not merely on the grounds of such defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct.

"(3) If the name of a person stated in a maintenance order as the person against whom the maintenance order has been made corresponds substantially to the name of the particular person prosecuted for an offence under this section, any copy of the maintenance order certified as a true copy by a person who purports to be the registrar or clerk of the court or other officer having custody of the records of the court in the republic where the maintenance order was made, shall on its production be prima facie proof of the fact that the maintenance order was made against the purpose so prosecuted.

"(4) if a person has been convicted of an offence under this section, the maintenance officer may, notwithstanding anything to the contrary obtained in any law, furnish that person's personal particulars to any business which has as its object the granting of credit or is involved in the credit rating of persons"

What must be noted as important in the abovementioned section is the fact that section 31 subsection (3) deals with the handing in of the maintenance order and except if the accused alleges that he is not the person against whom the said order was made. Therefore, the mere handing in of the maintenance order to the Court will be *prima facie* evidence that a

maintenance order was granted against the accused as long as it is properly certified a true copy of the original. No further evidence has to be presented to prove the authenticity of such maintenance order.

Section 32 deals with offences relating to examination of persons by the maintenance officer where a person is required to appear before a magistrate to be questioned by the maintenance officer and that person refuses to do so.

Section 33 deals with offences relating to witnesses who had been summoned to appear before a magistrate in a maintenance enquiry and then intentionally and unlawfully gives false evidence whilst under oath. That person can be found guilty and sentenced in accordance with any penalties which may be imposed for perjury.

Section 34 deals with offences relating to false information where a witness submits a false statement or false information to a maintenance officer and or maintenance investigator could be found guilty of an offence and upon conviction be sentenced to any penalty which may be imposed for the offence of perjury.

Section 35 deals with offences relating to maintenance enquiries. Where a person wilfully interrupts a maintenance enquiry or who wilfully obstructs a maintenance court in the functioning of its duties shall be guilty of an offence and could be sentenced to a fine or direct imprisonment not succeeding 6 months or both such fine or imprisonment.

Section 36 deals with offences relating to the publication of information in respect of children. Any person that publishes the name and or address and or details of the school and or any information of any person under the age of 18 years who is or was involved in proceedings in a maintenance enquiry shall be guilty of an offence and could be sentenced to a fine or imprisonment not exceeding two years or both to such a fine or imprisonment.

Section 37 deals with offences relating to disclosure. If any person discloses information of a person involved in a maintenance enquiry except in the performance of their duties or where directed to do so shall be guilty of an offence and sentenced to a fine or direct imprisonment not exceeding two years or both such fine or imprisonment.

Section 38 deals with offences relating to certain notices deals with a person that fails to make any payment in accordance with a notice under section 16(3)(a), 29(1) or 30(1) or fails to give notice to a maintenance officer as required by section 16(3)(b) or 29(2) shall be guilty of an offence and upon conviction be sentenced to a fine or to imprisonment for a period not exceeding 6 months.

Section 39 deals with offences relating to notice of change of address is where is person fails to give notice of any change of residence or employment as required in section 16(4) shall be guilty of an offence and on conviction be sentenced to fine or imprisonment not exceeding 6 months.

The definition of a maintenance order is any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance to any other person.

Maintenance orders are made in terms of sections 17, 18 and 19 of the Maintenance Act.

Please note that the definition specifically makes reference to any person and not only to a child. It therefore includes spousal maintenance where such an order was made by the court.

The onus of proof is always on the State to proof that the accused had sufficient means to adhere to the order made and or that it was due to his/her own conduct that he/she could not adhere to the maintenance order. Please note the case law as discussed below.

The difference of a maintenance officer and a maintenance investigator must also be noted. Any prosecutor whom the Director of Public Prosecutions has delegated the general power to institute and conduct prosecutions in criminal proceedings in a particular magistrate's Court shall be deemed to have been appointed as a maintenance officer of the corresponding maintenance court.

Maintenance investigators are appointed by the Minister or any officer of the Department of Justice and Constitutional Development or a person(s) authorized to exercise duties as described under the act which includes the investigation of any facts relevant to the enquiry.

They can subpoena witnesses and or any information as required for the maintenance enquiries including bank statements.

Therefore, a public prosecutor can be a maintenance officer but not a maintenance investigator.

G.L.R v S (CA&R 41/19) [2020] ZAECGHC 31; 2020 (2) SACR 30 (ECG) (29 April 2020). In this case the accused was convicted in the magistrate's court for the failure to make payment for his biological child after she turned 18 years. The appellant's grounds for an appeal was that the maintenance order referred to minor child and even though he still paid maintenance towards his child 18 months after she turned 18 he was not bound by any order as such to continue with such payment. The court of appeal stated that even though the maintenance order referred to a minor child the purpose of the legislation was that children should be supported until such a time that they are self-sufficient (within reason). The appellant's appeal was dismissed, and the conviction was upheld.

Another important case that needs to be considered when prosecuting in maintenance matters are considered in the matter of **S V Magagula 2001 (2) SACR 123 (T)**. Clear guidelines were given in this matter more specifically if the financial means of an accused to be able to pay the maintenance as per the maintenance order should be taken into account when prosecution or conviction is considered. If one looks at section 31(2) it is made clear that the State has the onus of proof to present evidence that the accused either had the means to pay the maintenance and or that the fact that he did not have the means to pay the maintenance was due to his own willingness to work or due to misconduct on his side. What this means is that if the State cannot prove the above elements this could be a defence on the side of the accused that the Court must take into account.If the prosecutor dealing with a section 31 prosecution is of the opinion that the accused may have a valid defence as discussed above use can be made of section 41 of this Act in that; "if during the course of any proceedings in a magistrate's court in respect of – *" (a) an offence referred to in section 31(1) or(b) the enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person,It appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests, the court shall convert the proceedings into such enquiry."*

What this means in practice is that when a prosecutor can see that the accused did not have the means to abide by the order made and it was not due to his/her conduct the matter is referred back to the maintenance court which is a civil court and a new enquiry will be held in terms of section 10 of the Act to determine what the accused's financial position is and what a reasonable amount will be based on the accused's financial position to contribute to the maintenance of his/her dependants. This is a civil enquiry.

Where an accused is convicted of an offence of section 31(1) an application can be made for the recovery of arrears maintenance in terms of section 40(1) of the Act which stipulates as follows;

> " *(1) A court with civil jurisdiction convicting any person of an offence under section 31(1) may, on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgement of court and shall, subject to subsection*
>
> *(2), be executed in the prescribed manner……..*"

Subsection 2 deals with the manner in which this order will be effected and will not be discussed at this stage.

Section 40(1) of this Act is similar to section 300 of the Criminal Procedure Act in that it serves as a compensation order.

What is important to understand is that the court in which the accused is being criminally prosecuted for section 31(1) will have civil jurisdiction for purposes of making an order in terms of section 40(1). The court can therefore sentence an accused to a period of imprisonment or a fine as prescribed in section 31(1) as well as make an order in terms of section 40(1).

What is very important to remember that an order in terms of section 40(1) is a civil order and if the accused person does not comply with the said order the civil courts will have to be approached for a warrant of execution as per civil litigation. The complainant cannot approach the prosecutor for a warrant as per the criminal procedure act and neither the prosecutor or the criminal court can enforce the section 40(1) order. This differs from an order made in terms of section 297(1)(a)(aa) of the Criminal Procedure Act which is discussed in this guide. When an accused is sentenced to a suspended sentence in terms of section 297 of the Criminal Procedure Act 51 of 1977 and a compensation order is made in terms of section 297(1)(a)(aa) upon a conviction of section 31(1) of the Maintenance Act and the accused does not comply with such an order, then the complainant can approach the prosecutor for

assistance to bring an application to the criminal court that a warrant of arrest be issued for the accused in order for the suspended sentence to be put in operation.

The matter of **SA v JHA and others 2021 (1) SA 541 (WCC)** was a case of civil litigation between the applicant and the respondent who had an agreement in regard to maintenance. The case mainly dealt with the civil question if a claim of debt which is created when a respondent does not pay maintenance and the arrears becomes that debt prescribed after a period of time. This case is however important in that section 40 was discussed and it was concluded as follows;

"….The Court held that section 40(1) of the Maintenance Act makes provision for a Court to grant an order for the recovery of arrear maintenance whereupon the order so granted shall have the effect of a civil judgment of the court. This section is another indication that a maintenance order has the effect of a civil judgment…."

- ***Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Date of commencement 16 December 2017) read with the Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021 (Date of commencement 31/07/2022)***

Source: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021; SAFFLI; Justice College Notes 2019.

Before 16/12/2007 sexual offence acts such as rape and indecent assault were prosecuted in terms of the Common Law or in terms of the Sexual Offences Act 23 of 1957 previously known as the immortality Act. When the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 came into operation on the 16/12/2007 it legislated the previous common law offences as mentioned above and repealed certain sections of Act 23 of 1957. What is an important factor to remember is that if allegations are made that a sexual act took place towards a complainant before the 16/12/2007, the accused will still have to be prosecuted in terms of the Common Law since this act is not retrospective.

For purposes of discussion of this act attention will only be given to offences of rape, sexual assault and sexual intimidation.

A child for purposes of this Act is;

(a) A person under the age of 18 years

(b) With reference to section 15 and 16, a person 12 years or older but under the age of 16 years.

Section 57 (1) of the Act reads as follows;

"Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act."

Therefore, no child below the age of 12 years can ever consent to a sexual act including sexual penetration as defined below. Where a child below the age of 12 years is involved the act will always be unlawful.

Previously section 15 and 16 also dealt with children from 12 years to the age of 15 years who had sexual relations with each other making it unlawful.

However, in the case of **The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another, [2013]** the Constitutional Court found sections 15 and 16 unconstitutional. The court found that these laws infringed the rights to dignity and privacy and the best interests of the child in principle. In 2015, Parliament amended the law so that consensual sex between two children between 12 and 16, or between a child under 16 and one over 16 if the age difference is less than two years, is no longer a crime.

Section 3 - Rape – *Any person who unlawfully and intentionally commits an act of sexual penetration with a complainant without the consent of the complainant is guilty of the offence of rape.*

For the offence of rape as contemplated in section 3 to be understood one must first understand the definition of sexual penetration.

Definition of sexual penetration – *includes any act which causes penetration to any extent whatsoever by*

*(a) The **genital organs** of one person into or beyond the genital organs, anus, or mouth of another person;*

*(b) Any other part of the body of one person or, **any object**, including any part of the body of an animal, into or beyond the genital organs or anus of another person or;*

*(c) The **genital organs of an animal**, into or beyond the mouth of another person.*

Under subsection (a) it is the **genital organs of the accused** ***into or beyond*** the **genital organs, anus of mouth of the complainant.**

Under subsection (b) it is **an object which includes any part of an animal** ***into or beyond*** the **genital organs or anus of the complainant**. Please note that the mouth of the complainant is not included in this subsection. Therefore, for example if the accused puts an object for example a bottle in the mouth of the complainant it will not constitute to rape under subsection (b).

Under subsection (c) the **genital organs of an animal** and ***not other parts of the animal into the mouth*** of the complainant.

Also remember that rape of a child as defined in this act as well as rape under certain circumstances falls within the ambit of Schedule 5 and 6 when it comes to bail. Please see the discussion on bail in this guide.

Section 5 – Sexual Assault

(1) A person who unlawfully and intentionally sexually violates a complainant without the consent of the complainant, is guilty of an offence of sexual assault.

Discussion of section 5(1);

"*A person who unlawfully and intentionally sexually violates a complainant without the consent of the complainant, is guilty of an offence of sexual assault*"

Before the offence can be understood the definition of sexual violation must be understood and such definition will be discussed below.

Each part of the definition of sexual violation will be discussed individually.

Definition of sexual violation;

(a) Direct or indirect contact between the

(a) Genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal

Discussion: Direct/Indirect contact between the –genital organs/anus/female breasts of one person (A) against any body part of another person (B) or animal and or an object including an object depicting the genital organs/anus of a person or an animal

(ii) mouth of one person and

(aa) the genital organs or anus of another person, or in the case of a female, her breasts

(bb) the mouth of another person

(cc)or any other part of the body of another person, other than the genitals organs or anus of that person or in the case of a female, her breasts which could

(aaa) be used in an act of sexual penetration

(bbb) cause sexual arousal or stimulation or

(ccc) be sexually aroused or stimulated thereby

(dd) any object resembling the genital organs or anus of a person and in the case of a female, her breast or an animal.

Discussion: The direct or indirect contact of the mouth of one person –

- The genital organs/anus /female breasts of another person
- The mouth of another person
- Any other body part except the genital organs/anus/female breasts of another person that can;

- Be used in an act of sexual penetration (please see the definition of sexual penetration as discussed above) for example a finger in the complainant's mouth.

- Cause sexual arousal/stimulation

- Can be sexually aroused or stimulated thereby

(iii) the mouth of the complainant and the genital organs or anus of an animal.

(b) the masturbation of one person by another; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.

Discussion: The mouth of the complainant and the genital organs/anus of an animal and or where a complainant is masturbated by the accused and or an object that looks like the genital organs of a human or an animal is inserted into the mouth of the complainant.

NB: What is very important to remember that with the offence of Sexual Assault as defined in section 5(1) of the Act, sexual penetration as defined in the definition of sexual penetration, never takes place.

The Criminal and Related Matters Amendment Act 12 of 2021 changed the position on bail where sexual assault took place on a child below the age of 18 years. This offence now falls within the ambit of Schedule 5. Please see the discussion of bail in this study guide.

Discussion of section 14A;

Previously section 5(2) of the Act dealt with the scenario where a person inspired the belief in another that they will be sexually violated.

Section 5(2) was however amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021 and substituted by section 14A which reads as follows;

"*A person (A) who unlawfully and intentionally utters of conveys a threat to a complainant (B) that inspires a reasonable belief of imminent harm in B that a* ***sexual offence*** *will be committed against N, or a third person (C) who is a member of the family of B or any other person in a close relationship with B, is guilty of the offence of sexual intimidation and maybe on conviction to the punishment to which a person convicted of actually committing a sexual offence will be liable."*

Definition of Sexual Offence;

"Means any offence in terms of Chapter 2,3 and 4 and sections 55 and 71(1), (2) and 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007".

Section 5(2) of the original act fell within the ambit of Chapter 2 part 2. Section 14(A) now falls within the ambit of Chapter 2 part 4. With the substitution of section 5(2) with section 14(A) it

has now broaden the definition. Section 5(2) only dealt with inspiring the belief that an act of *sexual violation* will occur but section 14(A) now includes other definitions and offences such as sexual penetration and so forth in that it broadened the definition by including a belief that a *sexual offence* will occur against a family member or a person in a relationship with the complainant and not only against the complainant.

For example, the accused threatens the complainant that he/she will rape the complainant. According to the act that is a sexual offence and forms one element of sexual intimidation. But it now also includes for example the accused threatening the complainant that he/she will rape the complainant's sister.

It is however very important that the complainant believed that the accused is serious in his/her threat. If the complainant believed that what the accused said or done was empty threats the State will not be able to proof the offence.

The test that the Court will have to apply is a subjective test to establish that the words or the actions of the accused did indeed inspire the belief (fear) that the accused will commit an act of sexual offence against the complainant.

The same principles of assault by threat have to be applied to this offence as set out in the matter of **Sibanyone 1940 (1) PH H67 (T):** "*…for an assault to be committed where no physical impact takes place there must be a threat of immediate personal violence in circumstances that lead the person threatened reasonably to believe that the other intends and has the power immediately to carry out the threat."*

In the matter *of* **S v R.R and Another (13919/2013, 17/2013, BSH 9/2013) [2016] ZAWCHC 2 (7 January 2016*)*** the appellant was a minor that was convicted in the trial court of attempted rape in terms of section 55 of this Act. The appellant with another person robbed the complainant and then told the complainant to undress her trousers. The court of appeal found that the trial court made an error in convicting the accused of attempted rape but found that the appellant did inspire the believe in the complainant that he had the intention to sexually violate her.

Penalties:

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 does not have a penalties section. This caused confusion when the Act came into operation since

the act created offences but no accompanying penalty clause. In the **Prins** matter the Court found that if a statute does not provide a penalty clause then the statute is defective. This decision was appealed and in the matter of **Director of Public Prosecutions, Western Cape v Prins (WCC) (unreported case no A134/08, 11-5-2012)** (Blignault J) it was clarified by the court that "…*I submit that the court's decision in the Prins case is unfortunate as it amounts to a narrow interpretation and application of South African law. The court did not explore all relevant legislation before seeking solace in international law. If it had, it could have found the provisions of s 276 of the CPA to hold the solution to the matter. These provisions are applicable to any person convicted of an offence, irrespective of whether the statute creating that offence has penal provisions or not; otherwise a category of offences relevant to its application could have been tabled."* This issue was also corrected by an amendment Bill passed by Parliament to state that where there is not a penalty clause for any offences created in the abovementioned act section 276 of the Criminal Procedure Act must be incorporated read with the punitive jurisdictions of the different courts as determined by the Magistrate's Court Act 32 of 1944 as amended.

However, rape and other forms of sexual offences are offences of a very serious nature and therefore most of the penalties applicable to these offences are dealt with in the Criminal Law Amendment Act 105 of 1997 (minimum sentences act). The offence of rape is dealt with in section 51(1) and section 51(2) of the abovementioned act. Due to the fact that only rape as contemplated in section 3 was discussed above only minimum sentences applicable to section 3 will be discussed. Please remember that only a regional court or the High Court can impose minimum sentences as clearly stated in section 51(1) of Act 105 of 1997.

MINIMUM SENTENCE

Life imprisonment is the minimum sentence prescribed if a person is found guilty of rape and or other offences where the offence of rape was involved in terms of section 51(1) read with Part I of Schedule 2 which are the following instances;

Murder when –

(c)…the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences;

(i) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, respectively …

Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 –

(a) When committed –

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii).by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv).by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) Where the victim –

(i). is a person under the age of 18 years;

(iA) is an older person as defined in section 1 of the Older Persons Act 13 of 2006

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii). Is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act , 2007 or

(iv). Is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused or

(c) Involving the infliction of grievous bodily harm……..”

Section 51(2) read with Part III of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (minimum sentences act) will be applicable for the following offences;

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, in circumstances other than those referred to in part I..”

And the prescribed sentence would be;

(i). a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii). A third or subsequent offender of any such offence; to imprisonment for a period not less than 20 years.

If an accused is found guilty of sexual assault as per section 5(1) and sexual intimidation as per section 14(A), the normal punitive jurisdiction of the trial court would be applicable.

In the case of **Molaza v S (A235/2018) [2020] ZAGPJHC 169; [2020] 4 All SA 167 (GJ) (31 July 2020)** the accused was convicted of rape (multiple counts) in the regional court in Soweto. The accused appealed against his conviction and sentence. The principle of multiple counts of rape was discussed in detail and it was found that the argument and conviction by the trial magistrate was correct. The accused's sentence of life imprisonment on the rape counts was upheld and his appeal on conviction and sentence was dismissed.

In the case of **Buso v S (A256/2021) [2022] ZAGPPHC 404 (17 June 2022)** the accused was found guilty of rape in terms of section 3 of this act of a minor child. He was sentenced to life imprisonment. He appealed both his conviction and sentence. What is very important in this judgement is how the court of appeal dealt with the credibility and cautionary rules of a child witness and at the same time a single witness. The court found that no negative inferences can be drawn just because the complainant in this matter was a child and a single witness in relation to the incident but that the court must take several factors into account such as the developmental stages of such a child and so forth. The Court also dealt with what would be seen as compelling and substantial circumstances when it comes to the prescribed minimum sentence for rape of a child. The court found that the child's evidence was credible and the appeal against the conviction was dismissed. The court found that there were some substantial and compelling circumstances when it came to this appellant such as the fact that he was incarcerated 3 years prior to his sentence. The Court looked at what the purposes of the minimum sentences act was and found that one of its basic purposes was to deal with some rehabilitation factors. The Court reduced the appellant's sentence to 25 years of which 5 years were suspended for a period.

In the matter of **ICM v The State (692/2021) [2022] ZASCA 108 (15 July 2022)** the appellant appealed against his conviction of 3 counts of sexual assault and 1 count of rape as well the sentence given by the trial court. The complainant was a minor of 11 years when these incidents happened. The facts on the sexual assault were that the appellant brushed the complainant's breasts. The Court discussed the credibility of the complainant as a single witness and the cautionary rule of a child witness. The court of appeal found that the complainant was a credible witness, and the appeal was dismissed.

PART II

THE LAW OF EVIDENCE & CYBER CRIMES

A Introduction

This portion of the study guide is developed to give you an overview on the law of evidence and similarly prepare you for the aspirant examination.

NOTE:

The Outcome of any prosecution solely rests on the shoulders of a prosecutor. It's the function of a prosecutor to present admissible and mainly relevant evidence which is assist the court in resolving mainly facts in dispute.

The main function of this is for the court to make a determination after having weighed the probabilities of each version presented to the court.

B. THE IMPACT THE LAW OF EVIDENCE HAS THE PRESENTATION OF EVIDENCE IN COURT

The fundamental principle that governs the Law of Evidence is that it tells us how to go about proving a case before court notwithstanding the fact that the foundation of this principle is based on what evidence is admissible and what evidence is excluded and such evidence must be relevant before proceeding with the case in the court.

The basic approach in understanding these concepts are broken down as follows:

- Any evidence is admissible and must deal directly with the facts in issue thus making it relevant to the issue before the court.
- A ***previous consistent statement*** made by a witness would normally serve to corroborate the witness subsequent statement which is inadmissible.
- ***Similar Fact Evidence*** which deals with the accused having something wrong prior to this act does not mean that the accused committed the current offence, thus this type of evidence is inadmissible.
- ***Character Evidence*** this evidence is inadmissible and has no relevance and or factual basis to determine if an offence was committed as it is purely the character of the accused.
- ***Hearsay Evidence*** is generally inadmissible as witnesses need to give evidence of what happened to them and or what they personally saw. However, after the promulgation of the Hearsay Act provision has been made for Hearsay evidence to be admitted to court under specific circumstances. Exceptions to the hearsay rule is evidence presented in bail applications as these are sui generis in nature.

- ***Opinion Evidence***. This type of evidence is when either party call a subject matter expert in a specialized field to give an opinion of his / her assessment in a case. The purpose of such evidence is guide the court in the interpretation of these aspects may be in dispute due to their technical nature, however this form of evidence does not amount to courts judicial powers being taken over. The court still has the duty to make a finding after having assessed all the evidence presented holistically.
- ***Privilege:*** Reference is made to the S192 of the CPA. Some evidence may be excluded as promulgated by statutes.
- Evidence may be excluded as the evidence obtained and or seized was in violation of the Bill of Rights as enshrined in the Constitution. However, this evidence must be presented to court to make a finding in so far the admissibility of the evidence is concerned.

- ***Accused*** who incriminate themselves through either by way of an admission and or confession will have to meet the threshold otherwise the incriminating statements cannot be used against him in the subsequent trial.

- **Court officials** – Apart from the presiding officer, all other officials are competent and compellable to testify, but it is not advisable - **S v Kirsten 1950 (3) SA 659(K)**.

- **Parliamentary representatives** - Competent and compellable in criminal cases, however members of Parliament cannot be compelled as a witness pending his / her business in Parliament, unless the court is situated in Parliament.

- **Diplomatic staff** – Exempted in terms of section 2, Act 74 of 1989. **S v Muchindu 1995 (1) SASV 194 (W)**, this includes Foreign heads of states as well as diplomats.

- **The President:** is both competent and compellable as a witness, the decision to compel him or her to give evidence should not be taken lightly.

- **Accused** – Only competent to testify on behalf of the defence at his own request - section 196(1)(a), Act 51 of 1977 – This is not applicable in inquests - **Wessels V Add Magistrate, Johannesburg 1983 (1) SA 530(T)**. Accused is competent, but not compellable to testify for his co-accused. **S v Ntuli 1978 (2) SA 69(A)**.

The primary rule of admissibility is the rule of relevance. The evidence must not only be logically relevant to be admissible, but must also be legally relevant. Relevance is a legal rule which has been formulated in s 210 of the Criminal Procedure Act and s 2 of the Civil Proceedings Evidence Act. Section 210 states that: 'No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduct to prove or disprove any point or fact at issue in criminal proceedings.

C. Definition of relevance as defined by case law

DPP v Kilbourne (1973) AC 729: "Evidence is relevant if it is logically probative or disprobative of some matter which required proof. I do not propose to analyse what is involved in "logical probativeness", except to note that the term itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say that relevant evidence is evidence which makes the matter which requires proof more or less probable."

R v Mpanza 1915 AD 348: "…. Any facts are…relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue."

S v Mayo 1990 (1) SACR 659 (E): "It is not in the interest of justice that relevant material should be excluded from court, whether it is relevant to the issue or to issues which are themselves relevant to the issue but strictly speaking not in issue themselves, and this includes the credibility of the witnesses, provided that the question of their credibility is in some way related to the issues or matter relevant to the issues."

S v Holshausen 1984 (4) SA 852 (A): "It is necessary to emphasise that logical relevancy of facts for the most part determines their legal admissibility."

In **R v Mattews 1960 (1) SA 752 (A)** at 758, Schreiner JA held that it is 'based upon a blend of logic and experience lying outside the law'. Any fact is relevant if, from its existence, alone or in combination with other facts, inferences may properly be drawn as to the existence of the fact in issue.

Evidence may be relevant to credibility only and not to an issue; it may then be admissible on that ground.

A document containing both inadmissible and admissible evidence does not become inadmissible in its totality – the admissible parts may be presented in evidence.

When a dispute arises about the admissibility of evidence, a "trial within a trial" is held to determine admissibility. It must be determined there and then – not only at the end of the trial. However, the finding is not final.

NOTE: The basic principles mentioned above is to ensure that the prosecution is able to understand the type of evidence presented to court. It is prudent that the prosecution is able to differentiate between admissible and inadmissible evidence.

THE MANNER IN WHICH EVIDENCE IS PRESENTED AT COURT

The way evidence is presented in court depends on the type and nature of the evidence.

There are various ways wherein evidence may be handed into court without the need of having to call a witness. These aspects will be covered under the topic of the CPA, just to name a few, S212 and S 213 of the CPA.

Evidence majority of the time is given by the witness giving his or her testimony in the witness box relating to the sequence of events that transpired on the day in question.

ASSESSMENT OF EVIDENCE FROM A PROSECUTORIAL PERSPECTIVE

1. Identify the issues surrounding the facts of the case, namely the elements of the offence, identity and evidence available in support thereof.
2. Identify all the evidence available in the docket that will be used in the presentation of the state's case.
3. Assess whether the evidence to be presented will assist the court in drawing the necessary inferences after taking a holistic approach to the evidence presented in court.

   Upon conclusion of this assessment, the prosecutor will be able to evaluate whether the evidence to be presented is relevant and thus admissible.

D. ORAL EVIDENCE

Firstly, before the prosecution can consider calling a witness in support of proving the commission of an offence, it is necessary to ascertain if there are any provisions in terms of law that will disqualify the witness from testifying in an open court.

The following Sections of the Criminal Procedure Act 51 of 1977 sets the foundation when making a determination whether to call a witness to give evidence in a Criminal Court.

- ***Section 192 of the CPA***

Every witness competent and compellable unless expressly excluded.

Every person not expressly excluded by the Criminal Procedure Act 51 of 1977 from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

Section 206 of the CPA

The law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the 13th of May 1961, shall apply in any case not expressly provided for by this Act or any other Law.

S v Maduma 1978 (2) SA 777(D): …… it is a fundamental principle of an ordered society and of a democratic society that witnesses can be compelled to testify as to what they know and that their evidence can be properly tested in a court of law. It may involve great hardship to the witness but the interests of society, or as the Chief Justice put it in **Weinberg's case 1966(4) SA 660(A)** 'the demands of justice' require that he testify.

- ***Section 193 of the Criminal Procedure Act 51 of 1977***

Court to decide upon competency of witness.

The court in which criminal proceedings are conducted shall decide any question concerning the competency or compellability of any witness to give evidence.

It should be noted from the onset that there is a difference between competence and compellability.

The questions to be asked by the trial court is: (i) Is the witness competent to testify? and (ii) Can the witness be compelled to testify? Parties cannot agree to let an incompetent witness testify – **S v Kumalo 1962 (4) SA 432(N)**.

Competence has to do whether the witness being called by the prosecution has the mental capacity to testify. Witnesses who lack the mental capacity to testify are automatically excluded from testifying in an open court. In this instance the focus is on the individual.

Compellability: Witnesses are considered compellable who may assist the prosecution in contributing the incident that transpired on that particular day, which resulted in the prosecution of the accused. Here the focus is the evidence to be presented by such person and whether in terms of Section 192 of the CPA does this witness is protected by persons excluded to testify in a court of law.

To understand the difference between the two concepts, it is important to look at statutory provisions of the Criminal Procedure Act and how witnesses have been categorized within the provisions dealing with the competency and compellability of witnesses to be considered by the prosecution with regard to it presentation of its case.

- *Section 194 of the Criminal Procedure Act 51 of 1977*

Incompetency due to state of mind

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.

A witness is incompetent to testify if he is, during the giving of his testimony, deprived of the proper use of his reason - **S v Zenzile 1992 (1) SASV 444(C)**.

Where a witness becomes incompetent during his testimony, that part of his evidence given before becoming incompetent as far as it is not in contention, remains standing - **S v Vilbro 1957 (3) SA 223(A).** See **S v Mokie 1992 (1) SASV 430(T)**.

1. MENTALLY CHALLENGED WITNESSES:

The basis for dealing with a mentally challenged witness adequately dealt with in **S v Katoo 2005 (1) SACR 522 (SCA)**.

The court, in considering Section 194 of the CPA 51 of 1977, held that "The first requirement of the section is that it must be shown to the trial court that the witness suffers from

(1) a mental illness, or

(2) that he or she labours under imbecility of mind due to intoxication or drugs or the like. Secondly it must also be established that as a direct result of such mental illness or imbecility the witness is deprived of the proper use of his or her reason. These two requirements must collectively be satisfied before a witness may be disqualified from testifying on the basis of incompetence."

Drunkenness – Competent and compellable – It will affect the credibility of the witness.

Deaf witness – Competent and compellable, provided that he can communicate and understand the nature of the proceedings. Section (2) stipulates that *viva voce*-evidence includes sign-language.

S v Ranikolo 1954 (3) SA 255 (O), S v Zenzle 1992 (1) SACR 444 (C)

2. SPOUSES AS STATE WITNESSES

With regard to the calling a spouse as a witness one needs to classify whether she is called by the prosecution, the accused or a co-co accused in the matter. Depending on the circumstances there are specific rules that the person calling the witness has to comply with

- *Section 195 of the CPA*

Evidence for prosecution by husband or wife of accused.

(1) The wife or husband of an accused shall be competent, but not compellable, to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with—

(*a*) any offence committed against the person of either of them or of a child of either of them;

(*b*) any offence under Chapter 8 of the Child Care Act, 1983 (Act 74 of 1983), committed in respect of any child of either of them;

(*c*) any contravention of any provision of section 31 (1) of the Maintenance Act, 1998, or of such provision as applied by any other law;

[Para. (*c*) substituted by s. 45 of Act No. 99 of 1998.]

(*d*) bigamy;

(*e*) incest;

(*f*) abduction;

(*g*) any contravention of any provision of section 2, 8, 9, 10, 11, 12, 12A, 13, 17 or 20 of the Sexual Offences Act, 1957 (Act 23 of 1957);

[Para. (*g*) amended by s. 1 of Act No. 49 of 1996 and by s. 4 of Act No. 18 of 1996.]

(*h*) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;

(*i*) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (*h*).
[Sub-s. (1) amended by s. 5 of Act No. 72 of 1985 and by s. 7 of Act No. 26 of 1987 and substituted by s. 6 of Act No. 45 of 1988.]
(2) For the purposes of the law of evidence in criminal proceedings, "marriage" shall include a customary marriage or customary union concluded under the indigenous law and custom of any of the indigenous peoples of the Republic of South Africa or any marriage concluded under any system of religious law.
[Sub-s. (2) substituted by s. 4 of Act No. 18 of 1996.]

The Sexual Offences and Related Matters Act also needs to be taken into consideration.

SPOUSES REQUIRED AS A DEFENCE WITNESS.

- *Section 196 of the Criminal Procedure Act 51 of 1977*

Evidence of accused and husband or wife on behalf of accused.

(1) An accused and the wife or husband of an accused shall be a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that-

(a) an accused shall not be called as a witness except upon his own application;

(*b*) the wife or husband of an accused shall not be a compellable witness where a co-accused calls that wife or husband as a witness for the defence.
[Para. (*b*) substituted by s. 7 of Act No. 45 of 1988.]

(2) The evidence which an accused may, upon his own application, give in his own defence at joint criminal proceedings, shall not be inadmissible against a co-accused at such proceedings by reason only that such accused is for any reason not a competent witness for the prosecution against such co-accused. **S v Haibed 1993 (1) PH H18 (Nm)**

(3) An accused may not make an unsworn statement at his trial in lieu of evidence but shall, if he wishes to give evidence, do so on oath or, as the case may be, by affirmation.

Marriage partner as witness called by the court – Section 186 Act 51 of 1977

S v Taylor 1991 (2) SASV 69 (C) on 73A-B: In my view, the correct view is that the court can call any witness whom the parties could have called. Where, as in this case, different rules apply in regard to the competence and compellability of a witness who is called by the prosecution, or by the defence, the court's duty is to ensure that in the interest of justice the accused is not prejudiced.

3. CO – ACCUSED

Section 157 (2) of the CPA provides that at any point during the trial, the court may order a separation of trials so that the one accused is no longer a co-accused in the trial of the other. Upon such separation, the co-accused may then give evidence against one another.

From the onset it should be noted that a co-accused is not a competent witness for the prosecution. The state may only call a person who had previously been a co-accused to testify under the following scenarios.

1. Where the prosecution withdraws charges against the Accused and considers using this accused as a Section 204 witness as provided in the Criminal Procedure Act 51 of 1977.
2. Where the co-accused has been acquitted of the charge and his testimony may assist the prosecution's case.
3. Where the accused tenders a plea of guilty and makes a full disclosure in his involvement of the crime with the assistance of the co-accused.
4. If the trials of the accused and co- accused have been separated by some legally valid reason submitted to the court.

Further it is advisable that the accused which the state intends calling on to give evidence against a co-accused should be sentenced after his conviction but prior to testifying in court

4. CHILDREN AS STATE WITNESSES

Young children are competent witnesses if, in the opinion of the court, they can understand what it means to tell the truth.

They must give their evidence sworn or unsworn, depending on whether they understand the meaning and import of the oath. This is sanctioned by section 164 of the CPA. The section then provides that, if they cannot take the oath, the judicial officer must admonish them to tell the truth.

If the child does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he or she cannot be admonished to tell the truth; he or she is then an incompetent witness.

A child is deemed to be a competent witness after the court has established the following from the witness:

1. Has sufficient intelligence;
2. Can communicate effectively;
3. Is capable of distinguishing between a truth and a lie and comprehends that it is wrong to tell a lie.

The Director Of Public Prosecutions V Hendrik Jacobus Petrus Swartz, Unreported case A906/98 delivered on 2/9/99 in the TPD: On a parity of reasoning, based on the judgement in *Jackson's* case *supra*, it cannot be said that the evidence of children, in sexual and other cases, where they are single witnesses, obliges the court to apply the cautionary rules before a conviction can take place.

It does not follow that a court should not apply the cautionary rules at all or seek corroboration of a complainant's evidence. In certain cases, caution, in the form of corroboration, may not be necessary. In others a court may be unable to rely solely upon the evidence of a single witness. This is so whether the witness is an adult or a child.

S v Viveiros [2000] (2) All SA 86(A) on 88c-d: In view of the nature of the charges and the age of the complainant it is well to remind oneself, at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution, and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach. (**S v J 1998 (2) SA 984 (A) on 1009b**)

Cautionary rules should be applied. **S v Mashava 1994 (1) SASV 224 (T)**. No encouragement (**S v Shabangu 1963 (3) PH H99 (N))** or threat **(S v Jacobs 1970 (2) PH H 152 (K))**, may be used to persuade the child to testify.

S v Jackson 1998 (1) SACR 471 (SCA) on 473F: In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of the accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

5. JUDICIAL OFFICERS AS STATE WITNESSES

A judge or magistrate may not give evidence, even on a formal matter, in a case that he is hearing. The function of the judicial officer is always to remain objective over the cases they preside. It is for this reason they are considered as incompetent witnesses in respect of the cases that they preside over.

Section 4 of the Magistrates Court Act states that a charge sheet is a reflection of the court proceedings and if a dispute of fact arises regarding endorsements on the charge sheet, the presiding officer may testify to clarify the record wherein he is not presiding over.

It also permissible for a magistrate to whom a confession has been made, to be called in a trial within a trial if the accused challenges the voluntariness of the confession. See Section 217 of the CPA

6. LEGAL REPRESENTATIVES / PROSECUTORS AS WITNESSES. SECTION 201 OF THE CPA:

PRIVILEGE OF LEGAL PRACTITIONER

No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally

employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned.

- A mere friendly conversation is not covered **S v Green 1962 (3) SA 899 (D)**.
- A relationship of legal adviser and client must exist otherwise the communication is not privileged.
- Where a client makes a confession to an attorney without seeking that attorney's legal advice in connection therewith, the confession is not privileged information **(S v Kearney 1964 (2) SA 495 (A)**
- It is undesirable for legal representatives to be called give evidence on any matter of controversy.

The General Rule applicable to both Legal Practitioners as well as Prosecutors is that they are both competent and compellable. However, there is a Legal Professional Privilege that they may rely upon as a just excuse.

PRESENTATION OF ORAL EVIDENCE DURING THE DIFFERENT STAGES IN A CRIMINAL TRIAL

Under this heading, the role of the prosecutor will be discussed, as to how a prosecutor should deal with its own witness it intends calling:

Oral evidence is the most common means used in adducing evidence in a criminal court. As a general rule oral evidence must be given under oath.

S v V 1998 (2) SACR 651 (KPA) on 652i – 653a: This capacity to understand the difference between truth and falsehood is thus a prerequisite for the oath, the affirmation and an admonition in terms of section 164. If section 164 is to be resorted to in order to procure the evidence of a child the court must first make the necessary finding that the child does not understand the nature and the import of the oath. To make a finding entails an enquiry. The court must enquire and satisfy itself whether the child understands the oath and understands what it means to speak the truth. See *Henderson v S* (supra at 597d-g). If the child does not, it cannot be admonished under section 164, it is an incompetent witness, whose evidence is inadmissible. The admission of such evidence is an irregularity which, in my opinion, constitutes a failure of justice *per se.*

The following methods may be used as defined in the CPA 51 of 1977 for witnesses to testify in a criminal court.

OATH / AFFIRMATION / WARNING

- ***Section 162, Act 51 of 1977 - Oath***

I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.

- ***Section 163, Act 51 of 1977 - Affirmation***

I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth.

- ***Section 164, Act 51 of 1977 – Warning***

Where any person, because of ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or affirmation, such person may be admitted to give evidence provided that such person, in lieu, of the oath or the affirmation, be admonished to speak the truth, the whole truth and nothing but the truth.

S v Ndlela 1984 (1) SA 223(N): The result, when no oath is taken by a witness of whom is required is that what he then says has neither the character or the status of evidence.

There are three (3) significant stages in a criminal trial win which oral evidence is presented to court.

1. Evidence in Chief;
2. Cross - examination;
3. Re - examination.

The purpose of evidence in chief is to put relevant and admissible evidence before the court through oral testimony of a witness in the form of questions and answers.

The opposing party will have an opportunity to test the credibility of that witness through cross –examination and the party being the prosecutor who called the witness will be able to clarify issues raised during cross examination in re-examination. The prosecution is not allowed to lead new evidence not canvassed during evidence in chief and or cross examination.

Leading questions which are suggestive of an answer is not allowed on a disputed fact but may be allowed when dealing with an undisputed fact but ultimately whether to allow a leading question or not is up to the court.

As a general rule, witnesses when giving oral testimony are not permitted to rely on or refer to any form of record including any witness statement.

The rules regarding the assessment of evidence are there to assist the court in evaluating the evidence presented, evidence that is allowed and admissible in order to arrive at a correct finding of fact.

Evidence assessment entails the court in analyzing all the evidence, making credibility findings, drawing inferences and finally looking at the probabilities of all the evidence presented.

EVIDENCE IN CHIEF

REFRESHING OF MEMORY OF A WITNESS

However due to the complexity of the matter a witness may be given time to refresh its memory.

There is no general rule which precludes a witness from reading his / her statement before entering the witness box.

- The common- law approach that witnesses should be allowed to refresh his memory before testifying;
- Pre- trial refreshment of memory is a procedural right based on a fundamental rule that the witness must be given adequate opportunity to prepare for trial.

The legal principles applicable in determining when a witness may refresh their memory is based on the following two (2) grounds:

1. The witness wants to refresh his / her memory before his / her testimony or during an adjournment;
   There is no general rule which prohibits a witness whose testimony has been interrupted by an adjournment to refresh his memory before re- entering the witness box.

2. The witness wants to refresh his/her testimony by referring to a document while in the witness box.

COMMON LAW FOUNDATION REQUIREMENTS FOR PURPOSES OF REFRESHING A MEMORY OF A WITNESS.

- Personal knowledge of the event
- Inability to recollect
- Verification of the document used to refresh memory
- Fresh in the memory
- Use of the original document
- Production of the document.

PROBATIVE VALUE OF A DOCUMENT USED TO REFRESH MEMORY

- Present recollection revived
- Past recollection revived
- Conduct of the cross- examiner

PROCEDURAL ASPECTS OF COMPETENCE AND COMPELLABILITY.

When dealing with the procedural issues, a distinction is made between the concepts of compellability and the right of privilege.

A prosecutor may compel a person to testify whereas relates to witness and whether under oath can be forced to answer questions put to him by the prosecution.

The first scenario we will deal with is where a witness has information in his/ her possession that might assist the prosecution in its case. The criteria being that this witness has material evidence or relevant information regarding an offence that was committed.

The remedy that the prosecution has in this instance is to invoke S 205 of the Criminal Procedure Act 51 of 1977.

- ***SECTION 205, ACT 51 OF 1977***

(1) a Judge of the Supreme court, a regional court magistrate or a magistrate may, subject to the provisions of ss (4), upon request of an Attorney-General or a public prosecutor authorised thereto in writing by the attorney-general, require the attendance before him or any other Judge, regional court magistrate or magistrate, for examination by the Attorney-General or the public prosecutor authorised thereto in writing by the attorney-General, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed:

Nel v Le Roux and Others 1996 (1) SASV 572 (CC) on 573g: There is nothing in the provisions of section 205, read with section 189 of the Criminal Procedure Act which compels or requires the examinee to answer a question (or for that matter to produce a document) which would unjustifiably infringe or threaten to infringe any of the examinee's Chapter 3 rights. On 575d: The court accordingly held that the provisions of section 205 of Criminal Procedure Act were not inconsistent with the Constitution.
S v Mahlangu 2000 (1) SACR 565 (W) – Headnote: The Court held as far as it could be argued that the applicant was seeking to protect rights which would come under threat once he commenced with the examination, the procedure itself afforded the necessary protection. The applicant's position could not be likened to that of a witness in a trial. The present situation dealt with the stage in the proceedings prior to the applicant being or becoming a witness: respondent sought his co-operation and still had to decide whether to ultimately use him as a witness. It was only once the applicant started giving the information he had that the respondent would be in a position to assess whether to disclose the information that he had to the witness. It was in the interest of the State to withhold secret information until it became its interest to disclose it as the circumstances demanded. Until the applicant was examined it was not clear what he knew and neither was it possible for the respondent to know what he was going to ask of the applicant as the applicant's responses would determine that to a large extent. If the applicant was required to answer a question relating to events so long ago that he could not recall them, the lack of recollection might be a 'just excuse' and thus he was protected. The determination was to be made as and when the facts and circumstances giving rise thereto appeared. His application at the present stage was clearly premature. The Court held further that the position of the applicant could not be likened to that of an accused. As to the complaint that the applicant's rights under section 32 of the Constitution was infringed, the court held that section 32 was aimed at the protection of the rights of a party seeking information from the State. The applicant was however the one who was under an obligation to give evidence and he had no protectable right not to do so, therefore he had no basis for seeking any information from the State prior to the commencement of the section 205 inquiry. The applicant had not mentioned in his founding papers what specific right or rights he sought to protect by his reliance on section 32. He had been offered immunity in terms of sections 203 and 204 and he was therefore only at risk for the purposes of section 205 itself, namely that if he refused information asked from him without just excuse.

- ***RECALCITRANT WITNESS – SECTION 189***

A compellable witness may not refuse to attend court, once a subpoena is served on this witness they have to attend court otherwise they face a risk of being arrested.

This witness may not refuse to take the oath or answer any questions without a just excuse.

DEFINITION: A witness that:

(i) is present, and

(ii) required to give evidence, and

(iii) refuses to take the oath/affirmation, or

(iv) takes the oath/affirmation but then refuses to answers questions or submit a book/document/other evidentiary material to court, and

(v) offers no just excuse for his conduct.

PROCEDURE WHEREIN A WITNESS REFUSES TO CO-OPERATE IN COURT

- Witness is entitled to legal representation - **S v Nkosi 1990 (1) SASV 509 (N)**
- At the first signs of recalcitrance the witness should be warned in terms of section 189, Act 51 of 1977
- Court should ask the accused if he have a just excuse
- If the witness does not offer a just excuse the court must proceed with the sentencing proceedings
- The sentence a court may impose is imprisonment not exceeding two (20 years, if offences under Part III of Schedule two (2) the court may impose a sentence not exceeding five (5) years.
- After expiration of the period of imprisonment the accused may be brought to court - Section 189(2)
- If good cause is shown the court may remit any punishment or part thereof - section 189(3)
- Section189(7) – Any lower court has jurisdiction to impose prescribed sentence
- Process can be repeated if the witness is still recalcitrant

The courts have ruled the following when dealing with a recalcitrant witness:

S v Weinberg 1966 (4) SA 660 (A) – wider than a mere legal excuse

S v Heyman 1966 (4) SA 598 (A) – where the physical and psychological nature of the witness is such that he cannot testify

Attorney-General, Tvl v Kader 1991 (2) SASV 669 (A): Even though a witness has reason to fear for his and his family's safety if he testifies, the demands of society and the interest of administration of justice require that he nevertheless testify.

S v Maluleke 1993 (1) SASV 649(T): Even when it is clear that the conduct of the witness constitutes a contravention of section 189(1) he must be given a full and fair opportunity of being heard on sentence.

- ***HOSTILE WITNESS – SECTION 190***

The rule at common law is that a party may not cross-examine his own witness unless he is impeached.

Circumstances dictate who will be the potential witnesses in the matter. The consequence of this is that some witnesses may be reluctant, resentful and blatantly untruthful in an attempt to undermine the case before court.

DEFINITION: A witness that shows an antagonistic *animus* against the party that called him and/or has the intention to prejudice the party that called him

Not all witnesses who give unfavourable evidence are hostile. A witness is hostile if he is not desirous of telling the truth to the court at the instance of the party calling him. The mere fact that he gives evidence contrary to what the party calling him expects does not make him hostile, nor is the fact that he has made a previous inconsistent statement necessarily conclusive - **Hoffmann** p.351

FACTORS TO BE CONSIDERED

(i) Conduct and attitude in the dock - **S v Steyn 1987 (1) SA 353(W)**

(ii) Relationship of the witness to the opposing party - **Meyers Trustees V Malan 1911 TPD 559**

(iii) Previous conduct towards the party that called him

(iv) Circumstances of the case - **City Panelbeaters v Bhana and Sons 1985 (2) SA 155(D)**

(v) Nature of the evidence that he gives, e.g. unsuspecting, unfavourable.

(vi) Previous inconsistent statements made by the witness - **S v Jabaar 1982 (4) SA 652(K)**

(vii) Nature of the contradictions

(viii) Prejudice shown towards other witnesses, accused

(ix) Explanation given for the contradictions

PROCEDURE

- A court can never *mero motu* declare a witness a hostile witness, it can only do so at the request of the party that called him.

- The *onus* is on the applicant to prove that the witness is a hostile witness. This can be either by addressing the court from the dock or by leading evidence.

- The manner in which one may counter such evidence is either by calling other witnesses to contradict such evidence; or using the statement against this witness and or applying to court to declare this witness as a hostile witness.

EFFECT OF IMPEACHMENT.

The witness can, after being declared a hostile witness, be cross-examined by the party that called him.

The evidence given by the witness is not excluded *per se*.

- *DISCREDITING OF OWN WITNESS – SECTION 190(2)*

- The witness, through his evidence is prejudicing the party that called him.
- It is not necessary that the witness show a hostile animus against the party that called him.
- The party that called him only has to prove that the deviation in the evidence of the witness is material.
- The mere proof of a previous inconsistent statement suffices.

PROCEDURE

- The party that called him informs the court that he is planning to discredit his own witness.
- This can be done at any stage of the proceedings, but tactically it would be better to do it during re-examination because the other side is then prevented from cross-examining the witness.
- Put question to the witness about his statement
- Hands the statement in as an exhibit
- Request the witness to explain the contradictions
- The witness is then discredited
- Where the witness denies any of the facts it must be proved by means of a trial-within-a-trial
    - Address the presiding officer
    - Lead evidence as to the voluntariness of the statement
    - Call interpreter and corroborating witness, if necessary

EFFECT OF DISCREDITING

The evidence is excluded.

R v W and another 1960 (3) SA 247 (OK): Now it is no doubt competent for a court, while rejecting one portion of the sworn testimony of a witness, to accept another portion; but where a witness is clearly perjuring himself in matters of great importance, there should be very good reasons to justify a court in finding that in other respects he is speaking the truth.

• *INDEMNIFYING OF WITNESS –SECTION 204, ACT 51 OF 1977*

The indemnifying of a witness from prosecution takes place in accordance with the provision of section 204, Act 51 of 1977 when a person who might incriminate himself, is used as a witness for the prosecution. Normally a witness is entitled to call on the privilege against self-incrimination as set out in section 203, Act 51 of 1977.

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor –

(a) The court, if satisfied that such a witness is otherwise a competent witness for the prosecution, shall inform such witness: -

(i) that he is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;

(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) Such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly to all questions put to him –

(a) Such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b)

(c) The court shall cause such discharge to be entered on the record of the proceedings in question.

PROCEDURE

- When the witness is called to the witness dock the prosecutor will inform the court that a request for indemnity will be made. The prosecutor acts in his own discretion and may offer indemnity without authority from the Director of Public Prosecutions – **S v Ndabeni 1959 (2) ALL SA 630 (EC)**

- The prosecutor specifies the crimes/offences the witness would require to be indemnified from.
- The court must satisfy itself that the witness is indeed a competent witness.
- The witness is then informed that he is obliged to testify.
- The court informs the witness that during his testimony certain questions would be put to him, which might require from him to incriminate him.
- The witness is then informed that, should he answers such questions frankly and honestly, he/she will be, at the end of the proceedings be discharged from prosecution on the offences specified by the prosecutor - **S v Mnyamana 1990 (1) SACR 137(A)**.

  In **S v Ncube 1976 (1) SA 798(RA)** it was considered an irregularity to inform the witness that he must testify to the 'satisfaction of the court'. It is also an irregularity to compare a witness's testimony to his statement to the police and then decide that he did not answer 'frankly and honestly' – **S v Banda: In re Zikhali 1972 (4) SA 707(NC)**.

CROSS – EXAMINATION OF A WITNESS

SECTION 166(1) is the enabling provision

REQUIREMENTS

- Courtesy - **S v Tswai 1988 (1) SA 851 (K)**
- Fairness – provocative cross-examination can lead to an irregularity in the proceedings and cause the conviction to be set aside on review or appeal - **S v T 1986 (2) SA 112 (O)**
- Honesty - **S v Kubeka 1982 (1) SA 543 (W)**
- Admissibility – No cross-examination is allowed on inadmissible evidence - **S v Nkwanyana 1978 (3) SA 404 (N)**

LIMITATION OF THE RIGHT TO CROSS-EXAMINATION I.T.O SECTION 166(3)

If it appears to a court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits on the examination regarding the length thereof or regarding any particular line of examination. The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness

FAILURE BY THE STATE TO CONDUCT CROSS-EXAMINATION

This may, in certain circumstances, have the effect that the State fails to prove its' case beyond reasonable doubt. **S v Manicum 1998 (2) SACR 400 (NPD)**

S v Katamba 2000 (1) SACR 162 (NmS) – Headnote: It is advisable for State counsel, when cross-examining an accused, to challenge specific facts in the accused's evidence, which the State wishes to suggest as false. However, when state counsel challenges the whole of the accused's exculpatory evidence, by suggesting that it is untrue and putting the essence of the State's case to the accused, the mere fact that one of the exculpatory facts alleged by the accused, which is inconsistent with the State's case, is not specifically challenged by State counsel, cannot be regarded as an implied admission by the State of the accused's evidence on that point.

RE-EXAMINATION OF A WITNESS

SECTION 166(1) Act 51 of 1977 is the enabling provision

THE PURPOSE AND SCOPE A PROSECUTOR / LEGAL REPRESENTATIVE MAY RE-EXAMINE A WITNESS

S v Ramalope 1995 (1) SASV 616 (A): on 619C: The right of a party to re-examine his or her witness is, therefore, not a privilege or favour granted by the court, but a legal right, statutorily entrenched.

S v Ramalope (supra) on 619J - 620A : Generally speaking, the object of re-examination is to clear up any point or misunderstanding which may have occurred during cross-examination; to correct wrong impressions or false perceptions which may have been created in the course of cross-examination, to give the witness a fair opportunity to explain answers given by him under cross-examination, which, if unexplained, may create a wrong impression or be used to arrive at false deductions; to put before the court the full picture and context of fact elicited during cross-examination; or to give the witness an opportunity, to correct patent mistakes made under cross-examination…All these objectives are covered by section 166(1). The examples quoted above are not intended to be a *numerus clausus*.

Re-examination can be, and frequently is, a very important mechanism for presenting a full and fair picture of the evidence of a witness and thus arriving at the truth. Of course, if council wishes to deal with new matter (i.e. not arising from cross-examination) he requires the leave of the court to do so.

COURT CAN EXAMINE A WITNESS

- *SECTION 167 enables the court to call back any witness to testify*

> **S v Sigwahla 1967 (4) SA 566 (A)**: A judicial officer should ever bear in mind that he is holding a balance between the parties, and that fairness to both sides should be his guiding star, and that his impartiality must be seen to exist. There are occasions, particularly where a party is unrepresented, when the judicial officer will properly take some part in the examination of a witness; but in the main, and as far as is reasonably possible, he will usually tend to leave the dispute to the contestants, interrupting only when it is necessary to clarify some point in the interests of justice. Thereby he is better able to form objective appraisals of the witness who appear before him, and avoids creating wrong impressions in the minds of those present.

The party that originally called the witness cannot cross-examine the witness.

GUIDELINES SET DOWN FOR QUESTIONING BY THE COURT

Set down in **S v Rall 1982 (1) SA 828 (A)**

- It must be done such a manner that the impartiality of the court is at no stage questioned
- The court must at no stage become so involved in the questioning that it clouds the issues
- The court must at no stage intimidate or upset the witness in such a manner that it weakens his answers and effect his credibility

See in general **S v Gerberts 1997 (2) SACR 601 (SCA)**.

Section 186, Act 51 of 1977 – The court may subpoena a witness, not present, to testify. The only question should be whether it is in the interest of justice to do so, if the answer is in the affirmative, the witness should be called to testify - **S v Qunika 1989 (4) SA 869 (WLD)**. This witness is then the witness of the court and both parties would be entitled to cross-examine.

> **R v Hepworth 1928 AD 265**: A judge is an administrator of justice, he is merely a figure head, he has not only to direct and control the proceedings according to the recognised rules of procedure but to see that justice is done.

PROCEDURES:

- The witness must be a competent witness. See sections 192 and 194 of Act 51 of 1977, and **S v Jamba 1947 (4) SA 228 (C)**
- Witness must give admissible evidence - **S v Zakeyu 1957 (3) SA 198 (C)**
- The court is not entitled to call the accused as a witness
- Both parties must be given the opportunity to refute the evidence tendered by the court's witness **S v Lubbe 1966 (2) SA 70 (O)**
- Witness can be called at any stage of the proceedings - **S v Van Molenddorf 1987 (1) SA 135 (T)**

E. REAL EVIDENCE

Real evidence is any object that is tangible upon inspection and identification, the mere identification in court becomes evidence of the said object.

There various types of real evidence, below are just a few examples used daily in court:

- Appearances of the accused.
- Video footage and or recordings
- Documents
- Fingerprints
- Weapons in the form of a knife, firearm, axe
- Handwriting samples
- Blood tests
- Tape recordings

ADMISSABILITY REQUIREMENTS:

The evidence mentioned above must be relevant to the current proceedings be heard in court. The basic requirement is that the evidence has to be properly identifiable and that their no exclusionary provisions in terms of legislations dealing with the rule of evidence.

The witness will have to correlate his testimony in accordance with the real evidence and how the presentation of the real evidence is applicable to the commission of the offence the accused is charged with.

IDENTIFICATION AND PURPOSE OF REAL EVIDENCE BEING PRESENTED IN COURT:

The court independently will make its own observations regarding the presentation of the real evidence before court.

APPEARANCES OF PERSONS

The court may note the following appearances / features of a person under the following circumstances:

- After having heard the testimony of the witness, the court may inspect any wounds and or injuries sustained by the witness including an accused who testifies regarding wounds and or injuries sustained at the time of the commission of the offence.
- Where the identity of the person is in question.
- Identifying specific characteristics and of features like scars or tattoos.
- To determine the competency of a specific person / witness.

VIDEO FOOTAGE:

With the increasing accessibility of technology for everyday people, things are starting to get digitalized: digital camera, digital cable, digital sound, and digital video. It is no longer the case where a video production is only possible for specialized studios.

The purpose of submitting video, audio or photographic evidence to a court is usually to prove the truth of the contents of these recordings. The requirements for admissibility of this kind of evidence have, for many years, been a cause of judicial inconsistency.

The difference in approach by the Natal Provincial Division on the one hand and those of other divisions, on the other hand, has far-reaching consequences when it comes to admissibility of these recordings. The Natal Provincial Division considers these types of evidence as documentary evidence. The inevitable result is that the common law requirements for the

admissibility of documents, namely, originality, authenticity and truth of the contents, are applicable to these recordings. The judgments of the other provinces referred to take the position that these recordings are not documentary evidence but real evidence.

The requirement of the evidence being 'original', for admissibility cannot be defended: The unavailability of the original of electronic emanated evidence does not affect its admissibility. Disturbances, interferences and where portions are destroyed, only affects the evidential weight and not its admissibility.

PRESENTING VIDEO AND AUDIO EVIDENCE:

The prosecutor must know what kind of evidence it is, to be able to know if there are any admissibility requirements!

Must see the videos before presenting it. Ideal to watch videos together with person that made the recording.

In **S v Baleka and Others (1) 1986 (4) 192 on 199 F-G** the court found the following:

'In my view tape sound recordings and tape video recordings and a combination of the two are real evidence to which the rules of evidence relating to documents are not applicable'.

See also***:*** **S v W 1975 (3) SA 841 (T) on 843A** *(Photo and video tape)*

S v Fuhri 1994 (2) SACR 829 (A) (Photo)

POSSIBLE OBJECTIONS BY DEFENCE:

1) Not originals – Refer court to **S v Baleka and Others supra** (Not necessary to be originals)
2) Not authentic – Argue that it does not relate to admissibility but to evidential weight. **S v Baleka supra**. (No trial within a trial)
3) That it was tampered with and therefore not a true version of what happened – Adduce chain evidence to proof the contrary. (Evidential weight – credibility question, thus no trial within a trial necessary)

The case law dealing with the status, admissibility and cogency of audio and video tapes as evidence are not in harmony. In ***S* v Mpumlo & others 1986 (3) SA 485 (E)** Mullins J found that a video film was not a document (at 488H) but constituted real evidence which, provided it was relevant, could be produced as admissible evidence subject to any dispute that might arise concerning its authenticity or interpretation (at 490H).

The film in that case was a copy and no evidence had been adduced as to the whereabouts of the original or the correctness of the copy. The lack of such evidence, Mullins J found (at 492C–D), 'would not affect the admissibility of the video film, but only if the authenticity thereof was attacked, the weight to be attached thereto'. He expressly excluded from the ambit of these remarks, however, cine films (which he regarded as being far more akin to a photograph (at 489–90)) and audio tapes (which, he suggested, may be governed by different principles (at 492H)).

In **S v Ramgobin & others 1986 (4) SA 117 (N)**, however, Milne JP found himself 'unable to see any difference, in principle, between the admissibility of an audio tape recording and a video tape recording' (at 129). For such tapes to be admissible against an accused person in criminal proceedings he found the State had to prove the following beyond reasonable doubt: *(a)* that they were original; *(b)* that they had not been interfered with; *(c)* that they related to the occasion to which it was alleged they related; *(d)* that they were faithful; *(e)* that they proved the identity of the speakers; and *(f)* that they were sufficiently intelligible to be placed before the trier or triers of fact. In regard to the need for proof of accuracy, he added, there must be a witness to the event purportedly recorded who is able to testify that it accurately portrays that event. It need not be the person who made the recording but may be anyone who witnessed the event. In laying down these requirements Milne JP expressly rejected the approach taken by Mullins J in **Mpumlo.** He found authority for his view in the decisions of the English, American and Canadian courts, the only Appellate Division decision in point (*viz* **S v Veii 1968 (1) PH H49 (A)**), and the decision in ***S v Singh & another* 1975 (1) SA 330 (N)**. He accordingly excluded evidence of two audio tape recordings of extremely poor quality, holding that since they were inaudible there was no basis upon which the accused, their counsel, the court or anyone else could consider them. **Singh's** case was, however, rejected in **S v Baleka & others (1) 1986 (4) SA 192 (T)** where Van Dijkhorst J took the view (at 199F–G) that 'tape sound recordings and tape video recordings and a combination of the two are real evidence to which the rules of evidence relating to documents are not applicable'. The principle in **Mpumlo's** case which dealt with the visual component of video tapes should, he found, be

extended to govern the aural component of both video and audio tapes. Subsequently, in **S v Baleka & others (3) 1986 (4) SA 1005 (T)** Van Dijkhorst J (at 1023E) found himself unable to agree with the 'stringent test for admissibility' laid down by Milne JP in **S v Ramgobin**. His conclusions may be summarized as follows:

(*a)* The **Ramgobin** test derives from the real danger that tape recordings may be altered in such a way that even experts cannot detect the alteration. But it is absurd to exclude evidence merely because it is potentially dangerous where its correctness has not even been challenged or placed in issue. All evidence—even viva voce testimony—is potentially dangerous, but a court will not disregard it unless it is shown that these dangers are real and not illusory. Thus, an eyewitness may be cross-examined, and a tape recording may be 'gainsaid by calling the speakers themselves or members of the audience to cast doubt on its authenticity and veracity' (at 1023F–G).

(*b)* Although the State will ultimately have to convince the court of the reliability and accuracy of a recording, there is no reason why this has to be done before the final argument at the end of the case. All that need be established for admissibility is that prima facie the recording has some probative value.

(*c)* Reliability and accuracy need not be proven solely by the viva voce evidence of a witness who saw and heard the events recorded: even circumstantial evidence may in appropriate cases be sufficient.

(*d)* There is no ground or authority for applying the best evidence rule to evidence of tape recordings: proof of originality is therefore not a prerequisite to the admissibility of such evidence.

(*e)* The test laid down by Milne JP in respect of the authenticity of a recording is too wide. No hard and fast rule should be applied since even a tape that is partly unintelligible or 'interfered with' may be relied on by a court if it finds that the balance of the recording is reliable.

In sum, Van Dijkhorst J found, tape recordings should be treated in the same manner as any other type of real evidence. It is admissible if it is relevant; it is relevant if it has probative value; and it will only have probative value if it is linked to the issues to be decided. This link will often have to be supplied by evidence of identification of the voices on the tape in cases where the identity of the speaker is in issue. However, at this stage of the proceedings no more than

prima facie proof is necessary, and it is only at the end of the case that the dangers inherent in such evidence have to be weighed.

In **S v Nieuwoudt 1990 (4) SA 217 (A)** the Appellate Division found it unnecessary, on the facts of the case, to choose between the approaches taken by the courts in Natal and the Transvaal. Hefer JA expressed the view, nevertheless, that the latter approach seemed to be preferable. He went on to say, however, that even if proof of authenticity was a prerequisite for the admissibility of a tape recording, the recording could not be excluded solely on the ground that interferences ('steurings') in the form of erasures, substitutions or insertions appeared in it. Whereas every interference had to be examined because of the danger of distortion, not every interference necessarily or even probably pointed to a lack of authenticity. Hefer JA pointed out that it would be absurd to exclude a recording solely because of an accidental erasure and said that the same applied to deliberate interferences in circumstances where the remainder of the recording was not distorted. The crucial question was whether the State had excluded the reasonable possibility of a false recording, and that question had to be answered by having regard to the cumulative effect of all available indications; the State was not expected to exclude every separate factor which might weigh in favour of the defence. Further support for the **Baleka** approach in preference to the **Ramgobin** approach is to be found in **S v Fuhri 1994 (2) SACR 829 (A)**, where Hefer JA again found himself unable to agree with some of the remarks made by Milne JP in **Ramgobin**. In **Fuhri** it was held that where the ability of a 'speed camera' to measure the speed of a vehicle and to record it and its reliability were not in issue, and where it was common cause that the apparatus had been correctly set up and put into operation, a photograph taken by that camera was admissible even where there was no witness who could verify that it was a true image of what had appeared in front of the lens of the camera at the critical moment. The trustworthiness of the process could, in the court's view, be judicially noticed as too notorious to need evidence, since the science of speed photography had advanced to a sufficient degree of general recognition.

One of the issues in **S v Koralev & another 2006 (2) SACR 298 (N)** was the admissibility of certain pornographic images, found on the computer of one of the appellants, which had either been downloaded from the Internet or transferred from a digital camera. The court referred to the different views expressed by the courts in Natal and the Transvaal (discussed above) as well as the judgment of Hefer JA in **S v Fuhri** *(supra)* and reached these conclusions: First, that, since in the modern age such images can be and are tampered with (and with ease)

because of the available technology, it is 'essential for evidence in relation to such images to be approached with extreme caution' (at 307 *e–f*), so that one can accept and rely on such evidence only where due and proper compliance with these requirements has taken place. Second, before the evidence could be received, there had to be some proof of their accuracy in the form of corroboration that the events depicted actually occurred. This corroboration must be found in some independent source of evidence which makes the evidence constituted by the images 'more acceptable in that it supports an aspect or aspects thereof' (at 307 *a–b*).

The court found that it would be extremely unsafe to rely solely on the evidence of the images to convict the appellants on a charge of unlawfully possessing child pornography: the computer was accessible to at least two other people, apart from the appellants (who were husband and wife). It disagreed, too, with the finding of the magistrate that the images were 'original' images. In its view the original images would have been those contained on the camera disk or the original source from which the images had been loaded onto the Internet site.

Koralev's case thus clearly leans more toward the views expressed in **Singh** and **Ramgobin** than those endorsed in **Baleka (1)** (supra) and **Baleka (3)** (supra). Its insistence on proof of originality and corroboration goes beyond the less formal test put forward in the latter cases.

The Supreme Court of Appeal in **Mdlongwa 2010 (2) SACR 419 (SCA) 427f-h** has finally given a conclusive judgement on this issue where it held undeniably and unequivocally that video evidence is real evidence and that it need not be established that the original footage was used in order to have it introduced into evidence.

The basic evidentiary rule is that all relevant evidence is admissible unless excluded either by the common law or by statute. See **Ex Parte Rosch [1998] 1 All SA 319 (W)**; **R v Trupedo 1920 AD 58 62** and **R v Katz 1946 AD 71, 78**.

- TRIAL-WITHIN-A-TRIAL

A trial-within-a-trial may be conducted to allow a party to identity (authenticity) the electronically emanated evidence to prove the admissibility of that evidence. The court is obliged to listen to the recordings during the trial-within-a-trial in order to adjudicate admissibility of the tapes. This situation is not analogues to the admissibility of a confession

since the contents of the recording cannot be equated with the contents of a confession. See **Motata v Nair 2009 (1) SACR 263 (T)**.

The trial-within-a-trial procedure followed in the **Motata** case can be contrasted with the different approach taken by the trial court and approved of by the appellate division in **Nieuwoudt 1990 (4) SA 217 (A) 231B**. In the **Nieuwoudt** case, the defence objected to the admissibility of the tape recording on the basis that it is not authentic but a fabricated tape recording. No trial-within-a-trial was held but the court followed the procedure adopted by a full bench in **Singh 1975 (1) SA 330 (N)**. The State, with the consent of the defence, submitted all its evidence in the main trial, including evidence on the authenticity of the tape. After closure of the State's case, the defence lead all its evidence on this issue. The State and the defence only argued on the authenticity of the tape recording during their final arguments and the court only dealt with it during its final judgement. The appellate division concluded that this procedure was undoubtedly the more practical one because the question of authenticity of the tape was closely related to the credibility of a number of witnesses, which could at best be adjudicated after hearing all the evidence.

- ***DOCUMENTS***

A document may provide probative value in so far as the contents are fixed and may give a clear indication and or interpretation of the facts in issue, for example, in fraud cases. However, there is a concern that documents may be falsified and thus it is crucial for the author to validate the authenticity of the contents as well as the originality thereof. The main requirement for a document to be used in court is that the prosecutor needs to prove its originality as well authenticity before it can be admissible in court. Besides the law of evidence there are various other statutes that makes provision for the handing in of documentary evidence, for example S 212 of the CPA, The Electronic Communications and Transactions Act and the recent promulgation of the Cyber Crime Act.

- ***INSPECTIONS IN LOCO***

This form of evidence allows the court to inspect a scene of crime as a result of this inspection the court is able to follow the testimony of the witness clearly as well as there may be certain factors omitted in the testimony which may allow the court to draw inferences which may

strengthen or negate the version of the witness in so far as corroboration of the evidence is being considered.

- *FINGERPRINTS AND HANDWRITING*

This form of evidence is not visible to a lay person and as such, a subject matter expert will testify as to the features of both the fingerprints as well as the disputed handwriting sample. This aspect will be dealt with more under Expert / Opinion Evidence below.

- *BLOOD TESTS AND DNA*

Blood tests are used a lot in criminal matters wherein the prosecution will lead evidence to prove offences like driving under the influence and DNA results for either paternity tests and or to link the accused in matters stemming from a sexual nature. In terms of the S37 of the Criminal Procedure Act 51 of 1977, no suspect may refuse to give a blood sample.

- *TAPE RECORDINGS*

Tape recording may be admissible as real evidence only if the prosecution is able to prove the following:

1. The court is satisfied on the mere production thereof it is prima facie original;
2. The recording is identifiable;
3. Evidence is led to identify the participants in the recording;
4. The court is able to draw an inference from the contents of the conversation;
5. Any transcription of the recording, also accompanied by a transcriber's certificate.

F. DOCUMENTS AND DOCUMENTARY EVIDENCE

Includes any device by means of which information is recorded or stored

[s 221(5) CPA];

To simplify: If one needs to read or listen to **and interpret** the content of evidential material in order to draw certain inferences, it will be documentary in nature.

Seccombe V Attorney-General 1919 TDP 270: The word "document" is a very wide term and includes everything that contains the written or pictorial proof of something. It does not matter of what material it is made. If it contains in writing or in cyphers proof of some facts it is a document, and the fact that a number of leaves happen to be bound together so as to take the appearance of a book cannot make any difference. If in fact it contains written proof of facts, it is a document.

Step 1

Identify the legal principles that should be applied

- Common law;
- Statutory law; or
- Both.

THE REQUIREMENTS FOR ADMISSIBILITY

The general rule is that no evidence may be used to prove the contents of a document except when the original is available. The court may allow secondary evidence only if copies of the secondary evidence can be authenticated regarding the contents through oral evidence.

AT COMMON LAW

Original (primary evidence; best evidence)
Ideally, the original document/ video footage must be presented;
Normally there will only be one original document / video footage but the possible existence of duplicate or multiple originals may exist;
The following are examples of exceptions to the rule that the original document / video footage must be presented:
Where the original was destroyed or cannot be found after diligent search or non-production can be satisfactorily explained;
Where the original is in the possession of the opposing party;
Where production of the original will be illegal (e g driver's licence);
Where a statutory provision dispenses with presentation of the original.

Authentic (genuine)

Authenticity of the document/ video footage does not mean that the contents of the Document / video footage is the truth.
Once the documentary evidence has been ruled admissible, the truth and reliability of such evidential material can only be decided on at the end of the case with due regard to all other evidential material and the evidential value of the particular document.
Authenticity merely means that the document is what it purports to be and was written executed / captured or made by the person who purports to have done so.

In a number of instances, a document need not be identified or authenticated by a witness. The following instances wherein authentication's required

1. When a person discovered a document and the witness has been requested to bring the said document before court.
2. When the court takes judicial notice of the document;
3. When the parties admit the authenticity of the document;
4. When a statute provides for an exception.

Reference is made to Chapter 24 of the Criminal Procedure Act 51 of 1977.

Generally admissible

All other requirements for admissibility that may be applicable in terms of the law of evidence (e.g. competence of the "author", relevance, hearsay, privilege, s 35(5) of the Constitution of the Republic of South Africa, 1996, etc.) as well as particular statutory requirements (e g compliance with the provisions of the Stamp Duties Act, 1968 (Act No 77 of 1968) or the Justices of Peace and Commissioners of Oaths Act, 1963 (Act No 16 of 1963)) must have been complied with.

STATUTORY PROVISIONS:

THE CRIMINAL PROCEDURE ACT 51 OF 1977

- Includes any book, pamphlet, letter, circular letter, list, record, placard or poster (s 246 of the Criminal Procedure Act, 1977 (Act No 51 of 1977))
- Includes any newspaper, periodical, book, pamphlet, letter, circular letter, list, record, placard or poster (s 247 Criminal Procedure Act, 1977)
- Includes any device by means of which information is recorded or stored (s 221(5) Criminal Procedure Act, 1977)
- Includes any book, map, plan, drawing, or photograph and 'statement' includes any representation of fact, whether made in words or otherwise (s 33 of the Civil Proceedings Evidence Act, 1965 (Act No 25 of 1965) as made applicable in criminal proceedings by s 222 of the Criminal Procedure Act, 1977)

MEDICAL EVIDENCE – J88

S v Hlongwane 2002 (2) SACR 37 (TPD) - Headnote: Form J88, which is commonly used by district surgeons, medical officers and medical practitioners to record their findings after conducting a medical examination in a case of alleged assault or other crime, is intended to be completed as an unsworn certificate by that person relating to the condition of a person alleged to have been involved in some way in a crime. Form J 88 cannot automatically be regarded as a certificate contemplated by section 212(4) and (12) of the Criminal Procedure Act 51 of 1977. ……. Without the doctor's oral evidence in the witness box, a non-complying certificate is not admissible at all.

G. EXPERT EVIDENCE

In many criminal matters wherein a prosecution is invoked, either the prosecution or the Defence adduce the evidence of an expert. Such evidence will usually consist of an oral statement made in court under oath or affirmation (oral/*viva voce* evidence) and is generally accompanied by documentary and/or real evidence.

DEFINITION OF AN EXPERT WITNESS

*An expert witness is a witness who possesses **knowledge** in a **specialized field** and*

*whose function is to **assist the court** in arriving at a correct decision* [our emphasis].
Gouws 1967 (4) SA 527 (E)

NATURE OF EVIDENCE

An expert witness may present the following evidential material (oral, documentary or real evidence) to court:

- Direct (factual) evidence where the witness personally and objectively ascertained certain facts by applying his/her knowledge, experience and expertise; and
- Opinion evidence where the witness interprets and/or expresses an opinion based on certain data/information/facts/findings. Such evidence will normally be circumstantial in nature with the result that, if ruled admissible, the evidence should further satisfy the rules as set out in **R v Blom 1939 AD 188 at 202** namely that –
  - the inference sought to be drawn must be consistent with all the proved facts; and
  - the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

- *"It must never be forgotten that the function of the expert is not to decide the case. The function of the expert is to provide the court with the tools to assist it in deciding the case. The extent to which the opinions advanced by an expert are to be accepted will depend upon whether, in the judgment of court, those opinions are founded on logical reasoning or are otherwise valid."*
  Ncube and others 2011 (2) SACR 471 (GSJ).

Section 224 of the CPA stipulates, however, that judicial notice **shall** be taken of any law or any matter published in the Government Gazette or the Official Gazette of a province or any law published under superintendence or authority of the Government Printers.

The court is thus the expert on South African Law and no evidence may be presented in court on the court's field of expertise.

In **De Klerk v Scheepers and others 2005 (1) SACR 475 (TPD)** Ngoepe JP said

"*It would, in my view, be an abuse of the process to subpoena somebody to come and give evidence on points of law, as that kind of evidence would be irrelevant and inadmissible*"

Mthiyane JA said the following in **Director of Public Prosecutions KZN v P 2006 (1) SACR 243 (SCA)**: "*Courts do not need professors of law to tell them what the law is or should be*"

For the evidence to be admissible, it must further be shown that:

- The expert
  - is competent to express the particular fact or opinion; and
  - has personal knowledge of or experience in the topic in question; or
  - relies on the knowledge or experience of other acceptable experts in the particular field of expertise. **Manday v Protea Assurance 1976 (1) SA 565 (E)**

  The evidence is not based on a hypothetical situation but that grounds exist upon which the fact or opinion is founded. **Mkohle 1990 (1) SACR 95 (A)**
- When the expert conducted a scientific examination/analysis (e g DNA-testing), the processes (including control measures) applied, were executed and recorded with such care that it can be verified by any objective scientist at any time and eventually also by the trial court (presiding officer). **Maqhina 2001 (1) SACR 241 (T)**

It remains the duty of the court to establish whether the witness possesses sufficient skill, training or experience to assist it and is therefore competent to testify as an expert.

Manday v Protea Assurance supra

An expert witness may not merely convey the opinion of others as contained in textbooks. He/she must show that (s)he has personal knowledge of the matter

and may refer to textbooks only for purposes of refreshing his/her memory or to explain or support his/her own opinion and then only if (s)he associates him-/herself with the contents. Only those parts of the textbook to which reference was made, becomes evidential material.

Harris 1965 (2) SA 340 (A)

Shine 1997 (1) SACR 212 (NM)

S v S [2012] JOL 28508 (SCA)

Bramwell v S [2015] JOL 32688 (ECG)

The provisions of s 212(1) to (11) CPA in terms of which certain facts may be proved through an affidavit or certificate, may be applicable.

It is therefore not necessary for the (expert) deponent to appear in court to testify to the fact(s) or matter(s) thus established unless the court exercises its discretion in terms of s 212(12) CPA to subpoena the deponent or cause written interrogatories to be submitted to the deponent.

OPINION EVIDENCE

Generally, opinion evidence is irrelevant and therefore inadmissible as it has no probative value and cannot assist in proving a fact in issue.

Where an opinion is used as evidence in court it must be relevant and admissible only if it can assist the court in deciding on a fact in issue.
Circumstances wherein opinion evidence becomes relevant and admissible:

- Where the knowledge and competency fall within the experienced gained by the lay person.
- Where a qualified expert assists the court in determining facts in issue that require specialised knowledge not available to the court.

The evidence led on the knowledge of the witness cannot deduce an opinion that results in a conclusion in law.

Exceptions

Opinion of lay persons

Requirements

- Witness must be competent to express an opinion - **S v van den Berg** 1975(3) SA 354(O)
- The court must not exchange his opinion with that of the witness. **S v Mashile 1993(2) SACR 67(A)**
- The grounds upon which the opinion is based must be set down at first. **S v Claassen 1976(2) SA 281(O)**

S v Govender 1968(3) SA 14(N):……. , a witness must not merely be asked to express a conclusion which relates to the question which the court is called upon to decide; the court is not allowed without more to rely upon such conclusion and thereby to constitute the judgement of the witness, whether or not, for its decision.

➢ SIMILAR FACT EVIDENCE

General

Similar fact evidence is, in general inadmissible because;
(i) it is irrelevant
(ii) it can be prejudicial against the accused

S v Yengeni and others (2) 1991 (1) SACR 329 (C): I would, however, record that the emphasis which is laid upon disallowing similar fact evidence in criminal trials stems from the fact that such evidence is prejudicial.

The most important characteristics noted in similar fact evidence are as follows:
Nexus to determine relevance

NB – These are only guidelines and not a *numerus clausus*
(i) Continuous conduct – ***Valkin v Daggafontein Mines Ltd 1960 (2) SA 507 (W)***; ***S v Lebogang 1980 (4) SA 236 (O)***; ***R v Maharaj 1947 (2) SA 65 (A)***
(ii) Improbability of chance or similarity – ***R v Roets 1954 (3) SA 512 (A)***; ***R v Jones 1970 (2) PH H 129 (A)***, ***S v Motshekwa 1993 (2) SACR 247 (A)***
(iii) Common origin – ***Laubscher v National Foods Ltd 1986 (1) SA 553 (ZH)***
(iv) Presence at a certain place– ***R v Dlamini 1960 (1) SA 880 (N)***; ***S v Khanyapa 1979 (1) SA 824 (A)***
(v) Contradiction of an otherwise available witness – ***S v M 1970 (1) SA 323 (RAD)***; ***S v Solomons 1959 (2) SA 352 (A)***

The basic enquiry is whether the proposed similar fact evidence has sufficient probative force or cogency to be admitted despite the general rule against it– ***S v Yengeni and others (2) 1991 (1) SACR 329 (C)***

S v Mavuso 1987 (3) SA 499 (A): *It is clear that the evidence of criminal actions other than those laid in the indictment is inadmissible merely to show a criminal propensity. But it is, I think equally well established – albeit seldom free from difficulty of application in any particular case – that evidence which is relevant to an issue before court is not rendered inadmissible merely because it tends to show the commission by the accused of other crimes.*

S v M and others 1995 (1) SASV 667 (BA): *I respectfully agree with the approach and the broad guidelines that to be admissible, the similar facts bear a striking similarity to the evidence in relation to the offence charged. The use of the word "striking" which can also mean, inter alia, "remarkable", "astonishing", "impressive", strengthens the concept that the admissions of similar fact evidence requires a strong degree of probative force bearing in mind the basic principle that its admission is out of the ordinary and unusual. It must however be borne in mind that a stricter test is applied when similar fact evidence is sought to be led against the accused, as against when it is intended to be used as, say against the police. The difference arises from the concept of the prejudicial effect on the accused.*

See ***S v Naryan 1998 (2) SASV 347 (WLD)*** for application in theft of a motorvehicle

The use of similar fact evidence to determine identity was discussed in ***S v D 1991 (2) SACR 543 (A) on 546g to 547b*** and ***S v Wilmot 2001 (1) SACR 362 (E)***.

Statutory exceptions

- Section 197, Act 51 of 1977
- Section 211, Act 51 of 1977. **S v Papinyana 1986 (2) PH H 115 (A)**
- Section 240, Act 51 of 1977. Evidence can be presented about the previous convictions, on counts of possession of suspected stolen property, fraud and dishonesty of an accused to prove that the accused knew that the goods were stolen. **R v Carrim 1959 (1) SA 617 N)**

➢ PREVIOUS CONSISTENT STATEMENTS

RULE:

Inadmissible at common law

R v Roberts 1942 ALL ER 191: *It is because it does not assist the elucidation of the matters in dispute that the evidence is said to be inadmissible on the ground that it is irrelevant*

EXCEPTIONS

(a) **To refute allegations of recent fabrication**

S v Berg 1976 (4) SA 857 (A): *Die begrip "onlangse versinsel" is nie 'n omlynde begrip nie en dit is die plig van die hof, by 'n probleem van hierdie aard, om vas te stel of die aanval op die getuie se getuienis wesenlik ooreenkom op suggestie, uitdruklik of implisiet, dat vir doeleindes van die saak hy iets as 'n feit beweer wat tydens die aflê van sy getuienis 'n versinsel is of in sy verbeelding bestaan.*

S v Moolman 1996 (1) SASV 267 (A): Een van die uitsonderings op die algemene reël is die betreffende die weerlegging van 'n aantyging van onlangse versinsel. Dit is gevolglik nie nodig vir die inwerkingstelling van die beginsel dat sy getuienis 'n onlangse versinsel is nie; dit is genoegsaam as so 'n beskuldiging implisiet in die kruisondervraging is.

(b) **Previous identification**

R v Rassool 1931 NPD 112: *Therefore it seems to me that evidence of previous identification should be regarded as relevant for the purpose of showing from the very start that the person who is giving evidence in Court identifying the prisoner in the dock is not identifying the prisoner for the first time, but has identified him on some previous occasion in circumstances such as to give real weight to his identification*

(c) Complaints of a sexual nature

- Which crimes?
  Rape, indecent assault, incest, sodomy, carnal intercourse with a girl under the age of 16 years, indecent acts with boys and girls, *crimen iniuria* - **S v V 1961 (4) SA 201 (O)**
- Voluntary report
  Must be made freely and voluntarily - **S v T 1963(1) SA 484(A)**
  On the first possible occasion

R v C 1955 (4) SA 40 (N): It must have been made, without undue delay but at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complainant could reasonably be expected to make it.

- Complainant must testify – **R v Kgaladi 1943 AD 255**

(d) Statutory Exceptions

- Explanation of plea – Section 115
  The fact that the accused's explanation is repeated under oath does not give it more evidentiary value. - **S v Mogoregi 1978 (3) SA 13 (0)**
- Section 212(12), Act 51 of 1977. *Viva Voce* evidence about Section 212 certificate
- Section 215(4), Act 51 of 1977.
- Section 222, Act 51 of 1977.

➢ CIRCUMSTANTIAL EVIDENCE

Circumstantial evidence is not necessarily evidence of a lesser probative value - **S v Shabalala 1966 (2) SA 297(A)**
Every piece of circumstantial evidence must not be considered in isolation because it is the cumulative effect of the evidence that must be considered - **S v Kessel 1968 (4) SA 224 (A)**

R v de Villiers 1944 AD 493: The cogency of circumstantial evidence usually arises from the number of independent circumstances which all point to the same conclusion. Each fact may be in itself perfectly consistent with innocence, but the court is not obliged to consider them in isolation. The question is whether the evidence as a whole furnishes sufficient proof of guilt.

R v Blom 1939 AD 188: In reasoning by inference there are two cardinal rules of logic which cannot be ignored. One, the inference sought to be drawn must be consistent with all the facts. If it is not, the inference cannot be drawn. Two, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

S v Letsoko en 'n ander 1964 (4) SA 768 (A): The true position is that, in cases resting on circumstantial evidence, if there is a prima facie case against the accused, which he could answer if innocent, the failure to answer becomes a factor to be considered along with other factors, and from the totality the court may draw the inference of guilt.

Serious defects in the evidence of an accused can be taken into consideration in order to strengthen the circumstantial evidence against him.

S v Cooper 1996 (2) SA 875 (T): When triers are fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which are sought to be established.

➢ CORROBORATION:

Corroboration is evidentiary material outside the evidence corroborated.

DPP v Kilbourne 1973 ALL ER 440 on 447H: The word corroboration is not a technical term of art, but a dictionary word bearing its ordinary meaning.
On 463A: Corroboration is therefore nothing other than evidence which confirms or supports or strengthens other evidence … It is, in short, evidence which renders other evidence more probable. If so, there is no essential difference between, on the one hand, corroboration and, on the other, supporting evidence…

S v C 1965 (3) SA10 (N): Corroboration means some evidence in addition to that of the complainant which is consistent with his story and in some degree inconsistent with the innocence of the accused.

RULE AGAINST SELF-CORROBORATION

It must come from an independent source – ***R v Manyana 1931 AD 386***; ***R v Rose 1937 AD 467***; ***S v Berg 1976 (4) SA 857 (A)***

Properties of corroboration
i) It must be admissible – ***R v Qwabe 1939 AD 255***
ii) Can be provided by any means – ***S v van As 1976 (2) SA PH H205 (A)***; ***S v Shabalala and two others 1977 (2) PH H 201 (A)***

Baskerville 1916-17 ALL ER 39: The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime…. Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case (homosexual conduct), could never be brought to justice.

iii) Corroboration must come from a source outside the fact that needs to be corroborated – ***R v Christie 1914 AC 545***; ***S v Rossouw 1994 (1) SASV 626 (OK)***
iv) It must be on a material aspect – ***S v P 1957 (3) SA 444(A)***; ***S v Artman 1968 (3) SA 48 (A)***
v) Corroboration does not alter the evidentiary burden - ***S v Kearney 1964 (2) SA 495 (A)***; ***R v Ndlovu 1983 (4) SA 507 (ZS)***
vi) Corroboration can also be provided by the opposing party – ***S v W 1963 (3) SA 516 (A)***; ***S v Rossouw 1994 (1) SASV 626 (OK)***
vii) An accused who fabricates his alibi could also serve as corroboration – ***Thebus and another v S [2002] 3 All SA 781 (SCA)***

STATUTORY CORROBORATION IS ONLY REQUIRED WITH A CONFESSION.
Section 209, Act 51 of 1977: *An accused may be convicted of any offence on the single evidence of a confession by such an accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.*
S v Mjoli 1981 (3) SA 439 (A); ***S v Erasmus 1995 (2) SASV 373 (E)***

➢ CAUTIONARY RULE

The courts in various decisions have applied the cautionary rule when evaluating certain categories of evidence which through experience have shown to be unreliable, however our courts have also indicated that the cautionary approach should not replace common sense This purpose of this approach to safeguard the risk of an incorrect finding based on evidence presented to court.

There is no closed category of pointers to truth; if the court is satisfied upon rational grounds that a witness is reliable, it is not obliged to reject his evidence because those grounds have not been mentioned in any decided case.

➢ PRIVATE DETECTIVE

The evidence of a private eye is handled with care because he may have a subjective interest in the outcome of the trial – **Preen v Preen 1935 NPD 138**
Contra: In **Van Vuuren v Van Vuuren 1931 GWP 42** it was decided that the stain to his career, if he falsely testifies in court, will be a sufficient deterrence to keep him from doing that.

➢ SINGLE WITNESS

Section 208, Act 51 of 1977
An accused may be convicted on any offence on the single evidence of any competent witness.

A witness can be a single witness on a particular fact although he might be corroborated in other aspects – ***S v Letsedi 1963 (2) SA 471(A)***

R v Adboorham 1954 (3) SA 163 (N): The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true. The court may be satisfied that the witness is speaking the truth notwithstanding that in some respects he is an unsatisfactory witness.

S v Sauls 1981 (3) SA 172 (A): There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness …… The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule …….., may be a guide to a right decision but it does not mean that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded ……It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

S v Artman and another 1968 (3) SA 339 (A): In accepting the evidence of a single witness all that is required is that his testimony should be clear and satisfactory in all material respects. The ultimate requirement is proof beyond reasonable doubt and courts must guard against their reasoning tending to become stifled by formalism.

S v Floros 1962 (1) PH H 91 (N): The evidence of one witness cannot be accepted if he:
(i) has an interest or bias to the accused
(ii) has made a prior inconsistent statement
(iii) contradicts himself in the witness box
(iv) has been convicted of an offence involving dishonesty
(v) has not had proper opportunities for observation.

S v Texeira 1980(3) SA 755(A): I think I am stating the obvious in saying that, in evaluating the evidence of a single witness, a final evaluation can rarely, if ever be made without considering whether such evidence is consistent with the probabilities.

➢ ACCOMPLICES

The term includes participants (co-accused an accomplices), as well as non-participants (accessory after the fact) - ***S v Malinga and others 1963 (1) SA 692 (A)***

S v Choucan 1987 (2) SA 315 (ZH): That policy of the rule applies in my view to a person who is afterwards acquitted as well as to the one who is convicted, as long as both were charged with an offence in connection with the same criminal transaction. This case fits the bill. Some witnesses may be accomplices or quasi-accomplices. The same cautionary rule still applies.

S v van Vreden 1969 (2) SA 524 (N): When it is said that the merits of an accomplice as a witness must be "beyond question" in order to be accepted as sufficient for a conviction this does not mean that his evidence must be free from any defects.

➢ CHILDREN

Children are not prohibited by law to testify.
The cautionary rule to be applied with a child witness can be overcome by the evidence of another child – ***S v De Graaff 1992 (1) PH H 23 (A)***, if that witness's evidence is also treated with caution

R v Manda 1951 (3) SA 158 (A): The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting perhaps to suspicion …….. The trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is no reason to suppose that such appreciation was present a Court of appeal may hold that the conviction should not be sustained.

See **S v Mathebula 1996 (2) SACR 231 (T)**

S v Viveiros [2000} 2 All SA 86 (A) op 88c-d: In view of the nature of the charges and the age of the complainant it is well to remind oneself, at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution, and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach. (**S v J 1998 (2) SA 984 (A)**)

Also reported as **S v V 2000 (1) SACR 453 (SCA)**

S v Jackson 1998 (1) SACR 471 (SCA) op 473F: In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of the accused beyond

reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

➢ TRAPS

The trap is considered as a participant to a crime and the cautionary rule governing accomplices will apply – **R v Milne en Erlich (7) SA 791 (A)**

S v Tscochlas 1974 (1) SA 565 (A): Although traps are not regarded as accomplices, nevertheless their evidence is in general treated with caution because of a motive to favour the prosecution.

S v Omar 1948 (1) SA 76 (T): As far as the trapping aspect of the case is concerned, two of the recommended safeguards were not carried out …….. That however, is not fatal to the case, if there are other good grounds for believing the traps evidence.

➢ SEXUAL OFFENCES

No statutory provisions are laid down for the handling of evidence in sexual cases. However, through the years a cautionary rule developed to be applied in considering the evidence of a complainant in a sexual offence.

These cases are particularly subject to the dangers of deliberately false charges resulting from sexual neurosis, fantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed – Glanville Williams, The Proof of Guilt (3) p 158

Reasons

(a) It is easy to fabricate and very difficult to refute – ***S v J 1966 (1) SA 88 (RA)***; ***S v Stemmet 1990 (1) PH H 16 (A)***; ***S v Snyman 1968 (2) SA 582 (A)***
(b) The origin of the accusation might be vengeance – ***S v J (supra)***
(c) An emotional reaction may cause the accusations – ***R v Rautenbach 1949 (1) SA 135 (A)***
(d) The financial position of the man may be the reason – ***R v W 1949 (3) SA 772 (A)***
(e) Circumstances may force the complainant to shout rape – ***S v J (supra)***
(f) "Spite, sexual frustration or other unpredictable emotional causes"– Hoffmann & Zeffertt p.579

S v Snyman 1968 (2) SA 582 (A): Hence in sexual cases there has grown up a cautionary rule of practice similar to that in accomplice cases which requires –
(a) the recognition by the court of the inherent danger aforesaid; and
(b) the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or in the absence of gainsaying evidence from him, or his mendacity as a witness

S v Jackson 1998 (1) SACR 471 (SCA) op 473F: In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of the accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

S v Katamba 2000 (1) SACR 162 (NmS) – Headnote: The cautionary rule applicable to complainants in sexual cases has outlived its usefulness. There are no convincing reasons for its continued application. The constitutional requirement (contained in art. 12 of the Constitution of Namibia, Act 1 of 1990) that: The accused is presumed innocent until proven beyond reasonable doubt to be guilty, reiterates and reinforces a fundamental principle of our criminal law and procedure. That principle, together with cautionary rules regarding the evidence of youthful witnesses, particularly children, and the evidence of single witnesses, would in the normal run of cases afford sufficient protection to the innocent accused. The additional burden of the application of the cautionary rule under discussion may adversely infringe the fundamental rights of victims, which include a fair trial also as regards to such victim's rights and interests. Accordingly, the cautionary rule applicable to complainants in sexual cases must not be applied in Namibia. However, that does not mean that the nature and the circumstances of the alleged offence must not be considered carefully. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

➢ CREDIBILITY

No set rules can be formulated in judging the credibility of a witness. The way in which credibility is handled will depend on the prudence of the presiding officer.

EXAMPLES OF ASSESSMENT DEALING WITH CREDIBILITY

1. TENDENCY TO LIE

S v Mtsweni 1985 (1) SA 590 (A): Leuenagtige getuienis of 'n valse verklaring regverdig nie altyd die uiterste afleiding nie. Die gewig wat daaraan verleen word moet met die omstandighede van elke geval verband hou.

2. CONTRADICTIONS

S v Mokhle 1990 (1) SASV 95 (A): Contradictions per se do not lead to the rejection of a witness's evidence, they may be simply indicative of an error. Not every error made by a witness effects its credibility; in each case the trier of the fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.

S v Nyembe 1982 (1) SA 835 (A): I am always surprised that witnesses can, after a passage of weeks and months, recollect how they were seated in a motor car, what route they travelled and at what time they reached their venue. I am not surprised, however, when they fall into contradiction. The wise trial judge knows that human memory is only too fallible; perhaps he should bear in mind the Spanish proverb 'Memory, like woman, is usually unfaithful'!

S v Bruiners en 'n andere 1998 (2) SACR 432 (SOKPA) at 439e-f: Ondervinding het geleer dat daar byna nooit twee of drie getuies sal wees wat presies dieselfde getuienis sal aflê met betrekking tot dieselfde voorval of gebeure nie. Dit is derhalwe vir die verhoorhof om te besluit, inaggenome die getuienis as geheel, of sodanige verskille wesenlik genoeg is voordat gesê kan word dat die Staat se weergawe nie aanvaar kan word nie.

S v Mafaladiso en andere 2003 (1) SACR 583 (SCA) at 593j – 594f: Die blote feit dat daar self-weersprekings voor hande is, moet deur 'n hof met omsigtigheid benader word. Eerstens moet nougeset vasgestel word wat die getuie werklik bedoel het om op elke geleentheid te sê ten einde te bepaal of daar 'n weerspreking voorhande is en wat die presiese omvang daarvan is. In hierdie verband moet die feite-beoordeelaar in ag neem dat 'n vorige verklaring nie by wyse van kruisverhoor afgeneem is nie, dat daar taal-en kultuurverskille tussen die getuie en die opskrifsteller mag wees wat die korrektheid van wat presies bedoel is om in die weg te staan, en dat die verklaarder selde of ooit deur 'n polisiebeampte gevra word om in detail sy of haar verklaring te verduidelik. ……..
Tweedens moet dit steeds voor oë gehou word dat nie elke fout deur 'n getuie en nie elke weerspreking of afwyking die getuie se geloofwaardigheid aantas nie (sien **S v Mokhle 1990 (1) SASV 95 (A) op 89f-g)**. Nie-wesenlike afwykings is nie noodwendig relevant nie. ……
Derdens moet die weersprekende weergawes steeds oorweeg en ge-evalueer word op 'n holistiese basis. Die omstandighede waaronder die weergawes gemaak is, die bewese redes vir die weersprekings, die werklike effek van die weersprekings ten aansien van die getuie se betroubaarheidof geloofwaardigheid, en die vraag of die getuie voldoende geleentheid gehad het om die weersprekings te verduidelik – en die kwaliteit van die verduidelikings – en die samehang van die weersprekings met die res van die getuie se getuienis moet onder andere in ag geneem word.

3. ATTITUDE AND CONDUCT OF THE WITNESS IN THE WITNESS STAND MUST BE HANDLED WITH CARE.

S v Boshomane 1980 (2) PH H 176 (T): The effect of demeanour in assessing credibility is a matter of judgement and common sense, but it must be remembered that the truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors.

R v Momokela 1963 (O) 23: In addition to the demeanour of the witness one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under inquiry.

S v Viveiros [2000] 2 All SA 86 (A) at 88i- 89a: It is of little value to judge an accused on his demeanour in the witness box and to convict on this ground. In this regard the magistrate sates that "the accused was ill at ease when testifying". Such conduct is not unusual nor surprising amongst accused persons or indeed witnesses generally who may be afraid or even overwhelmed at the experience of giving evidence in court, possibly for the first time.

4. PREJUDICE

The court must determine whether or not any prejudice is present with the witness

R v Mendy (1976) Cr. App. R4: There is no reason in logic why the mere fact of a contradiction, or of several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness.

5. **IMPORTANCE OF A CREDIBILITY FINDING BY THE TRIAL COURT**

S v M 1999 (2) SACR 548 (SCA) at 556i – 557a: It is to be regretted that the magistrate made no considered findings on the quality of the witnesses, particularly on the credibility of the complainant and the appellant. In his reasons for the conviction, hardly a word was said about appellant's evidence. Moreover, he did not appear to apply his mind properly, if at all, to the highly unsatisfactory aspects of the complainant's evidence to which I have referred. The result is that this court is called upon to reach a decision in a serious criminal case without the assistance of detailed reasoning which is usually required of a court of first instance.

➢ HEARSAY EVIDENCE

Section 3, Act 45 of 1988, governs the presentation of hearsay evidence.
Hearsay is described in section 3(4): *hearsay evidence means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.* See ***Mdani v Allianz Insurance 1991 (1) SA 184 (A)***. *In* ***S v Saat 2004 (1) SA 593 (W)*** it was held that evidence delivered in previous civil or criminal proceedings and presented in terms of section 235, Act 51 of 1977, in any subsequent trial, will be considered to be hearsay evidence for the purpose of this act.

3(1): *Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -*

(a) each party against whom the evidence is about to be adduced agrees to the admission thereof as evidence at such proceedings;
(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(c) the court, having regard to -
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail;
(vii) any other factor which should in the opinion of the court be taken into account;

is of the opinion that such evidence should be admitted in the interests of justice.

S v Ndhlovu and others 2002 (2) SACR 325 (SCA) at 326j - 327b: a trial court, in applying the hearsay provisions of the Act, must be scrupulous to ensure respect for the accused's fundamental right to a fair trial. Safeguards, including the following, are important: Firstly, a presiding judicial official is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. More specifically, under the Act, it is the duty of a trial Judge to keep inadmissible evidence out, and not to listen passively as the record is turned into a papery sump of 'evidence'. Secondly, the Act cannot be applied against an unrepresented accused to whom the significance of its provisions have not been explained. Thirdly, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgement, nor on appeal.

Exceptions

(i) Statutory exceptions - sections 212, 213, 221, 222, 236, 238, 246 and 247 of Act 51 of 1977

S v George Tibane (A 1085/88 W): In the present matter, the accused (who was unrepresented) was not asked to consent to the admission of the hearsay evidence. In my view it was proper to have refrained from inviting to give his consent. The accused appears to have been a person who would be unlikely to have had an appropriate grasp of the relevant implications of giving or withholding his consent to the admission of hearsay evidence, even if the essential implications had been explained to him and he had been induced to say that he understood them. Indeed, the circumstances in which it would be proper, in the interest of justice, to invite an unrepresented accused who has not had the benefit of independent legal advice, to consent to the admission of hearsay evidence against himself, must in the very nature of things be somewhat rare.

(ii) Permission of the other party - section 3(1)(a)
(iii) Provisional admissibility – section 3(1)(b)
(iv) Judicial discretion - section 3(1)(c)
Must be done with the utmost prudence - ***S v Cekiso 1990 (4) SA 20 (EC)***

Metadad v National Employers General Insurance 1992 (1) SA 494 (W): ……, evidence tendered for a compelling reason would stand a better chance of admission than evidence tendered for a doubtful or illegitimate purpose

S v Dimbane and others 1990 (2) SACR 502 (SE) – All the factors set out in this section must be properly considered by the court before hearsay is admitted into evidence.

S v Ngwani 1990 (1) SACR 449 (N) – The court is obliged to explain the provisions regarding and the effect of the admission of it to the accused and give him the opportunity to address the court on the admissibility.

S v Ramavhale 1996 (1) SACR 639 (A): A judge should hesitate long in admitting or relying on hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988, where such evidence plays a decisive or even a significant part in convicting an accused, unless there are compelling justifications for doing so……
……., the trial Court had not manifested a sufficient awareness of the perils of hearsay evidence. The facts of life however did not simply vanish at the flourish of the legislator's pen - hearsay evidence was long recognised to tend to be unreliable and it continued to tend to be so.

CONSTITITIONALITY
The provisions of section 3(1) (C) is not in conflict with the provision of section 35(3) (i) of the Constitution, Act 108 of 1996, because it is not affecting the accused's right to lead evidence.

S v Ndhlovu and others 2002 (2) SACR 325 (SCA) at 340c – f: It has correctly been observed that the admission of hearsay evidence 'by definition denies an accused the right to cross-examine', since the declarant is not in court and cannot be cross-examined. I cannot accept, however, that 'use of hearsay evidence by the State violates the accused's right to challenge evidence by cross-examination', if it is meant that the inability to cross-examine the source of a statement in itself violates the right to 'challenge' evidence. The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But, where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant.

➢ CONFESSIONS AND ADMISSIONS:

When dealing with this topic, the first point of departure is to ascertain whether a particular statement is an admission or a confession.

The general rule is that the prerequisite requirements must be met before a statement becomes admissible either in a form of a confession or an admission.

ADMISSIONS:

The most important characteristic of an admission is that its content as supplied by the author must be incriminating.
The test is that of an objective test.
Any admission made must be factually orientated and thus if an accused person admits a fact which is relevant to the main issues in dispute, thereby placing it beyond dispute.

TYPES OF ADMISSIONS:

- **FORMAL ADMISSIONS**

  SECTION 115 (2) (b) of the CPA obliges a court to inquire from an accused, who tenders a plea explanation or to answer questions to clarify issues, whether an allegation which not placed in issue may be recorded as an admission.
  Theses admissions may not be evidence, but it constitutes valuable evidentiary material.

S v Cloete 1994 (1) SASV 420 (A) op 424C: The purpose of section 115 of the Act is to enable an accused who has pleaded not guilty to specify, either by way of a statement in terms of subsection (1) or by answering questions put in terms of subsection (2), to what extent he admits or denies the issues raised by the plea and, generally, to indicate the basis of his defence. ….. If no such formal admission is made, a statement made in the course of the explanation of plea may have evidential value as an admission in the same way as one contained in an extra-curial statement….
Op 424E: …. An informal admission is of course not necessarily sufficient proof of any fact, and the accused is always at liberty to lead evidence to refute, qualify or weaken the effect of the admission. At the end of the case the court considers the evidential value of the informal admission in the light of the evidence as a whole….
Op 425B: To sum up: It is clear that the evidential value of informal admissions in section 115 statements derives from the ordinary common law of evidence. That being so, there would appear to be no reason of principle why the rule enunciated in **R v Valachia and another 1945 AD 826** should not be applicable also to such statements. The prohibition in S196 (3) of the Act on unsworn statements in lieu of evidence has no bearing on the matter and I can think of no other reason why a court should not be entitled to have regard to the incriminating parts of such statement while ignoring the exculpatory ones.

SECTION 220 OF THE CPA : An accused or his or her legal representative may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact

Reference will be made in detail under the heading Criminal Procedure Act, which will cover sections 115 (1); 112; 113; 219A and 212 (B)

THE MAIN DISTINCTION BETWEEN A FORMAL AND INFORMAL ADMISSION:
The main distinction is that the factually orientated admitted formally, need not be proved, whereas that which has been admitted informally, is evidentiary material which must be proved against the accused. Formal admissions cannot be rebutted.

S v Collop 1981 (1) SA 150 (A); Where an admission of any fact made by an accused or his legal adviser in terms of section 220 of Act 51 of 1977 is ambiguous or permits more than one interpretation, that construction which is most favourable to the accused must be adopted.

The primary requirements for admissibility are:

- The statement must have been made by the accused, alternatively he must have accepted the fact by way of his actions or conduct.
- The statement must have been made voluntarily.

S v Buda and others 2004 (1) SACR 9 (TPD) at 13i – 14a: Any statement of that nature must be made voluntarily and with full realisation of the implication of the statement. For real consent to be found to have been present, there must have been 'knowledge, appreciation and consent'. If an accused states to a magistrate that he believes that the statement would help him, he clearly does not understand the full implication of the statement, which he is about to make. The absence of real consent negates the requirement that the statement must be made voluntarily. It can only be made voluntarily if the full applications of the statement are understood and agreed to.

SECONDARY REQUIREMENTS

- Admission must be made to a magistrate
- Must be reduced to writing by the magistrate or be confirmed and reduced to writing before the magistrate
- The name of the declarant in the statement must correspond with the name of the accused in the charge sheet - S v DHLAMINI 1981(3) SA 1105(W)

- Where applicable, a certificate by the interpreter must be applied to the document
- It must appear *ex facie* the document itself that it was made voluntarily

S v Maake 2001(2) SACR 288(W) at 292: There is such repugnance to the admission of incriminating statements that are not freely and voluntarily made by an accused person that special procedures have evolved to ensure that such statements have to be ruled admissible before the contents can be disclosed to the Court. This has resulted in the trial-within-a-trial procedure where an accused may testify freely as to the disputed statement. Even if in his testimony on the merits the accused contradicts what he said in the trial-within-a-trial, this fact cannot redound to his discredit as a witness on the merits, for the trial-within-a-trial is a watertight compartment on its own. This seemingly illogical result is the outcome of the courts' repugnance to receiving self-incriminating evidence extracted by duress or undue influence from an accused person.
In an attempt to prevent such from occurring, the courts have repeatedly ruled that disputed self-incriminatory evidence may be disclosed to the court only when the court is satisfied beyond reasonable doubt that such evidence is admissible. In my view, therefore, such evidence cannot be received provisionally by the court.

CONFESSION

DEFINITION

A confession is an unequivocal acknowledgement of guilt which, if it were made in a court of law, would amount to a plea of guilty. **R v Becker 1929 AD at 71**

TYPES OF CONFESSIONS

- Section 217(1) – Made to private persons, justice, and magistrates (not in writing) – State carries the burden to prove that all the prerequisites has been met before it can be admitted in evidence. **S v Khoza 1984 (1) SA 57 (A)**
- Section 217(1)(a) – Confessions to ordinary peace officers are inadmissible unless it is reduced to writing in the presence of a magistrate or justice. See **S v K 1999 (2) SACR 385 (CPD)**
- Section 217(1)(b) – Confession made to a magistrate and reduced to writing, is admissible at the mere production thereof at the proceedings - **S v Mamba 1990 (1) SASV 227 (A)**. See onus of proof infra
- Confessions enticed in court – Governed by both section 217(3) and the common law **S v Mokoena 1978 (1) SA 229 (O)**; **S v Nieuwoudt 1990 (4) SA 217 (A)**

REQUIREMENTS

i) Must have been made by the accused
ii) Freely and voluntary - ***S v Ismael 1965 (1) SA 446 (N)***
iii) Accused in his sound and sober senses - ***R v Ramsamy 1954 (2) SA 491 (A)***
iv) Without any undue influence - ***S v Mavela 1990 (1) SASV 582 (A)***; ***S v Kondile en andere 1995 (1) SASV 394 (OK)***; ***S v Ndika and others 2002 (1) SACR 250 (SCA)***

S v Zulu and another 1998 (1) SACR 7 (SCA) op 10H: Lengthy interrogation in an appropriate case can no doubt be a decisive factor leading to the conclusion that a statement was not made freely and voluntary and without being unduly influenced thereto.

S v M 1993 (2) SACR 487 (A): The failure to afford a young person the assistance of a parent or guardian where this is reasonably possible before taking a confession from such a person, could conceivably lead to the conclusion that the confession was not made freely, voluntarily, or without undue influence.

See **S v Khan 1997 (2) SACR 611 (SCA) on 621H**: Having given the matter anxious consideration it seems to me that those factors which justify admission materially outweigh those which call for exclusion. The exercise of the relevant discretion leads to the conclusion, in my view, that appellant's confession to the magistrate was, ……. properly admissible in all respects.

CONFIRMATION

Section 209, Act 51 of 1977: *An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.* See ***S v Maelangwe 1999 (1) SACR 133 (NKA) at 147f-g***. In ***S v Erasmus 1995 (2) SACR 373 (EC)*** it was decided that a confession could also be confirmed by another confession.

ONUS OF PROOF

The provisions of section 217(1)(b), Act 51 of 1977 was declared unconstitutional in ***S v Mhlungu 1995 (2) SACR 277 (CC) en S v ZUMA 1995 (2) SA 642 (CC)***. It is applicable to all cases that started after 27 April 1994 wherein judgement was not yet delivered.
It therefore follows that the onus now rests on the State to prove that all confessions were made freely, voluntarily and without any undue influence, by the accused.

MODERN TECHNOLOGY AND HOW THIS IMPACTS THE PRESENTATION OF EVIDENCE

The term **"Cyber-crime",** although the relatively new term in the prosecution of cases. Prior to the enactment of the Cyber Crime Act, it has been promulgated in many forms of legislation creating offences for the misuse of information or data through some form of electronic medium.

In this note we will look at the development of Legislation where the misuse of data and or information gave rise to the promulgation of the Cyber Crime Act.

The Electronic Communications and Transactions Amendment Bill, 2012 (26 October 2012) defines cybercrime as follows:

"Cybercrime" means any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the Internet or any one or more of them

The Electronic Communications and Transactions Act 25 of 2002 does not define Cybercrime, although Chapter 8 of the Act is assigned to deal with Cybercrimes.

The Interception and Monitoring Prohibition Act specifically governs the monitoring of transmissions including e-mail.

Section 2 states that: no person shall – "intentionally intercept or attempt to intercept or authorize, or procure any other person to intercept or to attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission "

This means in simple terms that conduct that:

(a) Intentionally and without the knowledge or permission of the dispatcher to intercept a communication which has been or is being or is intended to be transmitted by telephone or in any other manner over a telecommunications line; or

(b) Intentionally monitor any conversations or communications by means of a monitoring device so as to gather confidential information concerning any person, body or organization, is committing a crime

- ***ELECTRONIC AND COMMUNICATIONS TRANSACTIONS ACT 25 OF 2002***

Common law position: Prior to the Electronic Communications and Transactions Act – ECTA

Prior to ECTA, the common and statutory law at that time could be extended as widely as possible. The common law crimes of defamation, indecency (Online child pornography, decimation of child porn), *crimen injuria* (also known as Cyber-smearing) fraud (Cyber fraud) (see the case of **S v Van den Berg 1991 (1) SACR 104 (T)**), defeating the ends of justice, contempt of court (in the form of publishing any court proceedings without the courts permission online or by other electronic means), theft (see the cases of **S v Harper 1981 (2) SA 638 (D)** and **S v Manuel 1953 (4) SA 523 (A) 526** where the court came to the conclusion that money which had been dematerialized could be stolen in it immaterial form) and forgery could easily be applied to the online forms of these offences.

OFFENCES CREATED BY THE ECT

***S86**: Unauthorised access to, interception of or interference with data*

(1) Subject to the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992), a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence.

(2) A person who intentionally and without authority to do so, interferes with data in a way which causes such data to be modified, destroyed or otherwise rendered ineffective, is guilty of an offence.

(3) A person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence.

(4) A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence.

(5) A person who commits any act described in this section with the intent to interfere with access to an information system so as to constitute a denial, including a partial denial, of service to legitimate users is guilty of an offence.

***S87.** Computer-related extortion, fraud and forgery*

(1) A person who performs or threatens to perform any of the acts described in section 86, for the purpose of obtaining any unlawful proprietary advantage by undertaking to cease or desist from such action, or by undertaking to restore any damage caused as a result of those actions, is guilty of an offence.

(2) A person who performs any of the acts described in section 86 for the purpose of obtaining any unlawful advantage by causing fake data to be produced with the intent that it be considered or acted upon as if it were authentic, is guilty of an offence.

Attempt, and aiding and abetting

(1) A person who attempts to commit any of the offences referred to in sections 86 and 87 is guilty of an offence and is liable on conviction to the penalties set out in section 89(1) or (2), as the case may be.

(2) Any person who aids and abets someone to commit any of the offences referred to in sections 86 and 87 is guilty of an offence and is liable on conviction to the penalties set out in section 89(1) or (2), as the case may be.

***Pornography** - S24B of the Films and publications act 65 of 1996- Prohibition, offences and penalties on possession of films, games and publications*

(1) Any person who—

(a) Unlawfully possesses;

(b) Creates, produces or in any way contributes to, or assists in the creation or production of;

(c) imports or in any way takes steps to procure, obtain or access or in any way knowingly assists in, or facilitates the importation, procurement, obtaining or accessing of; or

(d) knowingly makes available exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children, shall be guilty of an offence.

(3) Any person who processes, facilitates or attempts to process or facilitate a financial transaction, knowing that such transaction will facilitate access to, or the distribution or possession of, child pornography, shall be guilty of an offence.

- ***Copyright offences***

What You Need to Know About Copyright:

Copyright laws protect original works, but not ideas or facts. The Copyright Act of 1976 grants exclusive rights to the copyright holder. A copyright protects original works such as: literary works, musical works, dramatic works, pantomimes & choreographed works, pictorial, graphic, and sculptural works, motion pictures and other audio-visual works, sound recordings, architectural works, compilations (databases for example), written words on a website, and software programs on a website. The copyright holder has exclusive rights such as reproduction, derivative works (being allowed to alter it), distribution, performance, display, audio & video transmission.

Fair Use

'Fair Use' allows limited use of a copyrighted work. Some examples of what are considered 'fair use' are: **teaching, criticism, comment, news reporting, and research**. Only a court can decide if a copyrighted works use was considered 'fair use'.

What You Can't Do

1. Copy pictures to use on your brochure or website that you found on the internet (even if you put up the copyright line of who holds the copyright, this is considered infringement) Purchase a license to use a photo on your brochure, then continue to use it on your website, flyers, and postcards unless it is stated in the license.

2. Copy text out of a book or off from a website and use it verbatim

3. Put music on your website without permission

4. Post an article without permission, even if it's about you

5. Use an image by linking to it rather than copying it (This is still copyright infringement)

- *CYBER CRIMES ACT 19 of 2020*

Object of the Act:
To regulate:

1. The creation of offences which have a bearing on cyber crime
2. Criminalize disclosure of data messaging that is harmful
3. Provide for Protection Orders
4. Regulate the jurisdiction
5. Powers to investigate cyber crime
6. Mutual assistance
7. Establish a designated point of contact
8. Provide for proof by way of affidavit
9. Impose obligations to report cyber crimes
10. Capacity building
11. Executive power to enter into agreement with foreign states for the detection, prevention, mitigation, and investigation of cyber crimes
12. Delete and amend provisions of certain laws
13. Incidental matters

3. LEGAL RECOGNITION OF DATA MESSAGING

1.1. Prior to the enactment of the Electronic Communications and Transactions Action Act 25 of 2002 (ECT Act) there was legal uncertainty whether data messaging was valid as a form of contract negotiations of performance or other juristic acts, that could have legal obligations for the person using it,

Section 11- of the ECT Act reads:

"information is not without legal force and effect on the grounds that it is wholly or partially in the form of data message",

"information is not without legal force and effect merely on the grounds that it is, not contained in the date message purporting to give rise to such legal force and effect, but is merely referred to in such data message,

information incorporated into an agreement and is not in the public domain is regarded as having been incorporated into a data message if such information is:

a. referred to in any way which a reasonable person would have noticed the reference thereto and incorporated thereof, and

b. accessible in the form in which it may read.

1.2. A scrutiny of **Section 11**- immediately advises that data messages are now legally recognized as a form of conducting legal relevant acts and cannot be invalid due to the immaterial nature and, further provide for incorporation by reference of terms that are not contained in the data message. An example of this would be for instance in a case where the originator of an email attaches or links an email disclaimer,

1.3. **Section 12** of the Act relating to signature requirements reads:

"*A requirement under law that a document or information be in writing is meant is the document or information is:*

a. In the form of a data message; and
b. accessible in the manner usable for subsequent reference"

1.4 Several judgments confirm that data messaging has already been accepted and is accordingly part of our law. In a nutshell, the new ECT Act has entrenched in our law a recognition of data messages to be a functional equivalent to paper.

2. ORIGIN

2.1 There is no existing international treaty on cyber-crime which has being drafted by the United Nations,

2.2 The closest to such a treaty is the European Union –Originated Counsel of Europe convention on Cyber Crime,

2.3 South Africa has signed, but did not ratify the said convention however has complied with the first part of the convention in terms of which member States are obliged to:

2.3.1 Criminalize the illegal access to computer system,

2.3.2 Illegal reception of data to computer system,

2.3.3 Interfering with computer system without right, intentional interference with computer data without right,

2.3.4 Use of inauthentic data with the intent to put it across as authentic data (forgery),

2.3.5 Infringement of copyright rights online,

2.3.6 Interference with data of functioning of computer system,

2.3.7 Child pornography related offences.

The Electronic Communications and Transactions Act 25 of 2002 comprehensively deals with cyber-crimes in chapter xiii and has created legal certainty as to what may or may not constitute cyber-crime.

Section 3 of the said Act however does not exclude any statutory or common law from being applied to recognizing, or accommodating electronic transactions which means that the common law or other statutory law in place where applicable are still in force and binding which as a result that wherever the Act has not made specify provisions for criminal sanction, such law will apply.

Related Acts that combat cyber-crime that include:

- POCA,
- FICA,
- Copyright Act,
- Harassment Act and hate speech,
- Admissibility and evidential weight of data messages (ECT Act),
- *Anton Pillar* orders.

3. SECTIONS AND SIGNIFICANT FEATURES OF THE CYBERCRIMES ACT

SECTION	PROVISIONS
SECTION 1- DEFINITIONS	The most significant definitions include: **Article** – means any: o Data, o Computer program, o Computer data storage medium, or o Computer system which, i. is concerned with, connected with, or on reasonable grounds believed to concerned with or connected with commission or suspected commission, ii. may afford evidence, iii. is intended to be used or used in the commission or intended commission of,an offence in terms of Part I and Part II of Chapter 2, any other offence in the Republic or any other offence in a foreign State,

	Computer – means, any electronic programmable device…To perform predetermined arithmetic logical routing, processing, or storage operations in accordance with set instructions and includes any data, computer program or computer data storage medium and related to, connected with or used with such a device, other definitions include, computer data storage medium, computer program and computer system.
SECTION 2 – UNLAWFUL ACCESS	Makes provision for unlawful securing of access in respect of computer systems or computer storage medium, The Section regulates that any person who unlawfully and intentionally secures access to data, a computer program, a computer data storage medium or, a computer system is guilty of an offence.
SECTION 3	Creates an offence if an unlawful interception of data occurs, An unlawful interception of data may take the form of wiretapping, installing a sniffer to monitor communications on a network and packet sniffing.
SECTON 4	Creates an offence if a person unlawfully and intentionally uses of possess and software or hardware tool, whose purpose is to contravene Sections 2(1) and (2), 3(1), 5(1), 6(1) or 7(1) (a) or (d).
SECTION 5	Creates an offence if a person unlawfully and intentionally interferes with a data computer program.
SECTION 6	Creates an offence if a person unlawfully and intentionally interferes with a computer data storage medium or computer system and similar to Section 5 and 6 provides a clear definition of what constitutes and interference in this context.
SECTIONS 7, 8, 9 AND 10	Respectively creates an offence if: ➢ a person unlawfully and intentionally acquires, possesses, provides to another person, or uses a password, access code or similar data or device Section 7, ➢ For purposes of committing cyber fraud Section 8, ➢ Cyber forgery and uttering Section 9, and ➢ Cyber extortion Section 10

SECTION 11	Provides for aggravated offences and maps out clearly that its application extends to Section 3(1), 5(1), 6(1) or 7(1) insofar as the passwords, access codes or similar data and devices are concerned.
SECTION 12	Provides that theft of incorporeal property included in the common law offence of theft
SECTION 13	This section contains important terminology used in part of the Act and defines: "disclose"- and the methods of disclosure, groups of persons: including "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth or nationality", as contained in POPIA, "Related person" and "violence".
SECTION 14	Creates an offence in the event that a person discloses, by means of an electronic communications service, data message to a person, group of person or to the general public with the intention to incite damage to property that belongs to a person of group of persons.
SECTION 15	This Section creates an offence if a person unlawfully and intentionally disclosures a data message which threatens a person or damage to property belonging to that person or related persons or violence against that person or related persons.
SECTION 16 – DISCLOSURE OF DATA MESSAGE OF INTIMATE IMAGE	Creates an offence if a person unlawfully and intentionally disclosures, by means of electronic communication service, a data message of an intimate image of a person without the consent of such person. On the definition of intimate image – "non-consensual pornography, involuntary pornography, involves the distribution of sexually graphic images of individuals were at least one of the individuals depicted did not consent to the dissemination.
SECTION 17	Creates an offence in the event a person unlawfully and intentionally attempts, conspires with another person, or aids and abets, incites, instigates, instructs, commands or procures another to commit an offence set out in terms of Part I and Part II contained in Chapter 2 of the Act.
SECTION 18	Creates various alternatives when the evidence presented in criminal proceedings does not particularly prove the commission of an offence that is charged but rather proves contravention of another Section of the Act.
SECTION 19	Sets out appropriate sentences if found guilty.
SECTION 20	This Section provides for civil relief.

SECTION 21	Provides that the Complainant who lays a charge with the South African Police Services, that an offence contemplating that Section 14, 15 and 16 has allegedly been committed against them may on an ex-parte basis apply to the Magistrates Court for a Protection Oder, pending the finalisation of the criminal proceeding.
SECTION 22	Provides that the Court determining the application must consider any additional evidence if it deems fit including oral evidence or evidence by affidavit which must form part of the record of the proceedings.
SECTION 23	Makes provision where the application for a protection order made in terms of Section 21 and the Court is satisfied that in terms of Section 23 a protection order must be issued and the particulars of the person referred to in Section 20(1)(a) who disclosures the data message or electronic communication services referred to in Section 20(1)(b) whose service is used to host or where it is used to disclose such data message is unknown, the court is entitled to adjourn such proceedings on conditions as it deems appropriate.
SECTION 24 – JURISDICTION	Any Court in South Africa has jurisdiction to try any offence referred to in Part I and Part II of Chapter 2 of the Act, the definition in respect of jurisdiction is confusing and, in all probability, will be challenged as there does not appear to be jurisdictional requirements sufficient to justify the appropriate Court for hearing of the matters involving the Act.
SECTION 25	Provides pertinent definitions of terms such as “access”, “investigator” and “seize”.
SECTION 26	Sets out standard operating procedures in respect of personnel in the Government that are responsible for the consultation process.
SECTION 27	Provides that the Criminal Procedure Act applies to Chapter 4 insofar as same is consistent with the Cyber-Crimes Act.
SECTION 28	Confers police officials with the authority to search for, gain access to or seize certain articles.
SECTION 29	Delineates the types of articles that may be subject to a warrant in terms of Section 28
SECTION 30	Provides that an application for a warrant may be made orally.
SECTION 31	Confers authority to exercise powers in terms of Section 26 without a warrant but rather with the consent of a person who has authority to give consent for same.
SECTION 32	Confers authority on the police officials to exercise powers set out in Section 28 without a warrant.

SECTION 33	Confers authority upon a police officer to conduct an arrest without a warrant against a person who commits an offence in terms of Parts I and II of the Act.
SECTION 34	Makes it obligatory for electronic communications service providers, financial institutions or person who are in control of information, objects, or facilities to assist the police official by providing technical assistance and any other necessary assistance in the investigation process against a cyber-crime suspect.
SECTION 35	Creates an offence where any obstruction or hindrance is made against the police official exercising powers in terms of Section 28 and 29 of the Act.
SECTION 36	This section requires the police to exercise their powers decently and without infringing upon a person's other rights.
SECTION 37	Sets out an offence that an offence is committed where the police official exercises Section 28 powers wrongfully.
SECTION 38	Creates an offence where any person provides false information under oath in relation to the provisions set out in Chapter 4.
SECTION 39	Provides that it is unlawful to disclose information gathered during the investigation unless certain exceptions apply.
SECTION 40 **SECTION 41**	Sets out what constitutes unlawful interception of indirect communication. Empowers the designated police officer to issue a preservation of data direction against any electronic communications, service providers, referred to in Section 40(3) or a financial institution which has in its possession of, receives or is in control of certain data. Provides that an expedited vision of data direction maybe issued by a police official where certain requirements are met.
SECTION 42	Confers powers upon a Magistrate or a Judge to issue a preservation of evidence direction
SECTION 43	Provides that an application for such a direction may be made orally
SECTION 44	Provides for the disclosure of data in terms of Section 29 (1).
SECTION 45	Provides that a police official may without authorisation, obtain and use publicly available data from a person who is in possession of it.
SECTION 46 TO 51	These Sections deal with the international co-operation in criminal matters and provides for the mechanism by way of which the National Commissioner of the National Head of Directorate may provide co-operation to foreign law enforcement and other agencies, make request for foreign assistance and co-operation. It also makes obligatory for an electronic communications service provider or financial institution to comply with an order of a designated

	Judge in terms of Section 48(6) and provides that the National Director of Public Prosecutions must inform the designated Judge of applicable authority in a foreign State of the outcome of a request for assistance and co-operation. It also provides for issuing a direction requesting assistance from a foreign State.
SECTION 52	Obliges the National Commissioner to establish a designated office with an existing structure of the South African Police Services that will be known as the designated points of contact for South Africa.
SECTION 53	Provides for inducing of evidence by way of affidavit in terms of interpretation of data, the design or function of data, computer program, computer data storage medium or computer system or computer science, electronic communications networks and technology, software engineering or computer programming.
SECTION 54 TO 56	Provides that electronic communications service providers must within 72 hours of having become aware report any offence committed in terms of Part I of the Act and also provides that a cabinet minister responsible for policing must establish and maintain sufficient operational capacity to detect, prevent and investigate cyber-crimes and police officers have to receive requisite training and develop accredited training programs for SAPS members to achieve the purpose of the Act and the National Director of Public Prosecutions must keep statistics of prosecutions relating to cyber-crime.

PART III

THE CRIMINAL PROCEDURE ACT

Section 1 – Definitions

Aggravating circumstances

Aggravating circumstances in relation to robbery or attempted robbery means

(a) The wielding of a fire-arm or any other dangerous weapon or

(b) The infliction of grievous bodily harm or

(c) A threat to inflict grievous bodily harm

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.

At least one of the abovementioned situations must be present. The exact role of each robber (perpetrator, co-perpetrator or accomplice) need not be determined before he can be held guilty of robbery with aggravating circumstances according to **S v Mofokeng 2014 (1) SACR 229 (GNP)**.

A dangerous weapon is defined in section 1 of the Dangerous Weapons Act, 2013 as *"means any object, other than a firearm, capable of causing death or inflicting serious bodily harm if it were used for an unlawful purpose.*

(a) The wielding of a fire-arm or dangerous weapon does not require the pointing of a fire-arm at the victim. In **Hlongwane 2014 (2) SACR 397 (GP) [30]** the court said:
"*No proof beyond an action which amounts to "wielding" a dangerous weapon during the course of a robbery is required in order for aggravating circumstances to be present'*
The mere carrying, holding or possession of a firearm or dangerous weapon will not amount to aggravating circumstances unless they constitute a threat to inflict grievous bodily harm.

(b) The infliction of grievous bodily harm will depend on the facts of each case. This aspect must be determined objectively and the intention of the robber is irrelevant.

(c) The threat could be uttered expressly or through conduct. In **S v Anthony 2002 (2) SACR 453 (C)** a toy firearm was used during the robbery. The court held that the threat requirement would be satisfied if the victim subjectively experienced the conduct of the robber as a threat to inflict grievous bodily harm. An implied threat could be present and can be inferred even when no fire-arm or dangerous weapon is wielded. In **S v Hlongwane (supra)** the court said that the holding of a rifle with its muzzle facing the ground comfortably fits within the definition of a threat to inflict grievous bodily harm.

Section 6 (a) – Power to withdraw charge

A DPP or any person conducting a prosecution at the instance of the State may withdraw a charge before an accused has pleaded to the charge.

In terms of section 20(5) of the NPA Act 32 of 1998, DPPs have been designated by the National Director of Public Prosecutions (NDPP) to issue authorisations to prosecutors in their areas of jurisdiction to institute and conduct prosecutions and, where necessary, to prosecute appeals arising from these. This authority to prosecute refers to the day-to-day decisions which prosecutors are called upon to take in the execution of their function. There are exceptions to this general authority to prosecute and certain prosecutions that may not be instituted without the authorisation of a DPP or the National Director of Public Prosecutions. The offences mentioned in Part 8 of the Prosecution Policy Directives are examples of such cases.

A charge may only be withdrawn before an accused has pleaded to a charge. When a charge is withdrawn before an accused has pleaded to the charge, the accused is not entitled to a verdict of acquittal in respect of that charge. The fact that there is no verdict on the merits of the case by the court when a case is withdrawn, allows the State to prosecute the accused for the same charge in the future, provided that there is sufficient admissible evidence for a reasonable prospect of a successful prosecution.

The Prosecution Policy Directives directs that once enrolled, cases may only be withdrawn on compelling grounds, e.g. if it appears after thorough police investigation that there is no longer any reasonable prospect of a successful prosecution or the accused has successfully completed a diversion programme.

Cases should not be withdrawn solely on the ground that the accused person has compensated or reimbursed the complainant, or on the ground that a complainant or victim requests a discontinuance of the prosecution. Prosecutors should exercise special care when approached by a victim who is in a close relationship with the accused person, for example, a victim of domestic violence or parents in a “child abuse” case.

No prosecutor may withdraw any charges without the prior authorisation of the National Director or the DPP concerned, where the prosecution was on instruction of either the National Director or DPP.

The decision to withdraw a charge is at the discretion of the State (prosecutor). In **S v Mashaba (unreported review decision by the South Gauteng Division of the High Court, review case number 27/2020)** it was confirmed in paragraph 15 that the CPA does not make provision for the court to order the State to withdraw a case.

Section 6 (b) – Stopping of prosecution

A DPP or any person conducting a prosecution at the instance of the State may at any time after an accused has pleaded to a charge but before conviction, stop prosecution in respect of a charge. If the prosecution is stopped, the court must acquit the accused in respect of that charge.

The stopping of a prosecution in terms of section 6(b) of the *Criminal Procedure Act, 1977,* effectively means that the prosecuting authority is abandoning the case. The accused person will be entitled to an acquittal and may not be charged again on the same set of facts. A prosecutor may therefore not stop a prosecution without a DPP's authorisation.

As a rule, criminal proceedings should only be stopped when it becomes clear during the course of the trial that it would be impossible to obtain a conviction on any of the charges or where the continuation thereof has become undesirable due to exceptional circumstances.

Section 7 – Private Prosecution on certificate *nolle prosequi*

(*1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-*

(a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;

(b) a husband, if the said offence was committed in respect of his wife;

(c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or

(d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, subject to the provisions of section 9 and section 59 (2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process

a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.

(b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).

(c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph (a) within three months of the date of the certificate.

Section 8 - Private prosecution under statutory right

(*1) Any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.*

(2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the attorney- general concerned and after the attorney-general has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.

(3) An attorney-general may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the attorney-general, and that the attorney-general may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.

Section 9 - Security by private prosecutor

(1) No private prosecutor referred to in section 7 shall take out or issue any process commencing the private prosecution unless he deposits with the magistrate's court in whose area of jurisdiction the offence was committed-

(a) the amount the Minister may from time to time determine by notice in the

Gazette as security that he will prosecute the charge against the accused to a conclusion without undue delay; and

(b) the amount such court may determine as security for the costs which may be incurred in respect of the accused's defence to the charge.

(2) The accused may, when he is called upon to plead to the charge, apply to the court hearing the charge to review the amount determined under subsection (1) (b), whereupon the court may, before the accused pleads-

(a) require the private prosecutor to deposit such additional amount as the court may determine with the magistrate's court in which the said amount was deposited; or

(b) direct that the private prosecutor enter into a recognizance, with or without sureties, in such additional amount as the court may determine.

(3) Where a private prosecutor fails to prosecute a charge against an accused to a conclusion without undue delay or where a charge is dismissed under section 11, the amount referred to in subsection (1) (a) shall be forfeited to the State.

R2 500 - GN R62 in *GG* 36111 of 30 January 2013

Section 10 - Private prosecution in name of private prosecutor

(1) A private prosecution shall be instituted and conducted and all process in connection therewith issued in the name of the private prosecutor.
(2) The indictment, charge-sheet or summons, as the case may be, shall describe the private prosecutor with certainty and precision and shall, except in the case of a body referred to in section 8, be signed by such prosecutor or his legal representative.
(3) Two or more persons shall not prosecute in the same charge except where two or more persons have been injured by the same offence.

Section 11 - Failure of private prosecutor to appear

(1) If the private prosecutor does not appear on the day set down for the appearance of the accused in the magistrate's court or for the trial of the accused, the charge against the accused shall be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his control, in which event the court may adjourn the case to a later date.
(2) Where the charge is so dismissed, the accused shall forthwith be discharged from custody and may not in respect of that charge be prosecuted privately again but the attorney-general or a public prosecutor with the consent of the attorney-general may at the instance of the State prosecute the accused in respect of that charge.

Section 12 - Mode of conducting private prosecution

(1) A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State:
Provided that the person in respect of whom the private prosecution is instituted shall be brought before the court only by way of summons in the case of a lower court, or an indictment in the case of a superior court, except where he is under arrest in respect of an offence with regard to which a right of private prosecution is vested in any body or person under section 8.
(2) Where the prosecution is instituted under section 7 (1) and the accused pleads guilty to the charge, the prosecution shall be continued at the instance of the State.

Section 13 - Attorney-general may intervene in private prosecution

An attorney-general or a local public prosecutor acting on the instructions of the attorney-general, may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.

Section 14 - Costs in respect of process

A private prosecutor, other than a prosecutor contemplated in section 8, shall in respect of any process relating to the private prosecution, pay to the clerk or, as the case may be, the registrar of the court in question, the fees prescribed under the rules of court for the service or execution of such process.

Section 15 - Costs of private prosecution

(1) The costs and expenses of a private prosecutor shall, subject to the provisions of subsection (2), be paid by the private prosecutor.
(2) The court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence: Provided that the provisions of this subsection shall not apply with reference to any prosecution instituted and conducted under section 8: Provided further that where a private prosecution is instituted after the grant of a certificate by an attorney-general that he declines to prosecute and the accused is convicted, the court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid by the State.

Section 16 - Costs of accused in private prosecution

(1) Where in a private prosecution, other than a prosecution contemplated in section 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred in connection with the prosecution or, as the case may be, the appeal.
(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred in connection with the prosecution, as it may deem fit.

Section 17 - Taxation of costs

(1) The provisions of section 300 (3) shall apply with reference to any order or award made under section 15 or 16 in connection with costs and expenses.
(2) Costs awarded under section 15 or 16 shall be taxed according to the scale, in civil cases, of the court which makes the award or, if the award is made by a regional court, according to the scale, in civil cases, of a magistrate's court, or, where there is more than one such scale, according to the scale determined by the court making the award.

Section 18 – Prescription of right to institute prosecution

The right to institute a prosecution for any offence, shall lapse after 20 years from the time the offence was committed.

The CPA however provides that there is no prescription for certain offences and include:

1. Murder
2. Treason committed when the Republic is in a state of war
3. Robbery, if aggravating circumstances were present
4. Kidnapping
5. Child-stealing
6. Common law offence of bribery
7. Offences referred to in section of the Corruption Act 92 of 1994
8. Offences referred to in parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act 12 of 2004
9. Any sexual offence in terms of the common law or statute
10. Genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002
11. Any contravention of section 4, 5 or 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2003
12. Torture, as contemplated in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013

Section 19 - Saving as to certain powers conferred by other laws

The provisions of this Chapter shall not derogate from any power conferred by any other law to enter any premises or to search any person, container or premises or to seize any matter, to declare any matter forfeited or to dispose of any matter.

Section 20 - State may seize certain articles

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

Literally anything may be seized in terms of this section provided that it qualifies to be included in one of the three groups provided for in this section. Whether the belief or suspicion was reasonable is an objective question and will be answered objectively on all the facts before the court.

Section - 21 Article to be seized under search warrant

(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued-
(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
(b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.
(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.
(3) (a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.
(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.
(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.

In **Minister of Safety and Security v van der Merwe and others 2011 (2) SACR 301 (CC)** the Constitutional Court gave the following summary:

A valid warrant is one that, in a reasonable intelligible manner:

a. *states the statutory provision in terms of which it is used;*
b. *identifies the searcher;*
c. *clearly mentions the authority it confers upon the searcher;*
d. *describes the person, container or premises to be searched;*
e. *describes the article to be searched for and seized, with particularity; and*
f. *specifies the offence which triggered the criminal investigation and names the suspected offender.*

In the case of a statutory offence, it is important that the warrant should pertinently refer to the specific statute and the section or subsection thereof in order to enable the person in charge of the premises to be searched and also the police official authorised in terms of the search warrant to know precisely that for which the search has been authorised.

Only police officials may be authorised to search. The police may however require the assistance of experts in some cases. In these cases, there is a greater need to "*carve out and define the role to be played by such outside persons, both in seeking the authorisation for their presence as well as their role in the actual execution of the warrant.*" – see **Keating and others v Senior Magistrate and others 2019 (1) SACR 396 (GP)** where private individuals were authorised to act purely in an advisory capacity.

In **Cine Films (Pty) Ltd v Commissioner of Police 1972 (2) SA 254 (A)** it was held that it is not required that each and every article to seized must be described in detail, and types or classes of articles can also be identified, as long as reasonably clear descriptions are given for example where the warrant indicates computers, hard drives, discs and such materials. In **Vorster Interior Products CC v Minister of Police and others (unreported, WCC case no 3580/2021, 31 August 2021)** the court found that the reference to types of articles did not invalidate the search warrant because the warrant limited the search to specified illegal activities. It was further stated that the warrant is not required to specify precisely what information is sought to be seized when electronic devices are specified in the warrant since it might not be known in advance what information would be found so as to isolate information linked to the investigation from other confidential matters.

The evidence yielded by an irregular search and seizure is not automatically inadmissible. Section 35(5) of the Constitution states that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. The admissibility of evidence unconstitutionally obtained must, in general, be determined during a trial within a trial.

In considering fairness of the trial, prejudice to the accused becomes relevant. If it becomes apparent that the accused will be prejudiced if the evidence is admitted, the degree and nature of that prejudice must still be ascertained in order to determine whether admission of that

evidence will render the **trial** unfair. **[Nombevu 1996 (2) SACR 396 (E); Soci 1998 (2) SACR 275 (E)]** Fairness is not a *"one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment".* **[Shaik 2008 (1) SACR 1 (CC) par 43]** It must be fair to both the accused and the public as represented by the prosecution and not only be aimed at considerations of fairness or be to the advantage of the accused.

With regard to the administration of justice, the presiding officer has to determine whether the reasonable person, impartial, unbiased and fully conversant with all the facts and circumstances of the particular case, is of the opinion that admission of the evidence in question will be detrimental to the administration of justice. While public opinion has some relevance, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. **[Makwanyane 1995 (2) SACR 1 (CC)]**

If the court finds that admitting the evidence will render the trial unfair OR that it will be detrimental to administration of justice, the evidence must be excluded.

Section 22 – Search and seizure without a search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article

1. which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence,

2. which may afford evidence of the commission or suspected commission of an offence,

3. which is intended to be used in or is on reasonable grounds believed to be intended to be used in the commission of an offence. (as per section 20 of the CPA)

IF

(a) the person concerned consents to the search or the person who may consent to the search of the container or premises consents to the search and seizure

OR

(b) the police official on reasonable grounds believes that

(i) a search warrant will be issued to him if he applies for such warrant

AND

(ii) the delay in obtaining the warrant would defeat the object of the search.

Reference is made in this section (and others such as sections 24, 25 26 and 40. Comments made here about what constitutes a reasonable suspicion are therefore also applicable to such other sections.

In **Minister of Safety and Security v Magagula (2017) ZASCA 103 (unreported SCA case no 991/2016, 6 September 2017** the court accepted that a suspicion is a state of conjecture or surmise where proof is lacking. "*I suspect but I cannot prove*". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. A suspicion inherently involves an absence of certainty or adequate proof. A police officer is not expected to satisfy himself to the same extent as a court and a suspicion can be reasonable despite there being insufficient evidence for a prima facie case.

The standard of a reasonable suspicion is, said the Supreme Court of Appeal in **Biyela v Minister of Police (2022) ZASCA 36 (unreported, SCA case no 1017/2020, 1 April 2022**, very low. "*It must be more than a hunch; it should not be an unparticularised suspicion but must be based on specific and articulable facts or information.*" It must be based on credible and trustworthy information and is determined objectively, but the suspicion need not be based on information that would subsequently be admissible in a court of law.

In **Buthelezi v Minister of Police 2020 (2) SACR 21 (GJ)** the court laid down the requirements for consent. 1. The consent must be of a particular quality. The person whose consent is required should be informed of the purpose of the search. A mere request to search is insufficient. It must be established that the person whose consent is required to search a container or premises has the capacity to consent to the search.

2. The consent must be freely given. In **Maroko v Minister of Police and another (unreported, GJ case no 21697/2019, 2 November 2021)** the court had difficulty in accepting that meaningful consent can be given in the coercive environment created by a police operation, the express purpose of which is to stop and search those whose culpability can (as one of the police officers described it to the court) be read "*in their faces*".

3. The action taken has to be within the bounds of the consent given.
Whether reasonable grounds were present is an objective question answered on all the facts before the court. The state has to prove that at the time of the action **(LSD Ltd and Others v**

Vachell and Others 1918 WLD 127) the police officer objectively had reasonable grounds for the belief, assessed on all the available facts (**Ndabeni v Minister of Law and Order & Another 1984 (3) SA 500 (D)**). The official will have to show that reasonable grounds existed at the time he acted without a warrant and that it was not just a fishing expedition.

Where information is received by the officer it must contain sufficient detail to ensure that it is not based on gossip, but reliable. Factors that may contribute to the reliability of the information include that the information was received from a person who has in the past supplied reliable information, the information was received from more than one source, observation by the police and knowledge by the officer that the area is a crime hotspot.

Section 23 – Search of arrested person and the seizure of article

This section empowers a peace officer that arrested a suspect to search the arrested person and seize any article referred to in section 20 that is in possession or under the control of the arrested person. If the arresting person is not a peace officer, he may not search the arrested person, but still seize an article referred to in section 20 that is in his possession or under his control. If the arresting person is not a police official, the seized article must be delivered to a police official. Any arresting person may also take for safe keeping, any object found on the arrested person which may be used to cause bodily harm to himself or others.

Section 24 – Search of premises

Any person who is lawfully in charge or occupation of any premises and who reasonably suspects that stolen stock or produce, as defined in any law relating to the theft of stock or produce, is on or in the premises concerned, or that any article has been placed thereon or therein or is in the custody or possession of any person upon or in such premises in contravention of any law relating to intoxicating liquor, dependence-producing drugs, arms and ammunition or explosives, may at any time, if a police official is not readily available, enter such premises for the purpose of searching such premises and any person thereon or therein, and if any such stock, produce or article is found, he must take possession thereof and deliver it to a police official.

Section 25 - Power of police to enter premises in connection with State security or any offence

(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing—

(a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his area of jurisdiction; or

(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction, he may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose—

(i) of carrying out such investigations and of taking such steps as such police official may consider necessary for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of an offence;

(ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which such police official on reasonable grounds suspects to be in or upon or at the premises or upon such person; and

(iii) of seizing any such article.

(1A) Notwithstanding any other law, an application for a warrant under this section in respect of the offences listed in section 21(1A)(a) to (d) may be made to any magistrate or justice, irrespective of whether or not the place of execution of the warrant, or the place where the alleged crime has been committed falls within the jurisdiction of such magistrate or justice.

[Sub-s (1A) inserted by s 24 of Act 23 of 2022 (wef 4 January 2023).]

(2) A warrant under subsection (1) may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person of like authority.

(3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he on reasonable grounds believes—

(a) that a warrant will be issued to him under paragraph (a) or (b) of subsection (1) if he applies for such warrant; and

(b) that the delay in obtaining such warrant would defeat the object thereof.

Section 25 enables a magistrate or justice, where it appears from information on oath that there are reasonable grounds to believe that the internal security of the Republic is likely to be endangered by or as a result of a meeting which is being held or to be held in or upon premises within his jurisdiction area, to issue a warrant authorising a police official to enter the premises at a reasonable time with certain objects in mind. The same applies where it appears from information on oath that there are reasonable grounds to believe that an offence has

been or is being or is likely to be committed or that preparations for such commission are being or are likely to be made on premises within his jurisdiction area.

The police official may enter the premises for the purpose of carrying out such investigations or taking such steps as he may consider necessary for the preservation of the internal security or for the maintenance of law and order or the prevention of an offence. What is necessary will depend on the subjective decision of the police official and the objective standards will thus not apply. The police official may also enter the premises with the purpose of searching the premises or any person thereupon for an article referred to in section 20 which he reasonably suspects to be upon a person or on the premises. Here the test will be an objective one.

The warrant in terms of section 25 may be issued on any day and will remain in force until it is executed or cancelled by the person who issued it or someone with like authority if he is not available.

Where the delay in obtaining a warrant under this section would defeat the object thereof and the police official believes on reasonable grounds that a warrant would have been issued to him if he applied for one, he may also take the steps authorised under this section without such warrant. The test here will be objective.

Section 26 – Entering of premises for purposes of obtaining evidence

Provision is made for the entering of premises for the purposes of obtaining evidence in a criminal matter. The police official can enter a premises without a warrant to obtain evidence provided he reasonably suspects that a person who may furnish information with reference to an offence is on the premises. He may interrogate the person and obtain a statement from him. The official may not enter a private dwelling without the consent of the occupier thereof. The right to interrogate the person is clear and it is not necessary to obtain his consent before questions are put, although the person will clearly enjoy the right to remain silent.

Section 27 – Resistance against entry and search

Reasonable violence may be applied or used by the official who is entitled to search a person or who may enter a premises under section 26 to overcome any resistance against such search or entry. He may break a door or window of such premises, provided that the official must first audibly demand admission to the premises and notify the purpose for which he seeks to enter the premises. This is also applicable where no warrant has been issued

where the delay in obtaining a warrant would defeat the object thereof and the police official believes on reasonable grounds that a warrant would have been issued to him if he applied for one.

If the official is on reasonable grounds of the opinion that an article which is the subject of the search may be destroyed or disposed of if he audibly demands admission and notifies the person on the premises of the purpose for which he seeks entry, he is not required to do so.

Section28 - Wrongful search an offence, and award of damages

(1) A police official-
(a) who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25 (1); or
(b) who, without being authorized thereto under this Chapter-
(i) searches any person or container or premises or seizes or detains any article; or
(ii) performs any act contemplated in subparagraph (i), (ii) or (iii) of section 25 (1), shall be guilty of an offence and liable on conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding six months, and shall in addition be subject to an award under subsection (2).

(2) Where any person falsely gives information on oath under section 21 (1) or 25 (1) and a search warrant or, as the case may be, a warrant is issued and executed on such information, and such person is in consequence of such false information convicted of perjury, the court convicting such person may, upon the application of any person who has suffered damage in consequence of the unlawful entry, search or seizure, as the case may be, or upon the application of the prosecutor acting on the instructions of that person, award compensation in respect of such damage, whereupon the provisions of section 300 shall mutatis mutandis apply with reference to such award.

29 - Search to be conducted in decent and orderly manner

A search of any person or premises shall be conducted with strict regard to decency and order, and a woman shall be searched by a woman only, and if no female police official is available, the search shall be made by any woman designated for the purpose by a police official.

Section 30 - Disposal by police official of article after seizure

This section makes provision for articles seized under section 20 to be dealt with in specific way. Perishable goods may be disposed of in a manner as the circumstances may require. Stolen property or property suspected to be stolen may be delivered to the person from whom it was stolen if the person it was seized from consents thereto. Where consent to return the goods is refused or it is uncertain from whom the article was stolen, the article must be given an identification mark and retain it in police custody. In practice this means that the police book it into the SAP 13.

Section 31 - Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings

(1) (a) If no criminal proceedings are instituted in connection with any article referred to in section 30 (c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.
(b) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.

Section 32 - Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid

(1) If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and the accused admits his guilt in accordance with the provisions of section 57 (pays an admission of guilt fine), the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.
(2) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.

Section 33 - Article to be transferred to court for purposes of trial

The investigating officer must deliver a seized article to the clerk of the court where it is required as evidence or for a court order such as forfeiture. In cases where detention of the article by the clerk of the court is impracticable or undesirable, the investigating officer may be required to retain custody of the article.

Section 34 - Disposal of article after commencement of criminal proceedings

At the conclusion of the criminal proceedings, the court must make an order disposing of articles which were not forfeited or disposed of under section 35. The following orders may be given:
(a) be returned to the person from whom it was seized, if such person may lawfully possess such article; or
(b) if such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or
(c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.

Section 35 - Forfeiture of article to State

A court which convicts an accused of any offence may, without notice to any person, declare-
(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
(b) if the conviction is in respect of an offence referred to in Part 1 of Schedule 2, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property, and which was seized under the provisions of this Act.

Section 36 - Disposal of article concerned in an offence committed outside Republic

Where an article is seized in connection with which-
(a) an offence was committed or is on reasonable grounds suspected to have been committed in a country outside the Republic;
(b) there are reasonable grounds for believing that it will afford evidence as to the commission in a country outside the Republic of any offence or that it was used for the purpose of or in connection with such commission of any offence, the magistrate within whose area of jurisdiction the article was seized may, on application and if satisfied that such offence is punishable in such country by death or by imprisonment for a period of twelve months or more or by a fine of five hundred rand or more, order such article to be delivered to a member of a police force established in such country who may thereupon remove it from the Republic.
(2) Whenever the article so removed from the Republic is returned to the magistrate, or whenever the magistrate refuses to order that the article be delivered as aforesaid, the article shall be returned to the person from whose possession it was taken, unless the magistrate is authorized or required by law to dispose of it otherwise.

ASCERTAINMENT OF BODILY FEATURES OF PERSONS (ss 36A-37)

The meanings and definitions in section 36A(1) apply only for purposes of the interpretation of Chapter 3 of the Act that deals with the ascertainment of bodily features of persons, whereas all other meanings and definitions as provided in section 1 of the Act must be applied to the whole of the Act.

It is important to distinguish between bodily sample, buccal sample and intimate sample because the nature of the sample to be taken determines the procedure to be followed and the requirements that must be met. An intimate sample, for example, may only be taken by a registered medical practitioner or registered nurse as per section 36D(7)(d)(i).

36A - Interpretation of Chapter 3

(1) For the purposes of this Chapter, unless the context indicates otherwise-

(a) ***'appropriate person'*** *means any adult member of a child's family, or a care-giver of the child, which includes any person other than a parent or guardian who factually cares for a child, including-*

(i) a foster parent;

(ii) a person who cares for a child with the implied or express consent of a parent or guardian of the child;

(iii) a person who cares for a child whilst the child is in temporary safe care;

(iv) the person at the head of a child and youth care centre where a child has been placed;

(v) the person at the head of a shelter;

(vi) a child and youth care worker, who cares for a child who is without appropriate family care in the community; and

(vii) a child at the head of a child-headed household, if such a child is 16 years or older;

(aA) ***'authorised officer'*** *means the police officer commanding the Division responsible for forensic services within the South African Police Service, or his or her delegate;*

(b) ***'authorised person'*** *means-*

(i) with reference to photographic images, fingerprints or body-prints, any police official or a member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, in the performance of his or her official duties; and

(ii) with reference to buccal samples, any police official or member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, who is not the crime scene examiner of the particular case, but has successfully undergone the training prescribed by the Minister of Health under the National Health Act, in respect of the taking of a buccal sample;

(c) ***'body-prints'*** *means prints other than fingerprints, taken from a person and which are related to a crime scene, but excludes prints of the genitalia, buttocks or breasts of a person;*

(cA) ***'bodily sample'*** *means intimate or buccal samples taken from a person;*

(cB) ***'buccal sample'*** *means a sample of cellular material taken from the inside of a person's mouth;*

(d) ***'child'*** *means a person under the age of 18 years;*

(e) ***'Child Justice Act'*** *means the Child Justice Act, 2008 (Act 75 of 2008);*

(f) ***'comparative search'*** *means the comparing by the authorised officer of-*

(i) fingerprints, body-prints or photographic images, taken under any power conferred by this Chapter, against any database referred to in Chapter 5A of the South African Police Service Act; and

(ii) forensic DNA profiles derived from bodily samples, taken under any power conferred by this Chapter, against forensic DNA profiles contained in the different indices of the NFDD referred to in Chapter 5B of the South African Police Service Act;

(fA) ***'crime scene sample'*** *means physical evidence which is retrieved from the crime scene or any other place where evidence of the crime may be found, and may include physical evidence collected from the body of a person, including a sample taken from a nail or from under the nail of a person;*

(fB) ***'DNA'*** *means deoxyribonucleic acid which is a bio-chemical molecule found in the cells and that makes each species unique;*

*(fC) **'forensic DNA analysis'** means the analysis of sections of the DNA of a bodily sample or crime scene sample to determine the forensic DNA profile:*
Provided that this does not relate to any analysis pertaining to medical tests or for health purposes or mental characteristic of a person or to determine any physical information of the person other than the sex of that person;
*(fD) **'forensic DNA profile'** means the results obtained from forensic DNA analysis of bodily samples taken from a person or samples taken from a crime scene, providing a unique string of alpha numeric characters to provide identity reference: Provided this does not contain any information on the health or medical condition or mental characteristic of a person or the predisposition or physical information of the person other than the sex of that person;*
*(fE) **'Independent Police Investigative Directorate Act'** means the*
Independent Police Investigative Directorate Act, 2011 (Act 1 of 2011);
*(fF) **'intimate sample'** means a sample of blood or pubic hair or a sample taken from the genitals or anal orifice area of the body of a person, excluding a buccal sample;*
*(fG) **'National Health Act'** means the National Health Act, 2003 (Act 61 of*
2003);
*(fH) **'NFDD'** means the National Forensic DNA Database of South Africa, established in terms of section 15G of the South African Police Service Act;*
*(g) **'South African Police Service Act'** means the South African Police Service Act, 1995 (Act 68 of 1995).*
(2) Any police official who, in terms of this Act or any other law takes the fingerprints, a body-print or buccal sample or ascertains any bodily feature of a child must-
(a) have due regard to the personal rights relating to privacy, dignity and bodily integrity of the child;
(b) do so in a private area, not in view of the public;
(c) ensure the presence of a parent or guardian of the child, a social worker or an appropriate person; and
(d) treat and address the child in a manner that takes into account his or her gender and age.
(3) Buccal samples must be taken by an authorised person who is of the same gender as the person from whom such sample is required with strict regard to decency and order.
(4) Notwithstanding any other law, an authorised person may take a buccal sample or cause the taking of any other bodily sample with the consent of the person whose sample is required or if authorised under-
(a) section 36D; or
(b) section 36E.
(5) Any authorised person who, in terms of this Chapter or in terms of any other law takes a buccal sample from any person, must do so-
(a) in accordance with the requirements of any regulation made by the Minister of Police; and
(b) in a designated area deemed suitable for such purposes by the Departmental Heads: Police, Justice and Constitutional Development or Correctional Services in their area of responsibility.

Section 36B – Powers in respect of accused and convicted persons

A police official MUST take the fingerprints or MUST cause such fingerprints to be taken of all persons:

1. arrested for an offence referred to in Schedule 1
2. a person who has been released on bail if the fingerprints were not taken upon arrest
3. a person who has been summoned to court for an offence referred to in Schedule 1
4. a convicted person who has been sentenced to imprisonment without the option of a fine, whether suspended or not, if the fingerprints were not taken upon arrest. This includes any person serving a sentence of imprisonment without the option of fine or has been released on parole in respect of such a sentence irrespective of the fact that such a person was convicted prior to the commencement of this section.
5. a person convicted of any offence which the Minister has declared to be an offence for the purposes of this section.

A police officer MAY take fingerprints or MAY cause such fingerprints to be taken:

1. Upon the arrest of any charge
2. When admission of guilt has been paid for any offence that the Minister has declared to be an offence applicable to this section.

The fingerprints must be stored on the fingerprint database of the South African Police Service.

The retaking of fingerprints is allowed if

1. The previous fingerprints do not constitute a complete set
2. The previous fingerprints are not of sufficient quality to allow analysis, comparison or matching
3. The previous fingerprints cannot be found or not stored on the database.

The fingerprints may be the subject of a comparative search. This means that the fingerprints are compared against the fingerprints on the database.
The fingerprints MUST upon conviction of an adult be retained on the database and may be used to establish previous convictions. The fingerprints of a child MUST be retained on the database, but the retention thereof is subject to the expungement of records of certain convictions and diversion orders.
The fingerprints must as a general rule be destroyed if the prosecution declines to prosecute or a person has been acquitted. Fingerprints that are retained may only be used for the detection or investigation of crime, the identification of missing persons or human remains or the conducting of a prosecution.

Section 36C – Fingerprints and body-prints for investigation purposes

Any police official may without a warrant take fingerprints or body-prints if:

1. there are reasonable grounds to suspect that a person has committed an offence referred to in schedule 1

2. There are reasonable grounds to believe that the prints would be of value by excluding or including any person as a possible perpetrator.

The fingerprints may be used for a comparative search and the retention of the fingerprints are basically the section 36C discussed above.

Section 36D – Powers in respect of buccal samples, bodily samples and crime scene samples

An authorized person MUST take a buccal sample or cause the taking of any other bodily sample by a registered medical practitioner or nurse of any person:

1. arrested for an offence referred to in schedule 8

2. released on bail for an offence referred to in schedule 8 if it was not done upon arrest

3. who has been summoned to court for a schedule 8 offence

4. whose name appears in the National Register for Sex Offenders

5. charged or convicted for any offence that the Minister declared to be an offence for the purposes of this section.

An authorised person MAY take a buccal sample or cause the taking of any other bodily sample by a registered medical practitioner or nurse of any person:

1. upon the arrest for any offence
2. released on bail and such sample was not taken upon arrest
3. who has been summoned to court on any offence
4. whose name appears in the National Register for Sex Offenders
5. charged or convicted for any offence that the Minister declared to be an offence for the purposes of this section.

   A person who is required to submit a buccal sample and who requests to take it himself, must do so under the supervision of an authorised person. This procedure is confined to buccal samples. Intimate samples may only be taken by a registered medical practitioner or nurse.

   A buccal sample or bodily sample may be retaken if the first sample was insufficient for DNA analysis.

   The sample may be used for a comparative search.

A DNA profile derived from a sample may be used:

1. as an investigative tool
2. to identify persons involved in an offence irrespective of whether the crime was committed before or after the commencement of this section
3. to prove the innocence or guilt of a person
4. to exonerate a convicted person
5. to assist with the identification of missing persons or human remains.

Section 36 E – samples for investigation purposes.

(1) Subject to subsection (2) and section 36A(5), an authorised person may take a buccal sample of a person or a group of persons, or supervise the taking of a buccal sample from a person who is required to submit such sample and who requests to do so himself or herself if there are reasonable grounds to—

(a) suspect that the person or that one or more of the persons in that group has committed an offence referred to in Schedule 8; and

(b) believe that the buccal sample or the results of the forensic DNA analysis thereof, will be of value in the investigation by excluding or including one or more of those persons as possible perpetrators of the offence.

(2) If a person does not consent to the taking of a buccal sample under this section, a warrant may be issued by a judge or a magistrate if it appears from written information given by the authorised person on oath or affirmation that there are reasonable grounds for believing that—

(a) any person from whom a buccal sample is required has committed an offence listed in Schedule 8; and

(b) the sample or the results of an examination thereof, will be of value in the investigation by excluding or including that person as a possible perpetrator of the offence.

(3) The provisions of section 36D(4), (5)(a), (6) and (7) apply with the necessary changes, to a sample or forensic DNA profile derived therefrom as contemplated in subsection (1).

This section is wide enough to include the mass screening of a class of persons who are suspected of an offence where it is believed to be of value to include or exclude anybody who agrees to be sampled. This procedure is confined to the taking of buccal samples. If a person does not consent to the taking of the sample a warrant may be issued to obtain the samples.

Section 37 - Powers in respect of body-prints and bodily appearance of accused and convicted persons

(1) Any police official may—

(a) take the body-prints or may cause any such prints to be taken—

(i) of any person arrested upon any charge;

(ii) of any such person released on bail;

(iii) of any person arrested in respect of any matter referred to in paragraph (n), (o) or (p) of section 40(1);

(iv) of any person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed;

(v) of any person convicted by a court; or

(vi) of any person deemed under section 57(6) to have been convicted in respect of any offence which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subparagraph;

(b) make a person referred to in paragraph (a)(i) or (ii) or paragraph (a) or (b) of section 36B(1) available or cause such person to be made available for identification in such condition, position or apparel as the police official may determine;

(c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) or paragraph (a) or (b) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that a police official may not—

(i) take a blood sample of any person; or

(ii) examine the body of a person who is of a different gender to the police official;

(d) take a photographic image or may cause a photographic image to be taken of a person referred to in paragraph (a)(i) or (ii) or paragraph (a) or (b) of section 36B(1).

(2) (a) Any medical officer of any prison or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) or paragraph (a) or (b) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.

(b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take a blood sample of such person or cause such sample to be taken.

(3) Any court before which criminal proceedings are pending may—

(a) in any case in which a police official is not empowered under subsection (1) or section 36B(1) to take fingerprints or body-prints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;

(b) order that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings.

(4) Any court which has convicted any person of any offence or which has concluded a preparatory examination against any person on any charge, or any magistrate, may order that the fingerprints, body-prints or a photographic image of the person concerned be taken.

(5) Any fingerprints, body-prints or photographic images taken under any power conferred by this section, may be the subject of a comparative search.

(6) (a) Subject to subsection (7), the body-prints or photographic images, taken under any power conferred by this section, and the record of steps taken under this section—

(i) must upon the conviction of an adult person be retained on a database provided for in section 5A of the South African Police Service Act;

(ii) must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and

(iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceeding with reference to such body-prints or photographic images was instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified.

(b) Body-prints or photographic images which may be retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of a missing person, the identification of unidentified human remains or the conducting of a prosecution.

(c) The body-prints or photographic images referred to in paragraph (a)(i) and (ii), must be stored on the database established by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act.

(7) Subsection (6) does not prohibit the use of any body-prints or photographic image taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.

Any member of the SAPS may instruct that a person who is in custody on any charge: or who has been released on bail or warning in terms of Section 72 of the CPA
be made available for an identification parade in such circumstances, position and clothing as the police official should decide.

Evidence of the process which was followed during the holding of the parade is given by police witnesses. Although they are bound by certain rules and instructions, the only requirement for the admissibility of such evidence is its relevance. The prescribed safety precautions for holding an identification parade have a profound effect on the evidential value of the evidence about the parade. Legal representatives will usually vigorously attack this evidence as it is very damaging.

To eliminate possible irregularities at a parade, certain strict rules have been laid down by the police hierarchy. The court in **Bailey 2007 (2) SACR 1 (C)** confirmed that these are rules of

practice. These rules have no statutory force. Non-compliance with these rules will not *ipso facto* deprive an identification parade of all evidential weight. In other words, it does not affect the admissibility of the evidence but will have an impact on the reliability of the identification.

Rule 1

The proceedings at the parade should at the time of the parade be recorded (preferably on Form SAP 329) by the police official in charge of the parade.

Rule 2

The police official in charge of the parade should not be the investigating officer of the case in respect of which the parade is held.

Rule 3

Suspects should be informed of the purpose of the parade and the allegations them. In addition to this the suspects should be given an opportunity to obtain a legal representative to be present at the parade. The police official in charge of the parade may not refuse such a request. **Sibanda 1969 (2) SA 345 (T)**.

The suspect's legal representative must be given reasonable notice of the parade and must be given a reasonable opportunity to attend it.

An identification parade is not invalid simply because the legal representative was not present. If an accused had requested a legal representative to be present and said was not present during the parade, the state will however have to convince the court that there were very good reasons why legal representation was not available to the suspect and that the suspect's right to a fair trial has not in any way been violated by this fact.

Rule 4

A suspect should be informed that his refusal to take part in a parade can at a possible later trial be adduced as evidence against him and that the court might draw an adverse inference from such refusal. In **S v Maphumulo 1996 (2) SACR 84 (N)** it was held that the privilege against self-incrimination cannot be successfully invoked with regard to the ascertainment of bodily features because evidence of the identity of the suspect is real evidence.

Rule 5

The parade should in principle consist of at least eight to ten persons, but a greater number is desirable.

Rule 6

It is generally undesirable that there should be more than one suspect on the parade. If a second suspect is placed on the same parade, the two suspects should be more or less similar in general appearance and the persons on the parade should be increased to at least to sixteen.

Photographs taken during the parade constitutes real evidence and will be helpful in this regard.

Rule 7

If the same identifying witnesses are involved in two parades, then the suspect should not be the only person appearing in both; nor should a suspect be added to a parade already inspected by the identifying witnesses for purposes of a second parade.

Rule 8

The suspect and persons in the parade should be more or less of the build, height, age and appearance and should be more or less similarly dressed. General appearance includes standard of dress and grooming. This rule is of crucial importance. In **S v T 2005 (2) SACR 318 (E)** it was said that it must be ensured that that the suspect does not stand out like a sore thumb, which would obviously attract attention to him and increase the likelihood of him being identified whilst at the same time increases the likelihood of him being identified.

Rule 9

It is desirable that at least one photograph should be taken of all the persons, including the suspect, at the parade, depicting them as they appeared in the line-up and standing next to each other. These photographs may assist with regard to rules 6 and 8.

Rule 10

The police official in charge of the parade should inform the suspect that he may initially take up any position and change his position before any other identifying witness is called.

Rule 11

A suspect should be asked whether he is satisfied with the parade and if he has any further requests.

Rule 12

The police official in charge of the parade should comply with reasonable requests made by the accused especially with regard to a request to change clothing.

Rule 13

Identifying witnesses should be kept separately, not be allowed to discuss the case while waiting to be called to the parade and should not be able to see the parade being formed. The witnesses should be under the supervision of a police official who is neither the one in charge of the parade nor the investigating officer.

Rule 14

Identifying witnesses should not see anybody, particularly the suspect, on the parade before they are brought to the parade.

Rule 15

A police official, other than the investigating officer of the case, the person in charge of the parade and the official supervising witnesses who are waiting to be called to the parade, should escort the witnesses to and from the parade. After the parade the said official must escort the witnesses to a place where the witness can have no contact with witnesses who are still waiting to inspect the parade. The mentioned escorting official may not discuss the case with any of the witnesses.

Rule 16

The supervising official (before the witness is called to the parade) and the escorting official (to and from the parade) should not know who the suspect is and the parade must be formed in their absence.

Rule 17

The official in charge of the parade should inform each identifying witness that the person whom the witness saw may or may not be on the parade. The witness must also be informed that if he cannot make a positive identification, he should say so.

Rule 18

Identification may be done by touching the shoulder of the suspect and is desirable that a photo be taken of the actual act of identification.

Section 38 – Methods of Securing Attendance of Accused in Court

(1) Subject to section 4(2) of the Child Justice Act, 2008 (Act 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.
[Sub-s (1) substituted by s 4 of Act 42 of 2013.]
(2) The methods of securing the attendance of an accused who is under the age of eighteen years at a preliminary inquiry or child justice court are those contemplated in section 17 of the Child Justice Act, 2008.

In **S v Swart (unreported, WLD case number 5/3221/1994, 10 March 1995)** the accused was not brought before court in any of the manners mentioned in section 38, but appeared by agreement between the prosecution, the accused and his legal representative. The question arose whether an accused`s voluntary appearance has the effect of vesting that court with full jurisdiction over the person or not. The court held that section 38 is neither peremptory nor does it reflect an exhaustive list of methods of obtaining attendance at court. The provisions of section 38 should be purely directory, leaving it to the discretion of the prosecuting authorities as to the manner in which the attendance of an accused person is to be procured. Where an accused voluntarily submits himself to the jurisdiction of the court, the court clearly has jurisdiction over his person.

Section 39 - Manner and effect of arrest

(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.

An arrest (with or without a warrant) is effected, unless the person submits to custody, by the actual touching of the body of the person to be arrested or by forcibly confining his body if the circumstances require it. The arrested person must at the time of the arrest or immediately after the arrest be informed of the cause of the arrest. If a person is arrested by virtue of a warrant a copy of the warrant must be made available to the arrested person if he so demands. The effect of an arrest is that the arrested person is in lawful custody and is detained in custody until he is lawfully released from custody.

Section 40 - Arrest by peace officer without warrant

A peace officer may without warrant arrest any person-
(a) who commits or attempts to commit any offence in his presence;
(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
(c) who has escaped or who attempts to escape from lawful custody;
(d) who has in his possession any implement of housebreaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;
(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing; (f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;
(g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;
(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;
(i) who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;
(j) who wilfully obstructs him in the execution of his duty;
(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;
(l) who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;
(m) who is reasonably suspected of being a deserter from the South African National Defence Force;
(n) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;

(o) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;
(p) who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;
(q) who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.

Section 41 – Name and address of certain persons and powers of arrest by peace officer without warrant

(1) A peace officer may call upon any person—

(a) whom he has power to arrest;

(b) who is reasonably suspected of having committed or of having attempted to commit an offence;

(c) who, in the opinion of the peace officer, may be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish such peace officer with his full name and address, and if such person fails to furnish his full name and address, the peace officer may forthwith and without warrant arrest him, or, if such person furnishes to the peace officer a name or address which the peace officer reasonably suspects to be false, the peace officer may arrest him without warrant and detain him for a period not exceeding twelve hours until such name or address has been verified.

(2) Any person who, when called upon under the provisions of subsection (1) to furnish his name and address, fails to do so or furnishes a false or incorrect name and address, shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

A person would normally not be obliged to make statements to the police or to supply information to the police. This includes the provision of information in respect of the name and address. However, section 41 empowers peace officers to demand the names and addresses of person falling into certain categories:

1. All persons who might be arrested by a peace officer in terms of section 40
2. Persons reasonably suspected of having committed or of having attempted to commit an offence
3. Persons who may be able to give evidence in regard to the commission or expected commission of an offence

A person who fails to supply his full name and address or supplies a name and address that the peace officer reasonably suspects to be false, may be arrested. Failure to supply the required information in terms of this section is also an offence.

Section 42 - Arrest by private person without warrant

(1) Any private person may without warrant arrest any person—

(a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;

(b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;

(c) whom he is by any law authorized to arrest without warrant in respect of any offence specified in that law;

(d) whom he sees engaged in an affray.

(2) Any private person who may without warrant arrest any person under subsection (1)(a) may forthwith pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein.

(3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorized thereto by such owner, occupier or person in charge, may without warrant arrest the person so found.

A private person may arrest without a warrant any person in the following situations:

1. Who commits or attempts to commit an offence in his presence or whom he reasonably suspects of having committed a schedule 1 offence
2. The private person may voluntarily assist a private person or a peace officer who is having difficulty arresting somebody
3. When he may arrest a person without a warrant in terms of any law for an offence specified in that law
4. Any person he sees engaged in an affray

Owners, lawful occupiers or persons in charge of property or somebody authorised thereto by the aforementioned mat arrest a person who commits an offence on the property or in respect of such property. This authority is not restricted to schedule 1 offences.

Section 43 – Warrant of arrest may be issued by magistrate of judge

(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police—

(a) which sets out the offence alleged to have been committed;

(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

(2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.

A prosecutor or a commissioned police officer may apply for a warrant to be issued. The application must be in writing and contain the following information:

1. The offence which has allegedly been committed by the person for whose arrest the warrant is intended
2. One of the following – (i) that the offence was committed within the jurisdiction of the magistrate to whom the application is made OR (ii) that it is known or is on reasonable grounds suspected that the suspect is within the jurisdiction of the magistrate (It is preferable to apply for the warrant in the jurisdiction where the offence was committed, before the alternative is used.)
3. A statement that a reasonable suspicion exists that the person in respect of whom the warrant is applied for has committed the offence and that the suspicion is based upon information taken under oath.

It is preferable that the name of the person to be arrested is mentioned in the application, but if this is not possible, as accurate a description as possible of that person, will suffice.

Section 44 – Execution of warrants

A warrant of arrest issued under any provision of this Act may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof.

A peace officer must execute a warrant issued under any provision of the Criminal Procedure Act and must do so in accordance with the terms thereof.

Section 45 – Arrest on telegraphic authority

(1) A telegraphic or similar written or printed communication from any magistrate, justice or peace officer stating that a warrant has been issued for the arrest of any person, shall be sufficient authority for any peace officer to arrest and detain that person.

(2) The provisions of section 50 shall apply in respect of an arrest effected in accordance with subsection (1).

A peace officer who is advised telegraphically or by means of a similar written or printed communication that a warrant has been issued, is authorized in terms of such communication to arrest the person named in it. If the warrant itself is transmitted and a copy is executed, it has the same effect as the execution of the warrant itself in terms of section 330 of the CPA.

Section 46 – Non-liability for wrongful arrest

(1) Any person who is authorized to arrest another under a warrant of arrest or a communication under section 45 and who, in the reasonable belief that he is arresting such person, arrests another, shall be exempt from liability in respect of such wrongful arrest.

(2) Any person who is called upon to assist in making an arrest as contemplated in subsection (1) or who is required to detain a person so arrested, and who reasonably believes that the said person is the one whose arrest has been authorized by the warrant of arrest or the communication, shall likewise be exempt from liability in respect of such assistance or detention.

Section 46 protects an arresting person and the person or authority who is vicariously liable for his actions, who is reasonably mistaken in regard to the identity of the person named in the warrant.

If the arresting person believes that the person whom he takes into custody is one who, according to the warrant, he must arrest, he would not be held liable for an unlawful arrest. In determining the question of whether the arresting person acted reasonably, the question is asked whether a reasonable and careful man who was entrusted with the execution of the warrant would have believed that the person he had taken into custody was the person identified in the warrant.

Section 47 – Private persons to assist in arrest when called upon

(1) Every male inhabitant of the Republic of an age not below sixteen and not exceeding sixty years shall, when called upon by any police official to do so, assist such police official—

(a) in arresting any person;

(b) in detaining any person so arrested.

(2) Any person who, without sufficient cause, fails to assist a police official as provided in subsection (1), shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

Males between 16 and 60 years of age are obliged to assist with the arrest or detention of a person if so requested by a police officer. The duty to aid a police official is seen in a serious light and non-compliance therewith amounts to an offence.

Section 48 – Breaking open premises for purpose of arrest

Any person who may lawfully arrest another in respect of any offence, and who knows or reasonably suspects such other person to be on any premises, if he first audibly demands entry into such premises and gives notification of the purpose for which he seeks entry and fails to gain entry, may break open, enter and search such premises for the purpose of effecting the arrest.

Section 49 – Use of force in effecting arrest

(1) For the purposes of this section—

(a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect;

(b) 'suspect' means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and

(c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if—

(a) the suspect poses a threat of serious violence to the arrestor or any other person; or

(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

Section 50 – Procedure after arrest

(1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that—

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A,

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires—

(i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;

(ii) or will expire at, or if the time at which such period is deemed to expire under subparagraph (i) or (iii) is or will be, a time when the arrested person cannot, because of his or her physical illness or other physical condition, be brought before a lower court, the court before which he or she would, but for the illness or other condition, have been brought, may on the application of the prosecutor, which, if not made before the expiration of the period of 48 hours, may be made at any time before, or on, the next succeeding court day, and in which the circumstances relating to the illness or other condition are set out, supported by a certificate of a medical practitioner, authorise that the arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court: Provided that the court may, on an application as aforesaid, authorise that the arrested person be further detained at a place specified by the court and for such period as the court may deem necessary; or

(iii) at a time when the arrested person is outside the area of jurisdiction of the lower court to which he or she is being brought for the purposes of further detention and he or she is at such time in transit from a police station or other place of detention to such court, the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court.

(2) For purposes of this section—

(a) 'a court day' means a day on which the court in question normally sits as a court and 'ordinary court day' has a corresponding meaning; and

(b) 'ordinary court hours' means the hours from 9:00 until 16:00 on a court day.

(3) Subject to the provisions of subsection (6), nothing in this section shall be construed as modifying the provisions of this Act or any other law whereby a person under detention may be released on bail or on warning or on a written notice to appear in court.

(4) and (5) . . .

(6) (a) At his or her first appearance in court a person contemplated in subsection (1)(a) who—

(i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60—

(aa) be informed by the court of the reason for his or her further detention; or

(bb) be charged and be entitled to apply to be released on bail,

and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; or

(ii) was not arrested in respect of an offence, shall be entitled to adjudication upon the cause for his or her arrest.

(b) An arrested person contemplated in paragraph (a)(i) is not entitled to be brought to court outside ordinary court hours.

(c) The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorised thereto in writing by him or her may, if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court.

(d) The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if—

(i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;

(ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60(11A);

(iii) . . .

(iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to—

(aa) procure material evidence that may be lost if bail is granted; or

(bb) perform the functions referred to in section 37; or

(v) it appears to the court that it is necessary in the interests of justice to do so.

The detained person must be brought before a lower court within 48 hours. This does not mean that the detainee must be brought before a court that has jurisdiction to do the trial. If a detainee is brought before a court that does not have trial jurisdiction that court may still deal with the aspect of bail. The court is empowered at the arrested person`s first appearance or even at a postponed date to make an order in order to determine which court has jurisdiction.

The outer limit of 48 hours envisaged in section 51(1)(c) does not entitle a policeman to detain someone for that entire period without bringing him to court if it could be done earlier. Once it is reasonably possible to bring a detainee before court before the expiry of the 48 hours period, it must be done. What is possible or reasonably possible must be judged in the light of the prevailing circumstances in any particular case. Factors such as the availability of a magistrate, police manpower, transport problems and distances are to be taken into account, but convenience is not such a factor.

Where the 48-period expires outside ordinary court hours or on a day which is not an ordinary court day, the arrested person shall be brought before a lower court not later than the end of the first court day after the expiry of the 48 hours following upon his arrest. Section 50(d)(i) was intended to extend the 48-hour outer limit during which an arrested person could be detained where the 48-hour period expired outside court hours or on a day that was not an ordinary court day. The legislative purpose in extending the 48 hours, if it is interrupted by a weekend, is to overcome the difficulty of coordinating police, prosecutorial and court administration over weekends.

Section 1(d)(ii) in practice usually deals with matters where an arrested person is hospitalized and unable to physically appear in court. Please note that provision is made for a certificate of a medical practitioner in these circumstances and a hospital note from a nurse will not suffice.

Although section 6(a)(ii) states that an arrested person is not entitled to be brought to court outside ordinary court hours, it does not prohibit such a person from having the issue of bail considered outside of ordinary court hours in terms of section 59 (bail before first appearance of accused in lower court) and 59A (Director of Public Prosecutions may authorize release on bail) of the Act. The right to bail in terms of these sections is however limited to certain offences as discussed later when dealing with the respective sections.

Section 6(d) does not mean that all bail applications may not be postponed for longer than 7 days. This section is generally limited to matters where further investigation is required at the request of the prosecution. Where the State seeks a postponement of a bail hearing as provided for in terms of section 50, the prosecutor is not relieved of the duty to put all relevant information before the court. Bail applications or the continuance may otherwise be postponed for longer than 7 days at the discretion of the court.

Section 51 – Escaping and aiding escaping before incarceration

(1) Any person who escapes or attempts to escape from custody after he or she has been lawfully arrested and before he or she has been lodged in any correctional facility, police-cell or lock-up, shall be guilty of an offence

and liable on conviction to the penalties prescribed in section 117 of the Correctional Services Act, 1998 (Act 111 of 1998).

(2) Any person who rescues or attempts to rescue from custody any person after he or she has been lawfully arrested and before he or she has been lodged in any correctional facility, police-cell or lock-up, or who aids the person to escape or to attempt to escape from custody, or who harbours or conceals or assists in harbouring or concealing any person who escapes from custody after he or she has been lawfully arrested and before he or she has been lodged in any correctional facility, police-cell or lock-up, shall be guilty of an offence and liable on conviction to the penalties prescribed in section 117 of the said Correctional Services Act, 1998.

[Sub-s (2) substituted by s 4 of Act 66 of 2008.]

(3) Notwithstanding anything to the contrary in any law contained, a lower court shall have jurisdiction to try any offence under this section and to impose any penalty prescribed in respect thereof.

This section deals with escaping, attempting to escape and aiding escaping after a person has been lawfully arrested, but before the arrested person was lodged in a correctional facility, police-cell or lock-up. Once the person has been lodged in any of the mentioned facilities, any escape, attempted escape and aiding an escape is dealt with under the Correctional Services Act 111 of 1998.

Section 52 – Saving of other powers of arrest

No provision of this Chapter relating to arrest shall be construed as removing or diminishing any authority expressly conferred by any other law to arrest, detain or put any restraint upon any person.

Chapter 5 of the CPA does not affect the authority conferred by any other law to arrest or detain a person.

Section 53 – Saving of civil-law rights and liability

Subject to the provisions of sections 46 and 331, no provision of this Chapter relating to arrest shall be construed as removing or diminishing any civil right or liability of any person in respect of a wrongful or malicious arrest.

Section 53 provides that persons who suffer as a result of wrongful or malicious arrest have recourse to the usual remedies at civil law.

54 Summons as method of securing attendance of accused in magistrate's court

(1) Where the prosecution intends prosecuting an accused in respect of any offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance of the accused for a summary trial in a lower court having jurisdiction by drawing up the relevant charge and handing such charge, together with information relating to the name and, where known and where applicable, the residential address and occupation or status of the accused, to the clerk of the court who shall-

(a) issue a summons containing the charge and the information handed to him by the prosecutor, and specifying the place, date and time for the appearance of the accused in court on such charge; and

(b) deliver such summons, together with so many copies thereof as there are accused to be summoned, to a person empowered to serve a summons in criminal proceedings.

(2) (a) Except where otherwise expressly provided by any law, the summons shall be served by a person referred to in subsection (1) (b) by delivering it to the person named therein or, if he cannot be found, by delivering it at his residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there.

(b) A return by the person who served the summons that the service thereof has been effected in terms of paragraph (a), may, upon the failure of the person concerned to attend the relevant proceedings, be handed in at such proceedings and shall be prima facie proof of such service.

(3) A summons under this section shall be served on an accused so that he is in possession thereof at least fourteen days (Sundays and public holidays excluded) before the date appointed for the trial.

- The issue of a summons is formally the task of the clerk of the court, but it is primarily the prosecutor who is responsible for the preparation of the summons. If the prosecutor decides to prosecute a person, it is the prosecutor who prepares a charge sheet. In practice the prosecutor also completes the summons containing the name and other personal particulars of the accused before it is handed to the clerk of the court. If the prosecutor instead of the clerk of the court signs the summons, it is none the less considered to have been properly issued and valid.
- Service is effected by an authorised official handing the summons to the person therein named, or making use of one of the alternative forms of service. The alternative forms of service which are provided by s 54(2)(a) involve the handing-over of the summons at the residential, employment or business address of the person named therein to someone apparently over the age of sixteen and who apparently lives there.

- A summons may not come into the possession of an accused less than 14 days before his intended trial date. Please note that although the summons indicates it as a trial date, it is not the actual trial date, but rather the date of first appearance. At the first appearance issues such as legal representation and access to the docket are considered and only thereafter is the matter postponed for trial. For purposes of computing the 14 day period, Sundays and public holidays are not counted. If this requirement is not observed and the accused fails to appear on the date entered on the summons, no warrant for his arrest may be issued. However, should an accused, despite too short a period of notice being given, appear and plead without objecting to the fact that he came into possession of the summons less than fourteen days earlier, he is barred from arguing that the summons is invalid by virtue of its not having been served in good time – **Singh v Blomerus NO 1952 (4) SA 63 (N)**.
- Where children are served in terms of section 19 of the Child Justice Act, it is required that the summons be served on the child in the presence of his or her parent or other adult. The child and the adult involved must then also be specifically informed of the child`s rights and the allegation against him or her.

Section 55 – Failure of accused to appear on summons

(1) Subject to section 4(2) of the Child Justice Act, 2008, an accused who is eighteen years or older and who is summoned under section 54 to appear at criminal proceedings and who fails to appear at the place and on the date and at the time specified in the summons or who fails to remain in attendance at such proceedings, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

(1A) The provisions of section 46 of the Child Justice Act, 2008, apply to an accused who is under the age of eighteen years and who fails to appear at a preliminary inquiry in terms of a summons issued under that Act.

(2) The court may, if satisfied from the return of service referred to in paragraph (b) of section 54(2) that the summons was served on the accused in terms of paragraph (a) of that section and that the accused has failed to appear at the place and on the date and at the time specified in the summons, or if satisfied that the accused has failed to remain in attendance at the proceedings in question, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and unless the accused satisfies the court that his failure was not due to any fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months: Provided that where a warrant is issued for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant—

(a) may, where it appears to him that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 72; or

(b) shall, where it appears to him that the accused did not receive the summons in question or that the accused has paid an admission of guilt fine in terms of section 57 or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused, for which purpose he may require the accused to furnish an affidavit or affirmation, release the accused on warning under section 72 in respect of the offence of failing to appear in answer to the summons, whereupon the provisions of that section shall mutatis mutandis apply with reference to the said offence.

(2A) (a) If the court issues a warrant of arrest in terms of subsection (2) in respect of a summons which is endorsed in accordance with section 57(1)(a)—

(i) an endorsement to the same effect shall be made on the warrant in question;

(ii) the court may make a further endorsement on the warrant to the effect that the accused may admit his guilt in respect of the failure to appear in answer to the summons or to remain in attendance at the criminal proceedings, and that he may upon arrest pay to a clerk of the court or at a police station a fine stipulated on the warrant in respect of such failure, which fine shall not exceed the amount to be imposed in terms of subsection (2), without appearing in court.

(b) The fine paid in terms of paragraph (a) at a police station or to a clerk of a magistrate's court other than the magistrate's court which issued the warrant of arrest, shall, as soon as is expedient, together with the warrant of arrest in question, be forwarded to the clerk of the court which issued that warrant, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such admission of guilt in the criminal record book for admission of guilt, whereupon the accused concerned shall be deemed to have been convicted by the court in respect of the offence in question.

(3) (a) If, in any case in which a warrant of arrest is issued, it was permissible for the accused in terms of section 57 to admit his guilt in respect of the summons on which he failed to appear and to pay a fine in respect thereof without appearing in court, and the accused is arrested under such warrant in the area of jurisdiction of a magistrate's court other than the magistrate's court which issued the warrant of arrest, such other magistrate's court may, notwithstanding any provision of this Act or any other law to the contrary, and if satisfied that the accused has, since the date on which he failed to appear on the summons in question, admitted his guilt in respect of that summons and has paid a fine in respect thereof without appearing in court, in a summary manner enquire into his failure to appear on such summons and, unless the accused satisfies the court that his failure was not due to any fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

(b) In proceedings under paragraph (a) before such other magistrate's court, it shall be presumed, upon production in such court of the relevant warrant of arrest, that the accused failed to appear on the summons in question, unless the contrary is proved.

- Where an accused who is 18 years or older was been summoned to court and failed to appear or to remain in attendance, the court may issue a warrant of arrest for the accused if the court is satisfied that the summons was served as prescribed in section 54. If the warrant is executed and the accused is brought before court, the court may enquire into his failure to appear or remain in attendance in a summary manner. If the court is satisfied that the failure to appear or to remain in attendance was due to his fault, the court may then convict him of the offence of failure to appear or remain in attendance as provided for in the section and sentence him to a fine not exceeding R300 or imprisonment not exceeding 3 months.

- The procedure which is followed where a person who has been summoned to appear on a given day is absent on that day consists of two phases. On the day of his failure to attend, the court investigates whether the summons was properly served. For this purpose the court may rely on the return of service of the serving official. Should the court, however, entertain any doubt as to the accuracy or effectiveness thereof, it may require further evidence before concluding that proper service took place. If there is then no doubt in the court's mind that proper service was effected, the court issues a warrant for the arrest of the accused. It may be that the return of service before the magistrate is in reality the return of a putative or defective service, yet gives no hint of that fact. The validity of a warrant for the arrest of a person who has failed to appear is not dependent on fault. Even where the accused is unaware of his being required to attend, the consequent warrant can be legally in order – **Minister van Polisie v Goldschagg 1981 (1) SA 37 (A)**. This state of affairs is at least partially mitigated by the rule of practice that warrants are limited to cases in which failure to attend follows personal service of the summons.

- In consequence of the court's being convinced of proper service, a prima facie case of failure to attend exists against the accused. The second phase comes into play once the accused appears in court under the warrant for his arrest. The court may now summarily enquire into the reasons for the accused's failure to attend. First the court will inform him of the prima facie case against him and ask whether he received the summons. The subsequent proceedings must be seen against the background of the onus upon the accused to show on a balance of probabilities that his failure was not because of any fault on his part.

Section 56 – Written notice as method of securing attendance of accused in magistrate`s court

(1) If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount 1 determined by the Minister from time to time by notice in the Gazette, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall—

(a) specify the name, the residential address and the occupation or status of the accused;

(b) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer to a charge of having committed the offence in question;

(c) contain an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence in question and that he may pay a stipulated fine in respect thereof without appearing in court; and

(d) contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof.

(2) If the accused is in custody, the effect of a written notice handed to him under subsection (1) shall be that he be released forthwith from custody.

(3) The peace officer shall forthwith forward a duplicate original of the written notice to the clerk of the court which has jurisdiction.

(4) The mere production to the court of the duplicate original referred to in subsection (3) shall be prima facie proof of the issue of the original thereof to the accused and that such original was handed to the accused.

(5) The provisions of section 55 shall mutatis mutandis apply with reference to a written notice handed to an accused under subsection (1).

- If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that the accused, after being convicted, will not impose a fine exceeding the amount determined by the Minister (currently R5000), the peace officer may hand the accused a written notice to appear. The written notice may be issued irrespective of whether the person is in custody or not. If the person is in custody, he is released. The failure to attend court after a written notice has been issued is dealt with in the same manner as discussed under section 55.

Section 57 – Admission of guilt and payment of fine without appearance in court

(1) Where-

(a) a summons is issued against an accused under section 54 (in this section referred to as the summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, and such public prosecutor or clerk of the court endorses the summons to the effect that the accused may admit his guilt in respect of the offence in question and that he may pay a fine stipulated on the summons in respect of such offence without appearing in court; or

(b) a written notice under section 56 (in this section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer, the accused may, without appearing in court, admit his guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority.

(2) (a) The summons or the written notice may stipulate that the admission of guilt fine shall be paid before a date specified in the summons or written notice, as the case may be.

(b) An admission of guilt fine may be accepted by the clerk of the court concerned notwithstanding that the date referred to in paragraph (a) or the date on which the accused should have appeared in court has expired.

(3) (a)(i) Subject to the provisions of subparagraphs (ii) and (iii), an accused who intends to pay an admission of guilt fine in terms of subsection (1), shall surrender the summons or the written notice, as the case may be, at the time of the payment of the fine.

(ii) If the summons or written notice, as the case may be, is lost or is not available and the copy thereof known as the control document-

(aa) is not available at the place of payment referred to in subsection (1), the accused shall surrender a copy of the summons or written notice, as the case may be, at the time of the payment of the fine; or

(bb) is available at the place of payment referred to in subsection (1), the admission of guilt fine may be accepted without the surrender of a copy of the summons or written notice, as the case may be.

(iii) If an accused in respect of whom a warrant has been endorsed in terms of section 55 (2A) intends to pay the relevant admission of guilt fine, the clerk of the court may, after he has satisfied himself that the warrant is so endorsed, accept the admission of guilt fine without the surrender of the summons, written notice or copy thereof, as the case may be.

(b) A copy referred to in paragraph (a) (ii) may be obtained by the accused at the magistrate's court, police station or local authority where the copy of the summons or written notice in question known as the control document is filed.

(c) Notwithstanding the provisions of subsection (1), an accused referred to in paragraph (a) (iii) may pay the admission of guilt fine in question to the clerk of the court where he appears in consequence of such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection (1), he shall transfer such admission of guilt fine to the latter clerk of the magistrate's court.

(4) No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing an admission of guilt fine on good cause shown.

(5) (a) An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of non-commissioned officer attached to a police station within the

magisterial district or area in question or, in the absence of such a police official at any such police station, by the senior police official then in charge at such police station.

(b) An admission of guilt fine determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the Gazette (currently R10 000), whichever is the lesser.

(6) An admission of guilt fine paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question.

(7) The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said admission of guilt fine exceeds the said determination be refunded to the accused concerned.

- In terms of section 35(3)(a) of the Constitution every accused person has the right to be informed of the charge with sufficient detail to enable him to answer to it. In **S v Flynn 2011 (2) SACR 178 (KZP)** it was held that this constitutional right, as well as the essentials of a charge as set out in section 84 of the CPA, govern the charge in an admission of guilt: "*The charge must in every respect conform to the requirements of a valid charge.*"
- By electing to pay an admission of guilt fine an accused waives several important procedural rights which he would have enjoyed at trial and includes the right to be sentenced only upon proof beyond a reasonable doubt that he committed the offence,

the right to confront his accusers, the right to testify in an open court, the right to call witnesses and legal representation.

- In **S v Tong 2013 (1) SACR 346 (WCC)** the court stated that an accused must be warned of the full consequences of paying an admission of guilt fine. He must therefore be warned that it will be deemed that he was convicted and sentenced by a court and that such conviction will appear on his criminal record. This has resulted in the practice that an annexure has been included for the accused to sign that he has been warned about the abovementioned consequences.
- In **S v Karan 2019 (2) SACR 334 (WCC)** it was stated that section 57(7) confers a power of review on the magistrate and empowers the magistrate to intervene and set aside any conviction and/or sentence where it appears that any of the 3 grounds mentioned in subsection 7 are present.
- Where an admission of guilt is set aside, the accused may be prosecuted in the ordinary course and the pleas of autrefois acquit or convict will not be available to the accused.

Section 57A - Admission of guilt and payment of fine after appearing in court

(1) If an accused who is alleged to have committed an offence has appeared in court and is-

(a) in custody awaiting trial on that charge and not on another more serious charge;

(b) released on bail under section 59 or 60; or

(c) released on warning under section 72,

the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, (currently R10 000) hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again.

(2) Such notice shall contain-

(a) the case number;

(b) a certificate under the hand of the prosecutor or peace officer affirming that he or she handed or delivered, as the case may be, the original of such notice to the accused and that he or she explained to the accused the import thereof; and

(c) the particulars and instructions contemplated in paragraphs (a) and (b) of section 56 (1).

(3) The public prosecutor shall endorse the charge-sheet to the effect that a notice contemplated in this section has been issued and he or she or the peace officer, as the case may be, shall forthwith forward a duplicate original of the notice to the clerk of the court which has jurisdiction.

(4) The provisions of sections 55, 56 (2) and (4) and 57 (2) to (7), inclusive, shall apply mutatis mutandis to the relevant written notice handed or delivered to an accused under subsection (1) as if, in respect of section 57, such notice were the written notice contemplated in that section and as if the fine stipulated in such written notice were also the admission of guilt fine contemplated in that section.

- Payment of admission of guilt is not possible once an accused person has pleaded to a charge in court. (Section 106 of the CPA deals with the pleas.) The same principle that the accused must be aware of the full consequences at the time of paying the admission of guilt is also applicable here.
- In **S v Makolane 2006 (1) SACR 589 (T)** it was held that prosecutors are not prohibited by section 103 of the Firearms Control Act 60 of 2000 from invoking admission of guilt procedures as provided for in section 57A of the CPA. Section 103 (1) of the Firearms Control Act states that a person convicted of a list of offences mentioned in the section, becomes unfit to possess a firearm unless the court determines otherwise. It lists offences that are of a serious nature. Admission of guilt would not be applicable for these offences and in any event not be appropriate. The prosecution would however be able to set admission of guilt for an offence involving violence or dishonesty for which the accused is not sentenced to imprisonment without the option of a fine (as the case would then be when admission of guilt is set). Section 103(2) of the Firearms Control Act deals with when the court must enquire into the fitness of a person to possess a firearm after the person has been convicted for offences listed in schedule 2 of the same Act. The same principle as mentioned above is again applicable.
- Prosecutors must approach admission of guilt with care with due consideration of the nature of the offence, previous convictions and a possible suitable sentence.

BAIL PROCEEDINGS

Section 58 – Effect of bail

The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed: Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60(11)(a) or (b), as the case may be, and the court shall take into account—

(a) the fact that the accused has been convicted of that offence; and

(b) the likely sentence which the court might impose.

Section 59 - Bail before first appearance of accused in lower court

1) (a) An accused who is in custody in respect of any offence, other than an offence –

(i) referred to in Part II or Part III of Schedule 2;

(ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1996); or

(iii) referred to in –

(aa) section 17(1)(a) of the Domestic Violence Act ,1998;

(bb) section 18 (1)(a) of the Protection from Harassment Act, 2011 (Act 17 of 2011); or

(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused,

may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of

non- commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.

(b) The police official referred to in paragraph (a) shall, at the time of releasing the accused on bail, complete and hand to the accused a recognizance on which a receipt shall be given for the sum of money deposited as bail and on which the offence in respect of which the bail is granted and the place, date and time of the trial of the accused are entered.

(c) The said police official shall forthwith forward a duplicate original of such recognizance to the clerk of the court which has jurisdiction. (2) Bail granted under this section shall, if it is of force at the time of the first appearance of the accused in a lower court, but subject to the provisions of section 62, remain in force after such appearance in the same manner as bail granted by the court under section 60 at the time of such first appearance.

- Section 59 creates what is sometimes loosely referred to as police bail.
- It is determined by a police official of a certain rank or above and is determined before the first lower court appearance of the accused. In **Mvu v Minister of Safety and Security and another 2009 (2) SACR 291 (GSJ)** pointed out that a commissioned officer is of or **above the rank of inspector. (warrant officer)**

- Section 59 has limited application and bail may not be granted for the offences listed in Part II or Part III of Schedule 2. It further specifically excludes the offences mentioned in the section. In addition to this section 59 and 59A is further excluded for essential infrastructure-related offences in terms of section 2 of the Criminal Matters Amendment Act 18 of 2015.

Section 59A - Director of Public Prosecutions may authorise release on bail

(1) A Director of Public Prosecutions, or a prosecutor authorised thereto in writing by the Director of Public Prosecutions concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail: Provided that a person accused of any offence contemplated in section 59(1)(a)(ii) or (iii) may not be released on bail in accordance with the provisions of this section.

(3) The effect of bail granted in terms of this section is that the person who is in custody shall be released from custody-

(a) upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail at his or her place of detention contemplated in section 50 (1) (a);

(b) subject to reasonable conditions imposed by the DPP or prosecutor concerned; or

(c) the payment of such sum of money or the furnishing of such guarantee to pay and the imposition of such conditions.

(4) An accused released in terms of subsection (3) shall appear on the first court day at the court and at the time determined by the DPP or prosecutor concerned and the release shall endure until he or she so appears before the court on the first court day.

(5) The court before which a person appears in terms of subsection (4)-

(a) may extend the bail on the same conditions or amend such conditions or add further conditions as contemplated in section 62; or

(b) shall, if the court does not deem it appropriate to exercise the powers contemplated in paragraph (a), consider the bail application and, in considering such application, the court has the jurisdiction relating to the powers, functions and duties in respect of bail proceedings in terms of section 60.

(6) The provisions of section 64 with regard to the recording of bail proceedings by a court apply, with the necessary changes, in respect of bail granted in terms of this section.

(7) For all purposes of this Act, but subject to the provisions of this section, bail granted in terms of this section shall be regarded as bail granted by a court in terms of section 60.

- Bail granted in terms of this section remains subject to judicial control. Section 59A can only be applied prior to first appearance in court and does not permit release on warning. In a policy directive to prosecutors it has been suggested that in considering the amount of bail to be set, the customary or likely amount the court of the district would set in similar circumstances should serve as a guide.

- Section 59A is confined to Schedule 7 offences and prosecutors acting in terms of section 59A must have the required written authorisation from the DPP. In all instances there must be prior consultation with the official charged with the investigation. A policy directive issued to prosecutors determines that the consultation should not take place in the presence of the accused or his legal representative. *Mokoena: A Guide to bail Applications, 2 edition (2018*) *@ pg 27* reminds prosecutors that the investigating officer only acts in an advisory capacity and that the prosecutor is required to make the final decision based on fairness and objectivity.

Section 60 - Bail application of accused in court

(1) (a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

b) Subject to the provisions of section 50(6)(c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

(c)If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.

(2) In bail proceedings the court—

(a) may postpone any such proceedings as contemplated in section 50(6);

(b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;

(c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;

(d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (11) (a), (b) and (c), require of the prosecutor to place on record the reasons for not opposing the bail application.

(2A) The court must, before reaching a decision on the bail application, take into consideration—

(a) any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available; and

(b) the view of any person against whom the offence in question was allegedly committed, regarding his or her safety.

(2B) (a) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.

(b) If, after an inquiry referred to in paragraph (a), it is found that the accused is—

(i) unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13)(b); or

(ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances.

(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established—

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;

(5) In considering whether the ground in subsection (4)(a) has been established, the court may, where applicable, take into account the following factors, namely—

(a) the degree of violence towards others implicit in the charge against the accused;

(b) any threat of violence which the accused may have made to a person against whom the offence in question was allegedly committed or any other person;

(c) any resentment the accused is alleged to harbour against a person against whom the offence in question was allegedly committed or any other person;

(d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;

(e) any disposition of the accused to commit—

(i) offences referred to in Schedule 1;

(ii) an offence against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or

(iii) an offence referred to in—

(aa) section 17 (1) (a) of the Domestic Violence Act, 1998;

(bb) section 18 (1) (a) of the Protection from Harassment Act, 2011; or

(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, as is evident from his or her past conduct;

(f) the prevalence of a particular type of offence;

(g) any evidence that the accused previously committed an offence—

(i) referred to in Schedule 1;

(ii) against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or

(iii) referred to in—

(aa) section 17 (1) (a) of the Domestic Violence Act, 1998;

(bb) section 18 (1) (a) of the Protection from Harassment Act, 2011; or

(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, while released on bail or placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998; or

(h) any other factor which in the opinion of the court should be taken into account.

(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely—

(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

(j) any other factor which in the opinion of the court should be taken into account.

(7) In considering whether the ground in subsection (4)(c) has been established, the court may, where applicable, take into account the following factors, namely—

(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;

(b) whether the witnesses have already made statements and agreed to testify;

(c) whether the investigation against the accused has already been completed;

(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;

(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;

(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;

(g) the ease with which evidentiary material could be concealed or destroyed; or

(h) any other factor which in the opinion of the court should be taken into account.

(8) In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely—

(a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;

(b) whether the accused is in custody on another charge or whether the accused is on parole;

(c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or

(d) any other factor which in the opinion of the court should be taken into account.

(8A) In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors, namely—

(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;

(c) whether the safety of the accused might be jeopardised by his or her release;

(d) whether the sense of peace and security among members of the public will be undermined or jeopardised by the release of the accused;

(e) whether the release of the accused will undermine or jeopardise the public confidence in the criminal justice system; or

(f) any other factor which in the opinion of the court should be taken into account.

(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—

(a) the period for which the accused has already been in custody since his or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any financial loss which the accused may suffer owing to his or her detention;

(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;

(f) the state of health of the accused; or

(g) any other factor which in the opinion of the court should be taken into account.

(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence —

(a) referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release; or

(c) contemplated in section 59 (1) (a) (ii) or (iii), the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

11A)

(a) If the Director of Public Prosecutions having jurisdiction intends charging any person with an offence referred to in Schedule 5 or 6, the Director of Public Prosecutions may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue a written confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6.

(b) The written confirmation shall be handed in at the court in question by the prosecutor as soon as possible after the issuing thereof and forms part of the record of that court.

(c) Whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 5 or 6, a written confirmation issued by a Director of Public Prosecutions under paragraph (a) shall, upon its mere production at such application or proceedings, be prima facie proof of the charge to be brought against that person.

(11B)

(a) In bail proceedings, the accused, or his or her legal adviser, is compelled to inform the court whether—

(i) the accused has previously been convicted of any offence;

(ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges;

(iii) an order contemplated in section 5 or 6 of the Domestic Violence Act, 1998, section 3 or 9 of the Protection from Harassment Act, 2011, or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still of force; and

(iv) the accused is, or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998.

(b) Where the legal adviser of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.

(c) The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

(d) An accused who wilfully—

(i) fails or refuses to comply with the provisions of paragraph (a); or

(ii) furnishes the court with false information required in terms of paragraph (a),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(12) (a) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.

(b) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), in respect of an offence that was allegedly committed by the accused against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused, and a protection order as contemplated in that Act has not been issued against the accused, the court must, after holding an enquiry, issue a protection order referred to in section 6 of that Act against the accused, where after the provisions of that Act shall apply.

(13) The court releasing an accused on bail in terms of this section, may order that the accused—

(a) deposit with the clerk of any magistrate's court or the registrar of any High Court, as the case may be, or with a correctional official at the prison where the accused is in custody or with a police official at the place where the accused is in custody, the sum of money determined by the court in question; or

(b) shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that has been increased or reduced in terms of section 63(1), in circumstances in which the amount would, had it been deposited, have been forfeited to the State.

(14) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question,

which is contained in or forms part of a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.

SCHEDULE 5	SCHEDULE 6	SCHEDULE 7
(Sections 58 and 60(11) and (11A) and Schedule 6)	**(Sections 50(6), 58, 60(11) and (11A))**	**(Section 59A)** **Note that: S59A specifically excludes circumstances where offences were committed against persons who share a domestic relationship with the accused.**
Treason		
Murder	**Murder**, when— (a) it was planned or premeditated; (b) the victim was— (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1; (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences: (i) Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or (ii) robbery with aggravating circumstances; or (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy	**Culpable homicide** **Assault**— (a) when a dangerous wound is inflicted; (b) involving the infliction of grievous bodily harm; or (c) where a person is threatened— (i) with grievous bodily harm; or (ii) with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act 15 of 2013)
Attempted murder involving the infliction of grievous bodily harm		
Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Schedule 6	**Rape or compelled rape** as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively— (a) when committed— (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) by a person who is charged with having committed two or more offences of rape; or (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; (b) where the victim—	**Bestiality** as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007

	(i) is a person under the age of 16 years; (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; (c) involving the infliction of grievous bodily harm. Any offence referred to in section 4 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013	
Any offence referred to in sections 5, 6, 7, 8(1) and 23 and involvement in these offences as provided for in section 10 of the **Prevention and Combating of Trafficking in Persons Act, 2013**		
	Robbery, involving— (a) the use by the accused or any co-perpetrators or participants of a firearm; (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or (c) the taking of a motor vehicle. An offence referred to in Schedule 5— (a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule	**Robbery**, other than a robbery with aggravating circumstances, if the amount involved in the offence does not exceed R20 000,00
	The offences referred to in section 2, 3(2)(a), 4(1), 4A, 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the **Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004**, sections 133 or 142(2A), read with section 142(6), of the **Civil Aviation Act, 2009** (Act 13 of 2009), section 26(1)(j) of the **Non-Proliferation of Weapons of Mass Destruction Act**, 1993 (Act 87 of 1993) and section 56(1)(h) of the **Nuclear Energy Act, 1999** (Act 46 of 1999)	
Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992), if it is alleged that— (a) the value of the **dependence-producing** substance in question is more than **R50 000,00**; or (b) the value of the **dependence-producing** substance in question is more than **R10 000,00** and that the offence was committed by a person, group of persons, syndicate or any enterprise acting		Any offence in terms of any law relating to the **illicit possession of dependence-producing** drugs

in the execution or furtherance of a common purpose or conspiracy; or (c) the offence was **committed by any law enforcement officer**		
Any offence relating to the **dealing in or smuggling** of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament		
Any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act 75 of 1969), on account of being in **possession of more than 1 000 rounds of ammunition** intended for firing in an arm contemplated in section 39(2)(a)(i) of that Act		
Any offence relating to **exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act**, 2004— (a) involving amounts of more than **R500 000,00**; or (b) involving amounts of more than **R100 000,00**, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (c) if it is alleged that the offence was committed by any **law enforcement officer**— (i) involving amounts of more than **R10 000,00**; or (ii) as a member of a group of persons, syndicate or any enterprise **acting in the execution or furtherance of a common purpose or conspiracy**		**Theft** and any offence referred to in section 264(1)(a), (b) and (c), if the amount involved in the offence does not exceed R20 000,00 Any offence relating to **extortion, fraud, forgery or uttering** if the amount of value involved in the offence **does not exceed R20 000,00**
Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively on a child under the age of 16 years.		

An offence referred to in Schedule 1— (a) and the accused has previously been convicted of an offence referred to in Schedule 1; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1		
The offences referred to in section 3, 4, 11, 13 or 14 (in so far as it relates to the aforementioned sections) of the **Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004**. Any offence referred to in section 2, 4, 5, 6 or 9 of the **Prevention of Organised Crime Act, 1998** (Act 121 of 1998)		
Any offence referred to in— (a) section 54(1) of the **International Trade Administration Act, 2002** (Act 71 of 2002); (b) section 32(1)(a), (b), (c), (d), (k) in so far as that paragraph relates to section 21(1), (l), (m) or (o) of the **Second-Hand Goods Act, 2009** (Act 6 of 2009); or (c) section 36 or 37 of the **General Law Amendment Act**, 1955 (Act 62 of 1955), if it is alleged **that ferrous or non-ferrous metal** which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015, is involved		
Theft of ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015— (a) if it is alleged that the offence caused or has the potential to cause— (i) interference with or disruption of any basic service, as defined in section 1 of the aforementioned Act, to the public; or (ii) damage to such essential infrastructure; or (b) if it is alleged that the offence was committed by or		

with the collusion or assistance of— (i) a law enforcement officer, as defined in section 51(8) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997); (ii) a security officer, as defined in section 1 of the Private Security Industry Regulation Act, 2001 (Act 56 of 2001), who was required to protect or safeguard such essential infrastructure; (iii) an employee of, or contractor appointed by, the owner or the person in charge of such essential infrastructure; or (iv) a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.		
An offence referred to in section 3 of the Criminal Matters Amendment Act, 2015 (**Tampering or damaging essential infrastructure or assists / colludes with another person to tamper with or destroy essential infrastructure**.)		
A contravention of section 8, 9 or 10 of the **Cybercrimes Act, 2020**— (a) involving amounts of more than R500 000,00; (b) involving amounts of more than R100 000,00, if it is proven that the offence was committed— (i) by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (ii) by a person or with the collusion or assistance of another person, who as part of his or her duties, functions or lawful authority was in charge of, in control of, or had access to data, a computer program, a computer data storage medium or a computer system of another person in respect of which the offence in question was committed; or (c) if it is proven that the offence was committed by any law enforcement officer—		

(i) involving amounts of more than R10 000; or (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (ii) with the collusion or assistance of another person, who as part of his or her duties, functions or lawful authority was in charge of, in control of, or had access to data, a computer program, a computer data storage medium or a computer system of another person in respect of which the offence in question was committed		
A contravention of section 11 (2) of the **Cybercrimes Act**, 2020		
		Public violence
		Arson
		Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence
		Malicious injury to property
		Any **conspiracy, incitement or attempt** to commit any offence referred to in this Schedule

Bail is often misunderstood. The purpose of bail is that the accused must attend his trial without the interference with the administration of justice. This is weighed up against the liberty of the accused and the presumption of innocence. It is not a form of anticipatory punishment.

In **S v Mathebula 2010 (1) SACR 55 (SCA)** it was stated in relation to *onus*: *'In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: …Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him*'. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect. It is thus not sufficient to merely state that that the State has a weak case against the applicant.

- Section 60(1)(b) provides that if a court refers an accused to another court for trial or sentencing the court referring the accused retains jurisdiction relating to bail until the accused appears in such other court for the first time. In **S v Seroka 2021 (2) SACR 622**

(LP) the court held that if the receiving court refers the matter back to the transferring court, such transferring court shall again have the required jurisdiction to entertain the bail application.

There is a duty on the prosecutor to safeguard the rights of the community. The provisions of the CPA must be strictly adhered to. Failure to do so could have dire consequences and the failure to place all relevant information before court may lead to a delictual claim against the State such as in **Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC).** In this case not all the facts relevant to the bail application was placed before court. After the accused was released on bail he harmed the applicant and the applicant successfully instituted a civil claim.

If a court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court. In **S v Mabena and other 2007 (1) SACR 482 (SCA)** the court held although a bail inquiry is less formal than a trial, it remains a formal court procedure. A court is afforded greater inquisitorial powers in such an inquiry, but those powers are afforded so as to ensure that all material factors are brought to account, even when they were not presented by the parties.

Because bail is not as stringent as trial proceedings, it is often said to be inquisitorial in nature. The rules of evidence are not applied strictly and hearsay evidence is allowed. Viva voce evidence is not always required. For these reasons, the use of so called bail statements by both the investigating officer and the accused are permitted. In **S v Scott-Crossley 2007 (2) SACR 470 (SCA)** it was pointed out that that it is not the function of the Court which is seized of a bail application to analyse the evidence regarding the merits of the charges an accused is facing in great detail, otherwise the proceedings will become a dress rehearsal for the trial which is to ensue. In **S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC)** the Constitutional Court held that bail proceedings are considerably less formal than trial proceedings, as they are interlocutory in nature and are not concerned with the determining of the guilt of the accused. Thus, the evidentiary material which is proffered at such proceedings need not comply with strict rules pertaining to the admissibility of oral or written evidence. In the case of **Nafiz Modack & Jacqes Cronje v The State, case number A 44/2022, and Ashley Tabisher v The State, case number A111/22, delivered by the**

High Court of the Western Cape Division, Cape Town on 3 March 2023, the principle was again confirmed that the admissibility of evidence was a matter which properly fell to be determined by the trial court and not by the court dealing with the bail application.

- If the prosecution does not oppose bail for schedule 5 offences, schedule 6 offences or offences contemplated in section 59(1)(a)(ii) or (iii) – in general, offences with regard to the Domestic Violence Act and the Harassment Act stipulated in section 59 – the reasons for not opposing bail must be placed on record. Policy Directives have been issued in this regard to the effect that it is the Senior Prosecutor and the DPP who may decide not to oppose bail.

With regard to schedule 5 offences and offences contemplated in section 59(1)(a)(ii) or (iii), the onus of proof is on the accused to show that the interest of justice permits his release on bail.
Regarding "interest of justice "the CPA is clear in section 60(4) what the grounds are for establishing that it is not in the interest of justice to release the accused on bail. Sections 60(5) to 60 (9) refer to the factors to be taken into account in deciding if any of the grounds mentioned in section 60(4) have been established.

- In schedule 6 offences the accused must show that exceptional circumstances exist which in the interest of justice permit his release.

With regard to exceptional circumstances it must be noted that the CPA does not provide an indication of what constitutes exceptional circumstances. In **S v Schietekat (and other cases) 1999 (2) SACR 51 (CC)** the court indicated that the factors mentioned in subsections 4 to 9 are ordinary factors. In **S v C 1998 (2) SACR 721 (C)** the court indicated that exceptional circumstances must be sufficiently unusual or different. In **S v H 1999 (1) SACR 72 (W)** the court held that exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly to the application of the accused.

In **S v Jonas 1998 (2) SACR 673 (SE)** it was held that the term exceptional circumstances do not posit a closed list of circumstances. Whereas exceptional denotes something "unusual, extraordinary, remarkable, peculiar or simply different (see e.g. **S v Petersen 2008 (2) SACR 355 (C)**), it has been observed that showing exceptional circumstances does not set a

standard that would render it impossible for an applicant to make a case for bail – **S v Viljoen 2002 (2) SACR 550 (SCA).** They do not have to be circumstances over and beyond and generically different from those enumerated in ss 60 (4) – (9), which are circumstances to which regard is had in run of the mill bail applications not subject to the strictures of section 60(11). It is clear, however, that they must at least be compelling enough to take the case made out for the granting of bail beyond the ordinary.

Although the accused must show these exceptional circumstances, it is not for the accused to do it all. In **S v Jonas 1998 (2) SACR 673 (SEC)** it was held that the State can`t adopt this attitude and simply argue that the accused has not shown exceptional circumstances without placing any evidence on record.

In **Killian v S (2021) ZAWCHC 100** the court questioned the wisdom, in contested bail proceedings, of applying for bail by way of motion rather than by way of evidence viva voce. It was pointed out that inasmuch as bail proceedings are *sui generis* (of its own kind or class), where an accused is saddled with a statutory onus of the kind which is set out in sections 60(11)(a) and (b) of the CPA, the **Plascon-Evans** rule which applies in civil motion proceedings will not apply. (The **Plascon-Evans** rule entails that when a factual dispute arises, relief should only be granted if the facts stated by the respondent, together with the admitted facts in the applicant`s affidavits, justify the order.) In the case of conflict between the versions which are put up by the accused and the State in contesting affidavits, the version of the State must prevail, unless it is held to be improbable.

- In practice the accused starts with the bail application for schedule 5 offences, schedule 6 offences and offences contemplated in section 59(1)(a)(ii) or(iii) because the accused has the onus of proof. In bail applications for other offences the State will start with the bail application. Where it is in dispute whether it is a schedule 5 or 6 offence, the DPP may issue a written confirmation about whether the intention is to charge the accused with a schedule 5 or 6 offence. This serves as prima facie proof of the charge against the accused. This is important for the accused because of the burden of proof in that it is an indication whether he has to show “interest of justice” with regards to schedule 5 or “exceptional circumstances” with regard to schedule 6. The CPA does not provide that this legislative authority to issue a written notice may be delegated to other prosecutors. The

written notice is only prima facie proof with regard and the applicable schedule and the court must still make the final decision.

In **S v Nzima and another 2001 (2) SACR 354 (C)** the court stated that the Legislature placed the obligation on the court to advise the accused of the fact that the evidence he gives during the bail proceedings may subsequently be used against him in any proceedings. Irrespective of whether the accused is represented by an experienced or inexperienced legal representative, the court still has a duty to establish that the accused`s rights were properly explained to him. It is not a duty which rests upon a legal representative even though the legal representative may assist or complement the court`s obligation in explaining the accused`s rights.

In **S v Agliotti 2012 (1) SACR 559 (GSJ)** the court ruled that this judicial warning that must be given by the court also covers the situation where an accused elects to submit an affidavit in support of his bail application.

- Section 60(12)(b) has extended the jurisdiction of the court dealing with the bail application of an accused charged with an offence against a person who is in a domestic relationship with the accused. The court must establish whether there is an existing protection order and if there is no such pre-existing protection order, it is incumbent on the bail court to hold and enquiry and grant a protection order in terms of section 6 of the Domestic Violence Act.

- Section 60(14) seeks to secure a situation where the prosecutor`s docket privilege can be kept alive for purposes of a bail application, unless the prosecutor otherwise directs. The State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence for purposes of trial. In **S v Dlamini, S v Dladla, S v Joubert, S v Schietekat 1999 (2) SACR 51 (CC)** the court made it clear that nothing that was said in **Shabalala v Attorney-General and another 1995 (2) SACR 761 (CC)** should lead anyone to believe that the defence is entitled to look over the prosecution`s shoulder as the investigation runs its course. The judgement in **Shabalala** is no authority for the proposition that applicants for bail, or their legal representatives, are entitled to access to the police docket.

Section 62 – Court may add further conditions of bail

Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail—

(a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;

(b) with regard to any place to which the accused is forbidden to go;

(c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;

(d) with regard to the place at which any document may be served on him under this Act;

(e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused.

(f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

Section 62 empowers a court, on application by the prosecutor, to add further conditions of bail. It is therefore not applicable to the situation where an accused seeks a reduction of the bail amount in respect of bail granted earlier.

Section 63 - Amendment of conditions of bail

(1) Any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any condition imposed under section 60 or 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application.

(2) If the court referred to in subsection (1) is a superior court, an application under that subsection may be made to any judge of that court if the court is not sitting at the time of the application.

The purpose of s 63 is to provide the necessary procedure for those instances where changed circumstances require appropriate amendments to the conditions or amount of bail fixed at an earlier stage.

Section 63 should be distinguished from s 68 which governs cancellation of bail where the accused is about to abscond. But it is submitted that appropriate stricter amendments to the conditions of bail, or an increase in the amount of bail, can be applied for by the State in circumstances where the State fails to satisfy the court that cancellation of bail in terms of s 68 is warranted.

Section 63A – Release or amendment of bail conditions of accused on account of prison conditions

If the head of prison is satisfied that the prison population is reaching such proportions that it constitutes a material and imminent threat to human dignity, physical health or safety of an accused, he may apply to a lower court for either the release of an accused on warning. This section is largely limited to cases where bail has been set, but not paid, in respect of offences for which the police may set so called police bail in terms of section 59 and schedule 7 offences.

Section 64 -Proceedings with regard-to bail and conditions to be recorded in full

This section merely serves as statutory confirmation of the principle that courts of law courts of record and that the practice of keeping a proper record cannot be relaxed in matters pertaining to bail.

Section 65 - Appeal to superior court with regard to bail

An accused may appeal the refusal of bail, the mount of bail that was set or a condition of bail to the High Court. There is no requirement that leave to appeal against a magistrate's ruling must be obtained.

Section 65A - Appeal by Attorney-General against decision of court to release accused on bail

A Director of Public Prosecutions is entitled to appeal to the High Court not only against a lower court`s release on bail, but also against a condition of bail including the amount of bail.

Section 66 - Failure by accused to observe condition of bail

(1) If an accused is released on bail subject to any condition imposed under section 60 or 62, including any amendment or supplementation under section 63 of a condition of bail, and the prosecutor applies to the court

before which the charge with regard to which the accused has been released on bail is pending, to lead evidence to prove that the accused has failed to comply with such condition, the court shall, if the accused is present and denies that he or she failed to comply with such condition or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(2) If the accused is not present when the prosecutor applies to the court under subsection (1), the court may issue a warrant for the arrest of the accused, and shall, when the accused appears before the court and denies that he failed to comply with the condition in question or that his failure to comply with such condition was due to fault on his part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(3) If the accused admits that he failed to comply with the condition in question or if the court finds that he failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his part, cancel the bail and declare the bail money forfeited to the State.

(4) The proceedings and the evidence under this section shall be recorded.

In **S v Porrit and another (unreported GJ case no SS 40/2006, 21 July 2017)** it was pointed out that section 66 can only be triggered upon the prosecution`s application. The State bears the onus to prove on a balance of probabilities that the accused has breached the condition of bail due to fault on his part – phase 1. Once this is done, there is a burden upon the accused to prove on a balance of probabilities such facts as are relevant to persuade the court not to withdraw the bail or declare it forfeited to the State – phase 2. The court does not need to consider whether the ends of justice would be defeated if bail is not cancelled.

Section 67 - Failure of accused on bail to appear

(1) If an accused who is released on bail-
(a) fails to appear at the place and on the date and at the time-
(i) appointed for his trial; or
(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
(b) fails to remain in attendance at such trial or at such proceedings,
the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.
(2)(a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.
(c) If the accused does not appear before court within fourteen days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.
(3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.

:

Section 67 deals with the procedures and consequences of the non-attendance of an accused who was on bail. It does not envisage a trial which can result in a conviction and sentence. It has been said that the wording of s 67 'is peremptory and mandatory. A court is compelled to withdraw bail and declare it provisionally forfeited in terms of s 67 if an accused who is on bail fails to appear, or fails to remain in attendance.

- The issue with regard to forfeiture of the bail is usually not problematic in practice. If the accused is absent, the bail money is provisionally forfeited and the case postponed for 14 days as stipulated in the section. Upon the return of the case to court after the 14 days, the court may on good cause extent the period before considering the final forfeiture of bail. The court would have to be supplied with information to show that the accused is not at fault for his failure to attend for example that he has been hospitalized. If there is no information before the court to show that the failure to attend court is not due to the fault of the accused, the provisional forfeiture is made final.

- With regard to the warrant of arrest, it is often in practice ordered that a warrant of arrest for the accused due to his failure to attend, is authorized, but the execution thereof is held over or stayed for a period of 14 days in line with forfeiture of the bail. The validity of a court order staying the execution of the warrant needs further discussion.

In **S v Lerumo and others 2018 (1) SACR 202 (NWM)** the court dealt with a review of the lower court`s decision to issue a warrant of arrest with immediate execution. The court held that section 67 is peremptory and mandatory and that in the event of non- appearance of an accused who was on bail, a court does not have a discretion to stay the execution of the warrant. It is suggested that the finding is correct in so far as it relates to those instances where there is no information before the court to show that non-appearance was perhaps due to circumstances beyond the control of the accused.

In **S v Porritt and another (unreported, GJ case no SS 40/2006, 21 July 2017)** the court referred to the practice of only authorizing or issuing but not executing a warrant of arrest for non-appearance and stated that the said practice does not ignore the fact that section 67 requires that non-appearance be met with a warrant. It merely means that the court has a discretion, to be exercised on the basis of information made available to it, to remand its finalisation of the warrant of arrest to a specified date when evidence or further information regarding the reason for non-appearance might be available.

Section 67A - Criminal liability of a person who is on bail on the ground of failure to appear or to comply with a condition of bail

Any person who has been released on bail and who fails, without good cause to appear on the date and at the place determined for his or her appearance, or to remain in attendance until the proceeding in which he or she must appear have been disposed of, or who fails without good cause to comply with a condition of bail imposed by the court in terms of section 60 or 62, including an amendment or supplementation thereof in terms of section 63, shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year.

This section does not empower a court to enquire in a summary manner whether section 67A has been contravened. A charge sheet must be drawn and a formal trial held where the prosecution must prove the guilt of the accused beyond reasonable doubt.

Section 68 - Cancellation of bail

(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that—

(a) the accused is about to evade justice or is about to abscond in order to evade justice;

(b) the accused has interfered or threatened or attempted to interfere with witnesses;

(c) the accused has defeated or attempted to defeat the ends of justice;

(cA) the accused has contravened any prohibition, condition, obligation or order imposed in terms of—

(i) section 7 of the Domestic Violence Act, 1998;

(ii) section 10 (1) and (2) of the Protection from Harassment Act, 2011; or

(iii) an order in terms of any other law,

that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused;

(d) the accused poses a threat to the safety of the public, a person against whom the offence in question was allegedly committed, or any other particular person;

(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;

(eA) the accused has not disclosed that—

(i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;

(ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or

(iii) an order in terms of any other law,

was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force;

(eB) the accused has not disclosed or correctly disclosed that he or she is or was, at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;

(f) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or

(g) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.

(2) Any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), upon the application of any peace officer and upon a written statement on oath by such officer that—

(a) he or she has reason to believe that—

(i) an accused who has been released on bail is about to evade justice or is about to abscond in order to evade justice;

(ii) the accused has interfered or threatened or attempted to interfere with witnesses;

(iii) the accused has defeated or attempted to defeat the ends of justice; or

(iv) the accused poses a threat to the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person;

(b) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;

(c) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to release the accused on bail;

(d) the accused has contravened any prohibition, condition, obligation or order imposed in terms of—

(i) section 7 of the Domestic Violence Act, 1998;

(ii) section 10 (1) and (2) of the Protection from Harassment Act, 2011; or

(iii) an order in terms of any other law,

that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused;

(e) the accused has not disclosed or correctly disclosed that he or she is or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;

(f) the accused has not disclosed that—

(i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;

(ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or

(iii) an order in terms of any other law,

was issued by a court to protect the person against whom the offence in question as allegedly committed, from the accused and whether such an order is still of force; or

(g) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail.

The differences between 68(1) and (2):

Although the court may cancel bail in terms of both sections, the court may in terms of (1) impose more severe conditions to the bail.

- While in terms of ss(1) once the bail has been cancelled the accused may be committed to prison until the finalisation of the criminal proceedings, in terms of ss(2) if the bail is cancelled the accused may not be required to remain in custody pending the finalisation of the criminal proceedings, in that the accused could apply to the court before which he is facing charges, for the reinstatement of bail.

  An application in terms of ss(1) can only be made in the court before which the accused is facing charges, an application in terms of ss(2) can be brought before any magistrate.

  In an application in terms of ss(1) information relating to the factors enumerated in the subsection must be given on oath. This includes viva voce evidence and can be given by a witness. In terms of (2) the magistrate must be provided with a written statement by a peace officer under oath, stating that he has reason to believe that the accused has committed one of the wrongs as set out in ss(2).

- Subsection (1) has to take place in court whereas subsection (2) refers to a magistrate and the application can be done in chambers.

- Subsection (2) can only be used in circumstances in which it is not practicable to obtain a warrant under (1).

The magistrate seized with an application under (2) must be satisfied that the ends of justice may be defeated if the accused is not placed in custody whereas this is not the case in (1).

Section 68A - Cancellation of bail at request of accused

Any court before which a charge is pending in respect of which the accused has been released on bail may, upon application by the accused, cancel the bail and refund the bail money if the accused is in custody on any other charge or is serving a sentence.

Section 69 - Payment of bail money by third person

A third person may pay bail on behalf of the accused. Bail may only be refunded to the depositor of the money.

Section 70 - Remission of bail money

The Minister or any officer acting under his or her authority or the court concerned may remit the whole or any part of any bail money forfeited under section 66 or 67.

Section 72 - Accused may be released on warning in lieu of bail

Subject to section 4(2) of the Child Justice Act, 2008, if an accused who is 18 years or older is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II or Part III of Schedule 2— release the accused from custody and warn him to appear before a specified court at a specified time on a specified date in connection with such offence or, as the case may be, to remain in attendance at the proceedings relating to the offence in question, and the said court may, at the time of such release or at any time thereafter, impose any condition referred to in section 62 in connection with such release;
An accused who is released under subsection (1)(a) and who fails to appear or, as the case may be, to remain in attendance at the proceedings in accordance with a warning under that paragraph, or who fails to comply with a condition imposed under subsection (1)(a), shall be guilty of an offence and liable to the punishment of a fine not exceeding R300 or to imprisonment not exceeding 3 months.

Section 72A - Cancellation of release on warning

Notwithstanding the provisions of section 72(4), the provisions of section 68(1) and (2) in respect of an accused who has been granted bail, are, with the necessary changes, applicable in respect of an accused who has been released on warning.

Section 73 - Accused entitled to assistance after arrest and at criminal proceedings

(1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.

(2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

(2A) Every accused shall—

(a) at the time of his or her arrest;

(b) when he or she is served with a summons in terms of section 54;

(c) when a written notice is handed to him or her in terms of section 56;

(d) when an indictment is served on him or her in terms of section 144(4)(a);

(e) at his or her first appearance in court,

be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.

(2B) Every accused shall be given a reasonable opportunity to obtain legal assistance.

(2C) If an accused refuses or fails to appoint a legal adviser of his or her own choice within a reasonable time and his or her failure to do so is due to his or her own fault, the court may, in addition to any order which it may make in terms of section 342A, order that the trial proceed without legal representation unless the court is of the opinion that that would result in substantial injustice, in which event the court may, subject to the Legal Aid South Africa Act, 2014, order that a legal adviser be assigned to the accused at the expense of the State: Provided that the court may order that the costs of such representation be recovered from the accused: Provided further that the accused shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence.

(3) In addition to the provisions of sections 3 (g), 38 (2), 44 (1) (b) and 65 of the Child Justice Act, 2008 (Act 75 of 2008), relating to the assistance of an accused who is under the age of eighteen years by his or her parent, an appropriate person or a guardian at criminal proceedings, any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.

Section 75 - Summary trial and court of trial

(1) When an accused is to be tried in a court in respect of an offence, he shall, subject to the provisions of sections 119, 122A and 123, be tried at a summary trial in—

(a) a court which has jurisdiction and in which he appeared for the first time in respect of such offence in accordance with any method referred to in section 38;

(b) a court which has jurisdiction and to which he was referred to under subsection (2); or

(c) any other court which has jurisdiction and which has been designated by the Attorney-General or any person authorised thereto by the Attorney-General, whether in general or in any particular case, for the purpose of such summary trial.

(2)

(a) If an accused appears in a court which does not have jurisdiction to try the case, the accused shall at the request of the prosecutor be referred to a court having jurisdiction.

(b) If an accused appears in a magistrate's court and the prosecutor informs the court that he or she is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court but not of the jurisdiction of a regional court, the court shall if so requested by the prosecutor refer the accused to the regional court for summary trial without the accused having to plead to the relevant charge.

(3) The court before whom an accused appears for the purposes of a bail application shall, at the conclusion of the bail proceedings or at any stage thereafter, but before the accused has pleaded, refer such accused to a court designated by the prosecutor for purposes of trial.

Section 76 - Charge-sheet and proof of record of criminal case

If an accused is in custody, proceedings in a lower court commence with the lodging of a charge sheet with the clerk of the court. In practice the police docket is submitted to a prosecutor to decide on the case. If the prosecutor decides to institute a prosecution against the accused who is in custody, the prosecutor will complete a charge sheet (known as a J15 in the lower courts) and attach annexures to the charge sheet setting out the charges (offences) against the accused. The charge sheet with the attached annexures are handed to the clerk of the court in which the accused will make his first appearance for enrolment. The clerk of the court then writes the case in the court book that is used in court for the same day.

Where the attendance of the accused is secured by means of summons, the prosecution is initiated and proceedings commence upon the issue of the summons.

Apart from the charge against the accused, the charge sheet contains the name of the accused and if known, his address, sex, nationality and age.

It is required that a record be kept of the proceedings and the charge sheet, summons or indictment (High Court Charge sheet) forms part of the record.

Such record may be proved in a court by the mere production thereof or a copy thereof in terms of section 235 of the CPA.

Section 77 - Capacity of accused to understand proceedings

(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

(1A) At proceedings in terms of sections 77(1) and 78(2) the court may, if it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of section 22 of the Legal Aid South Africa Act, 2014.

(2) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(3) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

(4) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 has enquired into the mental condition of the accused.

(5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way.

Subsection 6 provides that where it is found that the accused is not capable of understanding the proceedings so as to make a proper defence, the court must still be satisfied on a balance of probabilities, with the limited available evidence, that the accused committed the offence. If the court does not have such evidence at its disposal, the court may order that information or evidence is placed before court so as to determine whether the accused has committed the act in question.

The court may then make any one of the orders with regard to the accused as listed in the section.

Where the court has found an accused to be incapable of understanding the proceedings and made an appropriate order, the accused may at time thereafter, when he is capable of understanding the proceedings so as to make a proper defence, again be prosecuted and tried for the offence in question. This is applicable to cases where an accused, after conviction but before completion of sentence, is found to incapable of understanding proceedings. The reason for this is that the court is required to set the conviction aside.

Section 78 - Mental illness or intellectual disability and criminal responsibility

A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable—

(a) of appreciating the wrongfulness of his or her act or omission; or

(b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

Every person is presumed not to suffer from a mental illness or intellectual disability so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities.

Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, **the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.**

If it is alleged at criminal proceedings that the accused is by reason of mental illness or intellectual disability or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or intellectual disability, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 enquired into the mental condition of the accused.

If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act—

(a) the court shall find the accused not guilty, or
(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,
by reason of mental illness or intellectual disability, as the case may be.

The court may then make any one of the orders with regard to the accused as listed in the section.

If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or intellectual disability, the court may take the fact of such diminished responsibility into account when sentencing the accused.

Section 79 - Panel for purposes of enquiry and report under sections 77 and 78

Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on—
(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the head of the designated health establishment designated by the court, or by another psychiatrist delegated by the head concerned; or

(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs—

(i) by the head of the designated health establishment, or by another psychiatrist delegated by the head concerned;

(ii) by a psychiatrist appointed by the court;

(iii) by a psychiatrist appointed by the court, upon application and on good cause shown by the accused for such appointment; and

(iv) by a clinical psychologist where the court so directs.

The prosecutor must supply the panel members with information specified in the act.

Section 80 - Accused may examine charge

An accused may examine the charge at any stage of the relevant criminal proceedings. When an accused is arrested it is not always possible for the State to draft a final charge sheet without further investigation. The accused is however still entitled to be informed of the charge against him. In practice it is for example not always possible at the first appearance of the accused, to specify that he is being charged with the possession of methaqualone (mandrax) because the test has not been conducted, but he can be informed that he is being charged with the possession of drugs and possibly what it is suspected to be.

Section 81 - Joinder of charges

(1) Any number of charges may be joined in the same proceedings against an accused at any time before any evidence has been led in respect of any particular charge, and where several charges are so joined, each charge shall be numbered consecutively.

(2)

(a) The court may, if in its opinion it will be in the interests of justice to do so, direct that an accused be tried separately in respect of any charge joined with any other charge.

(b) An order under paragraph (a) may be made before or during a trial, and the effect thereof shall be that the charge in respect of which an accused is not then tried, shall be proceeded with in all respects as if the accused had in respect thereof been charged separately.

- Any number of charges against an accused may be joined, provided this is done before evidence is led on any one of those charges. Charges may thus be added even after an accused has pleaded and given a plea explanation, but before evidence is lead. Where

a charge was added after evidence had been led, such a charge will be declared null and void on review and the matter remitted to the magistrate to continue with the trial on the original charge.

- An admission that is recorded in terms of section 220 of the CPA, is regarded as evidence for the purposes of section 81. Consequently, an additional charge cannot be joined after an admission is made in terms of section 220 of the CPA. Formal admissions in terms of section 220 of the CPA must be distinguished from admissions made during a guilty and not guilty plea.

- Where an accused pleads guilty and makes admissions in the course of the guilty plea, but a plea of not guilty is entered by the court in terms of section 113 of the CPA, the admissions "stand as proof in court" in terms of section 113(1) of the CPA. It does however not amount to evidence if not recorded as admissions in terms of section 220 of the CPA. It has probative value, but will only constitute evidence after formally admitted in terms of section 220 of the CPA.

In **S v Hendricks 1995 (2) SACR 177 (A)** the court had to determine whether such addition of charges could still take place after the accused had answered the court's questions in the process of a not guilty plea in terms of section 115. The crucial question was whether evidential material obtained in this manner was "evidence" as contemplated in section 81(1). The response was unambiguously negative and therefor charges could still be added. In **S v Mayedwa 1978 (1) SA 509 (E)** it was held that admissions in a plea explanation in terms of section 115, should not be construed as formal admissions in terms of section 220 without the prior and express consent of the accused as required by section 115(2)(b) of the CPA.

Section 82 - Several charges to be disposed of by same court

Where an accused is in the same proceedings charged with more than one offence, and any one charge is for any reason to be disposed of by a regional court or a superior court, all the charges shall be disposed of by the same court in the same proceedings.

Section 83 - Charge where it is doubtful what offence committed

If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.

In most cases, the person who is responsible for drafting charge sheets will not, prior to trial, be exactly sure which facts the court will find to be found proven.

To avoid this dilemma, s 83 authorises the drafter of a charge sheet or an indictment to charge an accused with all the offences that might possibly be proved by means of the available facts. Section 83 authorises the inclusion in the charge sheet of all the charges that could possibly be supported by the facts, even if they overlap to such an extent that convictions on all or on some of the counts would amount to a duplication of convictions. An accused may thus not object, at the beginning of the trial, to the charge sheet or indictment on the basis that it contains a duplication of charges.

Such a duplication will occur where more than one charge is supported by the same culpable fact. It is, however, the task of the court to be careful not to convict an accused of more than one offence if the offences with which the accused is charged in the relevant charges rest on the same culpable fact.

In short, it is the court's duty to guard against a duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges.

Section 84 - Essentials of charge

(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.

In the charge sheet, the accused is informed of the case that the State intends to prove against him. It is only fair that the charge should in no uncertain terms, let the accused know what to expect.

If the State intends to rely on a common purpose, it must be indicated in the charge sheet. Failure to do so could render the trial unfair.

The same principle is applicable to minimum sentences - section 51 of Act 105 of 1997. Failure to indicate the fact that minimum sentences are applicable in the charge sheet, may result in a sentence other than prescribed by section 51.

Prosecutors should take care not to draw up charge sheets that are careless and ambiguous but should present neat and succinctly formulated charges.

Section 85 - Objection to charge

An accused may, before pleading to the charge under section 106, object to the charge on the ground-

(a) that the charge does not comply with the provisions of this Act relating to the essentials of a charge;

(b) that the charge does not set out an essential element of the relevant offence;

(c) that the charge does not disclose an offence;

(d) that the charge does not contain sufficient particulars of any matter alleged in the charge:

(e) that the accused is not correctly named or described in the charge.

The accused must give reasonable notice to the prosecution of his objection and must state the ground upon which he bases his objection. The court may dispense with such notice if there is a good reason to do so or postpone the trial for the accused to give such notice. Where the court sustains an objection to the charge sheet. The court may make an order relating to the amendment of the charge sheet and the State must be given an opportunity to of remedying the charge sheet. However, if the charge sheet is not capable of amendment or if the particulars will not cure the defect, the charge will be quashed.

Section 86 - Court may order that charge be amended

The court has the power to amend a charge sheet at any stage before judgement in the following situations:

1. The charge lacks an essential averment (allegation).

2. An averment in the charge and the evidence to prove such averment differs.

3. Words or particulars that ought to have been included in the charge have been omitted.

4. Words or particulars that ought to have been omitted from the charge in fact feature in the charge.

5. Any other error in the charge. With the creation of this last category it may be accepted that that it is possible to amend any defect.

The only limitation placed on the court is that the amendment may not prejudice the accused in his defence.

Section 87 - Court may order delivery of particulars

An accused may at any stage before any evidence in respect of any particular charge has been led, in writing request the prosecution to furnish particulars or further particulars of any matter alleged in that charge, and the court before which a charge is pending may at any time before any evidence in respect of that charge has been led, direct that particulars or further particulars be delivered to the accused of any matter alleged in the charge, and may, if necessary, adjourn the proceedings in order that such particulars may be delivered.

It is generally accepted that the accused is entitled to as much information concerning the offence that the State intends to prove against him as will be required for a proper preparation of his defence.

The request for further particulars must take place before any evidence is led related to the charge in respect of which the particulars are requested.

When considering an application for further particulars, the guiding question is whether the accused has a reasonable need for the additional information in order to prepare his defence.

If the accused and the prosecution cannot agree about the provision of particulars, the accused may apply to the court for an order compelling the State to furnish particulars. The court may then direct that particulars be delivered.

The court must decide if the refusal of particulars would prejudice the accused and cause a failure of justice which would result in him not receiving a fair trial.

The request for further particulars may not be aimed at putting every conceivable question to the State rather than to obtain information to which the accused is entitled.

From **S v Alexander and others 1964 (1) SA 249 (C)** it is clear that a prosecutor cannot be expected to provide further particulars which he does not have.

It is important to differentiate between particulars that are necessary to inform an accused about the case against him and the evidence that may be led as proof of the commission of the offence. Whereas the State is obliged to provide particulars of the material facts that it

intends to prove, no obligation rests on it to disclose the evidence by means of which the facts are to be proved. By this stage the accused is generally in any event probably in possession of the contents of the docket.

In cases where the State alleges a conspiracy or a common purpose, the accused is entitled to particulars of those facts on which the State relies for its allegation that the accused was part of such conspiracy or common purpose.

The State is bound by the particulars. The particulars that the State provides become part of the record and the State must prove these.

Section 88 - Defect in charge cured by evidence

Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.

By virtue of section 88, a charge that is defective in the sense that an essential element of the offence charged was omitted, may be automatically cured by evidence. Section 88 has the effect that the accused can be found guilty even though the indictment does not disclose an offence, as long as the evidence proves the offence. The possibility of automatic curing exists only if the defect is not brought to the court's attention before judgment.

Section 89 - Previous conviction not to be alleged in charge

Except where the fact of a previous conviction is an element of any offence with which an accused is charged, it shall not in any charge be alleged that an accused has previously been convicted of any offence, whether in the Republic or elsewhere.

The proof of previous convictions during the trial but before judgment is, in general, prohibited. If the previous conviction is an element of the offence for example the contravention of section 11(B)(d) of the CPA – failure to inform the court during bail proceedings regarding previous convictions – it may be alleged in the charge.
See discussion below on sections 211, 240, 241,

Section 90 - Charge need not specify or negative exception, exemption, proviso, excuse or qualification

In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negatived in the charge and, if so specified or negatived, need not be proved by the prosecution.

In defining statutory offences, prohibited conduct is often cast in the form of a general prohibition. The general prohibition is then made subject to a series of exceptions.

These exceptions may, for example, relate to factual situations, a person`s sex, age or profession. Section 90 is applicable to this sort of statutory provision.

Where the legislature makes use of this procedure, the State need only allege and prove the essential element of the offence. An accused who alleges that he is excluded from the scope of the provision by an exception, exemption, proviso, excuse or qualification will have to prove the same. The State does not even have to allege that an accused is protected by an exception of other limitation.

Section 91 - Charge need not state manner or means of act

A charge need not set out the manner in which or the means or instrument by which any act was done, unless the manner, means or instrument is an essential element of the relevant offence.

Although section 91 exempts the State from the requirement of setting out the manner in which or the means by which the offence was allegedly committed, it is customary to refer thereto. This exemption does not apply in cases where the manner, means or instrument is a material element of the offence for example the illegal possession of an unlicensed or prohibited firearm. The charge sheet would have to refer to the said firearm.

Section 92 - Certain omissions or imperfections not to invalidate charge

(1) A charge shall not be held defective-

(a) for want of the averment of any matter which need not be proved;

(b) because any person mentioned in the charge is designated by a name of office or other descriptive appellation instead of by his proper name;

(c) because of an omission, in any case where time is not of the essence of the offence, to state the time at which the offence was committed;

(d) because the offence is stated to have been committed on a day subsequent to the laying of the complaint or the service of the charge or on an impossible day or on a day that never happened;
(e) for want of, or imperfection in, the addition of any accused or any other person;
(f) for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil in any case where the value or price or the amount of damage, injury or spoil is not of the essence of the offence.
(2) If any particular day or period is alleged in any charge to be the day on which or the period during which any act or offence was committed, proof that such act or offence was committed on any other day or during any other period not more than three months before or after the day or period alleged therein shall be taken to support such allegation if time is not of the essence of the offence: Provided that-
(a) proof may be given that the act or offence in question was committed on a day or during a period more than three months before or after the day or period stated in the charge unless it is made to appear to the court before which the proceedings are pending that the accused is likely to be prejudiced thereby in his defence on the merits;
(b) if the court considers that the accused is likely to be prejudiced thereby in his defence on the merits, it shall reject such proof, and the accused shall be deemed not to have pleaded to the charge.

Section 93 - Alibi and date of act or offence

If the defence of an accused is an alibi and the court before which the proceedings are pending is of the opinion that the accused may be prejudiced in making such defence if proof is admitted that the act or offence in question was committed on a day or at a time other than the day or time stated in the charge, the court shall reject such proof notwithstanding that the day or time in question is within a period of three months before or after the day or time stated in the charge, whereupon the same consequences shall follow as are mentioned in proviso (b) of section 92(2).

The special protection that an accused enjoys under section 93 is necessitated by the special nature of the alibi defence. An accused who relies on an alibi alleges that on the day or at the time when the offence was allegedly committed, he was elsewhere and therefore could not have committed the offence. He may thus be easily prejudiced if he ties his alibi to the date or time mentioned in the charge, but the State proves that the offence was committed on another day or at another time. If the court is of the opinion that the accused may be prejudiced if the State proves another day or time than stated in the charge, that evidence will be rejected. The accused is then treated as if he has not yet pleaded to the charge and accordingly a new charge may be out to him.

Section 94 - Charge may allege commission of offence on divers occasions

Where it is alleged that an accused on divers occasions during any period committed an offence in respect of any particular person, the accused may be charged in one charge with the commission of that offence on divers occasions during a stated period.

Where it is not practically to individually specify each occasion on which the crime was committed, the prosecution should draw up the charge as provided for in this section. In **S v Mponda 2007 (2) SACR 245 (C)** the court explained that the administration of justice is potentially prejudiced because the allegation of only a single rape in a charge-sheet, where the evidence supports a multiplicity of counts, means that the convicted accused can only be sentenced as a single-count offender.

Section 95 - Rules applicable to particular charges

(1) A charge relating to a testamentary instrument need not allege that the instrument is the property of any person.

(2) A charge relating to anything fixed in a square, street or open place or in a place dedicated to public use or ornament, or relating to anything in a public place or office or taken therefrom, need not allege that the thing in question is the property of any person.

(3) A charge relating to a document which is the evidence of title to land or of an interest in land may describe the document as being the evidence of the title of the person or of one of the persons having an interest in the land to which the document relates, and shall describe the land or any relevant part thereof in a manner sufficient to identify it.

(4) A charge relating to the theft of anything leased to the accused may describe the thing in question as the property of the person who leased it to the accused.

(5) A charge against a person in the public service for an offence committed in connection with anything which came into his possession by virtue of his employment may describe the thing in question as the property of the State.

(6) A charge relating to anything in the possession or under the control of any public officer may describe the thing in question as being in the lawful possession or under the lawful control of such officer without referring to him by name.

(7) A charge relating to movable or immovable property whereof any body corporate has by law the management, control or custody, may describe the property in question as being under the lawful management or control or in the lawful custody of the body corporate in question.

(8) If it is uncertain to which of two or more persons property in connection with which an offence has been committed belonged at the time when the offence was committed, the relevant charge may describe the property as the property of one or other of those persons, naming each of them but without specifying which of them, and it

*shall be sufficient at the trial to prove that at the time when the offence was committed the property belonged to one or other of those persons without proving which of them**.***

(9) If property alleged to have been stolen was not in the physical possession of the owner thereof at the time when the theft was committed but in the physical possession of another person who had the custody thereof on behalf of the owner, it shall be sufficient to allege in a charge for the theft of that property that it was in the lawful custody or under the lawful control of that other person.

(10) A charge relating to theft from any grave need not allege that anything in the grave is the property of any person.

(11) In a charge in which any trade mark or forged trade mark is proposed to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that such trade mark or forged trade mark is a trade mark or forged trade mark.

(12) ***A charge relating to housebreaking or the entering of any house or premises with intent to commit an offence, whether the charge is brought under the common law or any statute, may state either that the accused intended to commit a specified offence or that the accused intended to commit an offence to the prosecutor unknown****.*

Section 96 - Naming of company, firm or partnership in charge

A reference in a charge to a company, firm or partnership shall be sufficient if the reference is to the name of the company, firm or partnership.

This section is not about the accused but a complainant or someone else. When, however, a corporation or association is charged as an accused, such a charge is made in terms of section 332(2) against the name of a director or employee as representative

Section 97 - Naming of joint owners of property in charge

*A reference in a charge to joint owners of property shall be sufficient if the reference is to one specific owner and another owner or, as the case may be, other owners**.***

The wording of this section is a bit cryptic. It means that when property is held by more than one person in co-ownership, it is sufficient to name one of the owners and to add thereto "and another owner" or "and other owners", or "and another" or "and others", as the case may be.

Section 98 - Charge of murder or culpable homicide sufficient if it alleges fact of killing

It shall be sufficient in a charge of murder to allege that the accused unlawfully and intentionally killed the deceased, and it shall be sufficient in a charge of culpable homicide to allege that the accused unlawfully killed the deceased.

This section might create the impression that it is not required to state the time and place at which the offence was committed or the name of the victim in charges of murder or culpable homicide, but this information must be supplied. In terms of this section it is not required that the charge state the method of killing or the manner of the killing. It is, however customary and advisable to refer to both the manner and the means in the charge sheet.

Section 99 - Charge relating to document sufficient if it refers to document by name

(1) In any charge relating to the forging, uttering, stealing, destroying or concealing of, or to some other unlawful dealing with any document, it shall be sufficient to describe the document by any name or designation by which it is usually known or by the purport thereof, without setting out any copy or facsimile thereof or otherwise describing it or stating its value.

(2) Whenever it is necessary in any case not referred to in subsection (1) to make any allegation in any charge in relation to any document, whether it consists wholly or in part of writing, print or figures, it shall be sufficient to describe the document by any name or designation by which it is usually known or by the purport thereof, without setting out any copy or facsimile of the whole or any part thereof, unless the wording of the document is an element of the offence.

Section 100 - Charge alleging theft may allege general deficiency

On a charge alleging the theft of money or property by a person entrusted with the control thereof, the charge may allege a general deficiency in a stated amount, notwithstanding that such general deficiency is made up of specific sums of money or articles or of a sum of money representing the value of specific articles, the theft of which extended over a period.

The section presupposes an initial lawful receipt of and possession by an accused of money or property and a subsequent unlawful appropriation of that money or property.

A general deficiency is alleged by stating the amount of money or what property the accused received in custody and that the accused only accounted for a lesser amount or quantity.

There has to be an allegation that the money or property was owned by someone other than the accused and that the accused had stolen it.

The provision is intended for a series of thefts over a period of time, the particulars of which are difficult to prove. It is sufficient to mention a deficiency as an amount of money or quantity of goods stolen over a period. It will also be sufficient in an appropriate case to say that the owners are unknown to the prosecutor.

Section 101 - Charge relating to false evidence

(1) A charge relating to the administering or taking of an oath or administering or making of an affirmation or the giving of false evidence or the making of a false statement or the procuring of false evidence or a false statement -

(a) Need not set forth the words of the of the oath or the affirmation or the evidence or the statement

(b) Need not allege, nor need it be established at the trial, that the false evidence or statement was material to any issue at the relevant proceedings or that it was to the prejudice of any person.

(2) A charge relating to the giving or the procuring or attempted procuring of false evidence need not allege jurisdiction or state the nature of authority of the court or tribunal before which or the officer before whom the false evidence was given or was intended or proposed to be given.

The authority to administer oath is derived from the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. Subsection 1(a) was confirmed in the case of **R v Motongwane 1927 TPD 461-465**… 'the elements of the offence to which section 101 applies are identified and discussed in the book by Hoctor: Snyman's Criminal Law 7ed (2020) pages 296-202. Section319(3) of Act 56 of 1955 has no equivalent section in the new CPA and therefore applies unchanged. The State president made regulations pertaining to taking the oaths and affirmation, in terms of section 10 of the Justices of Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963).

Other relevant sections: 162, 163.

Section 102 - Charge relating to insolvency

A charge relating to insolvency need not set forth any debt, act of insolvency or adjudication or any other proceeding in any court, or any order made or any warrant or document issued by or under the authority of any court.

In the case of an offence that can only be committed while an estate is under sequestration, the fact of sequestration must be stated in the charge (**R v Holtz 1928 TPD 63**)

Section 103 - Charge alleging intent to defraud need not allege or prove such intent in respect of particular person or mention owner of property or set forth details of any deceit

In any charge in which it is necessary to allege that the accused performed an act with intent to defraud, it shall be sufficient to allege and to prove that the accused performed and the act with intent to defraud without alleging and proving that it was the intention of the accused to defraud any particular person, and as such charge need not mention the owner of any property involved or set forth the details of any deceit.

If possible, in the interests of efficiency and fairness towards the accused, the person who was allegedly prejudiced should be made known despite the exemption… (**S v Avion Motor Enterprises (Pty) Ltd 1978 (4) SA 692 (T)**).

Other relevant sections: 99 & 254.

Section 104 - Reference in charge to objectionable matter not necessary

A charge of printing, publishing, manufacturing, making or producing blasphemous, seditious, obscene or defamatory matter, or of distributing, displaying, exhibiting, selling or offering or keeping for sale any obscene book, pamphlet, newspaper or other printed or written matter, shall not be open to objection or be deemed insufficient on the ground that it does not set out the words thereof: provided that the court may order that particulars shall be furnished by the prosecution stating what passages in such book, pamphlet, newspaper, printing or writing are relied upon in support of the charge.

In S v Ncikazi 1980 (3) SA 789 (C), it was held that a court may examine, in its entirety, a speech which is partially quoted in a charge, but that the State was bound by the portion contained in the charge.

Other relevant section: 101.

Section 105 - Accused to plead to charge

The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77,85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.

- In simple terms, to plead is to formally respond or answer to the charge/s read out in court by the prosecutor.

- A criminal matter cannot be said to have started unless accused has pleaded.
- As provided for in section 109, if accused refuses to plead, then the court can enter a plea of not guilty on his or her behalf, and the matter shall proceed as if he has actually pleaded not guilty him or herself.
- The court shall see to it that the accused has pleaded to each and every charge that he or she is facing, regardless of the availability of legal representative.
- Most common pleas are the following, guilty and not guilty, even though there are more others listed under section 106.
- For a person to plead to a charge, he or she must be in sound and sober senses, for example a person who is mentally challenged cannot in law, plead to the charge, see sections 77,85 and 105A.
- The provisions of section 105 are peremptory, **S v Mamase & others 2012 (1) SACR 121 (SCA)**. In **S v Moses 2019 (1) SACR 75 (WCC)** it was held that a plea process is peremptory in terms of section 105 for purposes of the commencement of the trial.

In **S v Ndwanyana & others (unreported, WCC case number A153/20, 13 September 2021)**, one of the issues on appeal related to the third appellant's submission that the court had erred in convicting him on 10 counts as he had not been asked to plead to one of those counts. The court found that as there was no record or evidence to support the state's claim that the third appellant had pleaded to the charge in issue, the requirements of section 105had not been substantially fulfilled and the matter was not triable, as a result, the conviction on the disputed count was set aside.

Appeal court found in **S v Njezula 2019 JDR 1683 (GJ)** that the trial court's failure to ask the appellant to plead to the second of two counts amounted to a fatal irregularity. The conviction and sentence of accused were set aside as a result, and the matter was remitted for retrial before another magistrate.

Section 105A - Plea and sentence agreements

(1) (a) a prosecutor authorized thereto in writing by the NDPP and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of a plea of guilty; sentence to be imposed by court, or an award for compensation.

(b) The prosecutor may enter into such agreement after consultation with the investigating officer of the case.

(c) The requirements of paragraph (b)(1) may be dispensed with if prosecutor finds that consultation shall delay proceedings and cause substantial prejudice

(2) Agreement contemplated in subsection 1shall be in writing

(3) The court shall not participate in the negotiations contemplated in subsection (1)

(4) The prosecutor shall, before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into…

(5) If the court is satisfied that the agreement complies with the requirements of sections (1)(b)(i) and (iii), the court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court.

(6) After the contents of the agreement have been disclosed, the court shall question the accused, and after this inquiry if the court is not satisfied about the plea of guilty, then the court shall record a plea of not guilty and inform the prosecutor and accused about the reasons thereof.

(7) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.

(8) If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused, and then sentence accordingly.

(9) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.

(10) Where a trial starts de novo as contemplated in subsection (6)(c) or (9)(d) – the agreement shall be null and void.

- The prosecutor and the accused who is legally represented are allowed by section 105A to enter into negotiations about plea of guilty that accused is to tender, and they can also agree in terms of this section on sentence that should be imposed by the presiding officer or judge.
- The mandatory provisions in section 105A provide protection to the accused person who has waived his or her rights in terms of section 35(3) of the Constitution to a public trial before an ordinary court and to be presumed innocent in return for agreeing to both plea and sentence.

- Adherence to the provisions of section 105A provides an appropriate check and balance against the abuse of the plea bargain process in the context of waiver of the accused's constitutional rights.
- After the agreement between prosecutor and accused who is legally represented, they must present before court all that they have agreed upon, including terms of the agreement, as well as all admissions that accused is admitting pertaining to the charge he or she is facing.
- The court will look into the matter and then deal with the matter, taking into account the interests of justice. The court must also question the accused to ascertain whether the agreement was entered into freely and voluntarily.
- Rules and principles which govern judicial questioning in terms of section 112 (1) (b) are also applicable to to judicial questioning in terms of section 105A(6)(a)(ii). In **S v Wessels (Unreported, FSB case no. 62/2019, 23 May 2019**) the court pointed out that a prosecutor will as a rule have 'greater bargaining powers than the accused 'and that legal representation is of paramount importance to ensure that the 'unequal negotiating position' does not cause prejudice.

The South African Law Commission, as part of its investigation into the amplification of Criminal Procedure- concluded that the plea negotiations and agreements did take place in South Africa and were legal, whilst sentence bargaining and agreements were not regulated by the CPA.

See decision in Uijs AJ in **North Western Dens Concrete & another versus Director of Public Prosecutions (Western Cape) 1999 (2) SACR 669 (C***) in terms of case* ***S*** **v DJ 2016 (1) SACR 377 (SCA***) at [16], the prosecutor retains his discretion, and the defence need not cooperate but mutuality of negotiations take place in a spirit of 'give and take'. At the core of the give and take process that characterizes a plea and sentence agreement, is the fact that the prosecution can obtain a plea of guilty whilst the accused can secure a lesser sentence than might otherwise have been the case…***(S v Groenewald & others, unreported, WCC case no. A688/2010, 10 December 2019 at [19])**

Section 106 - Pleas

(1) When an accused pleads to a charge he may plead: -

(a) that he is guilty; or

(b) that he is not guilty; or

(c) that he has already been convicted of the same offence (autrefois convict); or

(d) that he has already been acquitted (autrefois acquit) of the same offence; or

(e) that he has received a free pardon under section 327(6)

(f) that the court has no jurisdiction to try the offence; or

(g) that he has been discharged under the provisions of section 204 from prosecution; or

(h) that the prosecutor has no title to prosecute; or

(i) that the prosecution may not be resumed or instituted owing to an order by a court under section 342A (3)(c)

(2) Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge.

(3) An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than plea of guilty or not guilty

(4) An accused who pleads to a charge other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall be entitled to demand that he be acquitted or be convicted.

- Plea of guilty s106 (1)(a) is where accused agrees that he has committed the offence which has been read out to him or her, and further details regarding this plea are to be found in section 112.
    - The court will have to ensure that what accused is admitting is indeed amounting to plea of guilty in terms of the law.
    - If the court is not satisfied that the accused is indeed guilty in terms of the law, then the court may alter a plea to one of not guilty in terms of section 113.
    - If the court is satisfied that the accused has correctly pleaded guilty to the charge, then the court shall find accused guilty of such offence.
- A plea of guilty is an admission by the accused of each of the essential allegations in the charge. The accused who pleads guilty waives his right to remain silent but not his right to fair treatment during the court's questioning in terms of section 112 (1) (b).
    - Where an accused pleads guilty and submit statement in terms of section 112 (2) wherein all details relating to essentials of crime have been written, then such statement will be containing factual reasons, and upon acceptance by the

prosecutor, and if the magistrate is also satisfied that all elements of crime have been dealt with in the statement, then the accused shall consequently be sentenced. The provisions of section 114 are also relevant here.

- Where the court is not satisfied about the contents of statement prepared by the accused admitting offence, then the court may alter a plea of guilty to one of not guilty in terms of section 113. In terms of section 106 (1) (a) for accused to plead guilty to an alternative charge or a charge in respect of which a competent verdict is permitted by the Act.

- But if the plea of guilty is a plea to an alternative charge or competent verdict, it is not a plea of guilty to the offence charged and questioning in terms of section 112 (1) (b) is not permitted unless the prosecutor accepts the plea to the alternative charge or competent verdict.

- Once an accused pleads not guilty as provided for under section 106 (1)(b), he is procedurally protected throughout up to a stage even if he is convicted, his persistence to pleading not guilty must not be used against him when the sentencing stage comes.

- The plea of not guilty is general denial of all the allegations made in the charge*. In the case* **S v Ngcukana (unreported, WCC case number A443/15, 18 August 2017) at [97]** *Rogers J pointed out that an accused who has pleaded not guilty and has not taken the court into his confidence 'is to a disadvantage in advancing the prospect of rehabilitation as a mitigating circumstance but it would not be in keeping with our constitutional order to hold that the prospect of rehabilitation must be ignored just because the accused, as is his right, maintains his innocence'. The other relevant section in respect of 106 (1)(b) is section 115 and 116.*

- An accused person is entitled to raise plea that he or she has already been convicted **(autrefois convict**) or already acquitted **(autrefois acquit**), of the same offence or facts which he or she is standing before court for.

  - This is based on the constitutional protection against double jeopardy which is part of the right to fair trial. The individual must be protected against abuse by the State and be given the benefit of a final decision in any criminal prosecution.

  - It is in the general interest of the administration of justice that there should be finality in the criminal process. It is the duty of accused to prove that he or she has already been convicted or acquitted of the same charge he or she is facing. An accused should give

reasonable notice to prosecution of his intention to raise a plea of autrefois acquit or convict. The prosecution may waive this right of prior information.

- The accused should be called upon to adduce evidence in support of his or her plea. The grounds upon which he bases his plea must be set out in such notice. The court may, on good cause shown, dispense with such notice or remand the case to enable such notice to be given.

- There are instances wherein it become impossible to charge an accused for a particular offence due to factors beyond anyone's control, for example, accused can be charged and convicted of assault with intent to do grievous bodily harm, later on we may find the victim passing on. In this instance death occurred as a result of assault by the accused which he has been convicted of, therefore a plea of autrefois convict shall not stand before court because, at the time when offence of assault GBH was finalized, the deceased was still alive and it was therefore impossible to charge accused with murder.

In **S v Basson 2007 (1) SACR 566 (CC)** *the Constitutional Court upheld the State's appeal against the trial court's quashing of six charges against the respondent (at [259]). It also confirmed the principles that in such circumstances the plea of autrefois acquit would not succeed in a subsequent prosecution 'as there was no acquittal on merits in respect of the quashed charges, and the accused did not plead to these charges and was therefore never in jeopardy of conviction upon them' at ([256]).*

The requirement that the previous acquittal (autrefois acquit) should have been on merits, must be interpreted in the light of provisions of sections 322(3) and 324. Section 324 should also be read with section 313 which deals with the institution of proceedings de novo when a conviction in a lower court is set aside on appeal or review **(Makau v Magistrate (unreported, GNP case no. A10/2011, 25 October 2011) at [24]**.

In **S v Msomi 2009 (1) SACR 441 (N)** *the accused at his second trial had pleaded guilty to and was convicted of theft. Prior to sentencing it emerged that the accused could successfully rely upon autrefois convict. The magistrate upheld this 'plea' despite the fact that the accused himself had never tendered such plea. The magistrate sent the matter on review for confirmation of his finding. On review it was held that the magistrate should have stopped the proceeding and sent the matter on review in terms of section 304A, which provides for the situation where magistrates are faced with irregular proceedings after conviction but before sentence.*

- Section106(4) contains the important principle that an accused who pleads to a charge shall, except in special circumstances, be entitled to demand that he be acquitted or convicted.
    - The effect of this section is that an accused must be acquitted or convicted of that with which he has been charged and not an entirely different offence with which he has been charged.
    - An accused who has pleaded to certain charges but in respect of which no judgement was given, should be acquitted on all those charges.
    - The procedural right granted to an accused in terms of section 106(4) only exists in a situation where the accused pleads to a charge on which he is actually being tried in the sense that he is before tribunal which has the power to find him guilty or not guilty on that charge.
    - The availability of presiding officer is also a factor that affects the right of the accused to demand a verdict. Where the magistrate who started the trial is no longer available in the absolute sense like where he dies or recuses himself, the trial can start de novo before another presiding officer. For a case to start de novo, it means that the case is to start afresh, or from the beginning.

The plea of lis pendens *is not referred to in section 106. But it is a plea that can be raised, see* **S v Motsepa 1982 (1) SA 304 (O)**. *See also* **Wild & anther v Hoffert NO & others 1997 (2) SACR (N) 237.** This is where accused replies that this matter which he is being charged for, is already pending or proceeding before another court and as such he cannot be prosecuted again as it has to be finalized where he is being tried.

Section 107-Truth and Publication for public benefit of defamatory matter to specially pleaded

A person charged with the unlawful publication of defamatory matter, who sets up as a defence that the defamatory matter is true and that it was for the public benefit that the matter should be published, shall plead such defence specially, and may plead with any other plea except plea on guilty.

The common law crime of defamation has not been abrogated by disuse and is consistent with constitutional provisions **((S v Hoho 2009 (1) SACR 276 (SCA); (S v Motsepe 2015 (2) SACR 125 (GP))**

Section 108 - Issues raised by plea to be tried

If an accused pleads a plea other than a plea of guilty, he shall, subject to the provisions of sections 115, 122 and 141(3), by such plea be deemed to demand that the issues raised by the plea be tried.

other relevant section: 106(4). *See also* **S v Basson 2004 (1) SACR 285 (CC) 313H**.

Section 109 - Accused refusing to plead

Where an accused in criminal proceedings refuses to plead to any charge, the court shall record a plea of not guilty on behalf of the accused, and a plea so recorded shall have the same effect as if it had been actually pleaded.

A refusal to plead does not amount to contempt of court (**S v Monnanyane 1997 (3) SA 976 (O)**)

Section 110 - Accused brought before court which has no jurisdiction

(1) Where an accused has pleaded that the court has no jurisdiction and it at any stage -

(a) after the accused has pleaded a plea of guilty or of not guilty; or

(b) where the accused has pleaded any other plea and the court has determined such plea against the accused,

appears that the court in question does not have jurisdiction, the court shall for the purposes of this act be deemed to have jurisdiction in respect of the offence in question.

(2) where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.

The Court explained *in* **Savoi & others v National Prosecuting Authority & another 2021 (2) SACR 278 (KZP) at [53]**, *'in a criminal matter, jurisdiction is determined by the area in which the offences have been committed (territorial jurisdiction), the nature of the offence (substantive jurisdiction) and also the nature of the penalty that should be imposed (punitive jurisdiction).*

Section 110A - Jurisdiction in respect of offences committed by certain persons outside Republic

(1) Notwithstanding any other law, any South African citizen who commits an offence outside the area of jurisdiction of the courts of the Republic and who cannot be prosecuted by the courts of the country in which the offence was committed, due to the fact that the person is immune from prosecution as a result of the operation of provisions of -

(a) the convention on the Privileges and immunities of the UN, 1946

(b) the convention on the Privileges and immunities of the specialized agencies, 1947,

(c) the Vienna Convention on Diplomatic Relations, 1961;

(d) the Vienna Convention on Consular Relations, 1963; or

(e) any other international convention, treaty or any agreement between the Republic and any other country or international organisation.

and that person is found within the area of jurisdiction of any court in the Republic which would have had jurisdiction to try the offence if it had been committed within its area of jurisdiction, that court shall, subject to subsection (2) have jurisdiction to try that offence.

(2) no prosecution may be instituted against a person under subsection (1) unless;

(a) the offence is an offence under the laws of the Republic, and

(b) the NDPP instructs that a prosecution be instituted against the person

(3) At the conclusion of the trial against a person under this section, a copy of the proceedings, certified by the clerk of the court or registrar, together with any remarks as the prosecutor may wish to append thereto, must be submitted to the Minister of Foreign Affairs.

In **Southern African Litigation Centre & another v NDPP & others 2012 (10) BCLR 1089 (GNP)**, *the North Gauteng High Court in Pretoria considered the provision or universal jurisdiction in Act 27 of 2002. The High Court held that the decision taken by the NPA refusing and/ or failing to accede to the first applicant's request that an investigation be initiated under the implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe, was unlawful and inconsistent with the constitution and therefore invalid.*

The SALC judgement was taken on appeal. In **National Commissioner, South African Police Service & another v Southern African Human Rights Litigation Centre & another 2014 (2) SA 42 (SCA)** *the SCA agreed with the High Court. The SCA clearly understood the notion of universality as a basis for prescriptive jurisdiction to be the idea that 'states are*

empowered to prescribe conduct that is recognized as [threatening] the good order not only of particular states but of the international community as a whole'.

Section 112 - Plea of Guilty

(1) where an accused at a summary trial in any court, pleads guilty to the offence charged, and the prosecutor accepts that plea –

(a) the presiding officer, if he or she is of the opinion that the offence does not merit punishment of Imprisonment or any other form of detention without option of a fine or a fine exceeding the

amount determined by the Minister from time to time (currently @ R5 000-00), convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and -

(i) impose any competent sentence other than imprisonment or fine exceeding amount determined By the Minister

(ii) deal with the accused otherwise in accordance with the law

(b) the presiding officer shall, if he or she is of the opinion that the offence merits punishment of Imprisonment without option of a fine or a fine exceeding the amount determined by the minister (currently being R5000-00), question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded.

(2) If an accused or his legal advisor hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may in lieu of questioning the accused under subsection 1(b), convict the accused on the strength of such statement and sentence him or her as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty, however court may put any question for clarity.

(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

This section must be read with section **106 (1)(a) and (b**) as discussed above.

It is a section wherein accused admits that he knows what he has been charged with and furthermore, he is taking responsibility for what he has done, and again admitting that he does not have a just excuse in law which he can defend himself or herself.

It becomes the responsibility of the presiding officer or judge to ensure that indeed the accused is guilty in terms of the law, by following all necessary steps that are prescribed.

- If accused is pleading guilty to an offence which according to the prosecutor, does not warrant a fine which has been determined in government gazette, then the prosecutor shall inform the presiding officer that he or she is accepting the plea of accused and request the court to find accused guilty on his plea- section **112 (1)(a**). This is done for those minor offences wherein the court will not impose a punishment of direct imprisonment or sentence with option of fine exceeding the one determined in gazette. The finalization of cases via summary route as provided for in section 112 (1)(a) is not acceptable in cases where an accused has no legal representation and pleads guilty to an offence of some complexity. The court should exercise its discretion and not pursue the speedy disposal of cases at the expense of protecting and promoting the truth and fair trial requirements*. In* **S v Gumede & Others 2020 (1) SACR 644 (KZP)** *Olsen J stated… 'the discretion must be exercised judicially, in exercising that discretion, the magistrate must recognize that the advantage sought to be gained by the employment of section 112 (1)(a) is one of efficiency. That however must be weighed against the fact that an important component of the right to fair criminal trial is the achievement of an adequate assurance that innocent people are not wrongly convicted, bearing in mind that protection against wrong conviction is no less important in the case of a minor offence'.*

  - If the prosecutor is of the view that accused deserve a sentence which is beyond the one in the gazette, then the prosecutor shall request the court to ask questions to accused in terms of section **112(1)(b)** in order to confirm that indeed accused has pleaded guilty correctly and in terms of the law*.* If accused is convicted following section 112 (1)(b) the he or she can be sentenced to any sentence that such court has jurisdiction in respect of that offence, including sentence where accused is sent direct to prison without an option of a fine.

  In **S v Kholoane 2012 (1) SACR 8(FB) at [15] -[16]** *Rampai J took the following view as regards the different procedures created by section 112 (1)(a) and (b): The configuration*

of the two procedures is undesirable. The important distinction between the two may thereby be blurred. If subsection (1)(a) is not strictly complied with, then subsection (1)(b) should not be used as corrective procedure for a sentence which does not fully fall within the scope of sub-section (1)(a). the court has to decide whether to use sub-section (1)(a) or (1)(b). There is no room somewhere for hybrid procedure. The court which applies sub-section (1)(a) should only import the tool of judicial questioning into the subsection provided the fine component of the sentence it proposes imposing does not exceed the statutory limit. In other words, if the matter falls squarely within the ambit of sub- section (1)(a) the court is at liberty to ask certain judicial questions to the accused for the purpose of confirming legal compliance. However, if the proposed fine exceeds such limit, then the court should rather completely deal with the matter in terms of subsection (1)(b) instead of using sub-section (1)(b) to perfect irregular use of sub-section (1)(a) procedure'.

Section 112 (1)(b) was designed to protect an accused who is uneducated and undefended from the adverse consequences of an ill-considered plea of guilty. The questions and answers must cover all essential elements of the offence which the State in the absence of plea of guilty would have been required to prove. The court should avoid a procedure in terms of which the accused is merely asked to confirm his plea by making a series of admissions in respect of each element of the offence. The court should use a simple and understandable language to an undefended accused when questioning him or her. It is improper to ask an accused whether he admits all the allegations made in the charge read by the prosecutor. If there is more than one accused, each accused should be questioned separately from the other. Grant AJ said in **S v Serame 2019 (2) SACR 407 (GJ) at [35]**, *'a court is obliged to ensure that the accused means to say that, in truth, he is really guilty'.*

Section 112 (1)(b) must be applied within the context of an accused's constitutional right to a fair trial, (see remarks made by Makgoba AJA in **S v Shiburi 2018 (2) SACR 485 (SCA) at [18].**) Section *112 (1)(b) was designed to avoid the necessity for calling evidence in cases where it is clear that the accused understands all the elements of the charge against him and admits them all.*

- A section 112 (2) statement serves the same purpose as questioning in terms of section 112 (1)(b), i.e. to ensure that the court is provided with an adequate factual basis which supports the plea of guilty and justifies a conviction to the satisfaction of the court. The statement has to satisfy the court that the accused admits the facts which underlie the charge and the court must be fully informed of the facts. This is a written statement which

accused prepares or through his or her legal representative hands it in before court as exhibit after pleading guilty to the charge., detailing the facts on which his plea is premised, and if the prosecutor accepts, and court also finds that it is in order, then accused can consequently be sentenced.

In **DPP, Gauteng Division, Pretoria v Hamisi 2018 (2) SACR 230 (SCA) at [7]** *Dambuzo JA pointed out that section 112(2) 'regulates guilty pleas made in writing; whereas section 112(1) governs the conviction and sentence of an accused on a verbal plea of guilty'. It was further indicated that a court considering a statement made in terms of section 112 (2) exercises its discretion to determine whether the statement admits all the elements of the offence in question. If it is not satisfied that that is so, it must question the accused as set out in section 112 (1)(b) to clarify a matter raised in the written plea. If it determines that the statement is satisfactory and admits all the elements of the offence, it shall convict the accused on the plea of guilty. The written plea is aimed at ensuring that the court is provided with an adequate factual basis to make a determination on whether the admissions made by an accused support the plea of guilty tendered.*

Section 113 - Correction of plea of guilty

(1) If the court at any stage of the proceedings under section 112 (1)(a) or (b) or 112(2) and before sentence is passed, is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution, provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty shall stand as proof in any court of such allegation.

(2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicate otherwise.

The court in **S v Mangena 2022 (1) SACR 102 (LP) at [13]** held that the prerequisites for a presiding officer to record a plea of not guilty in terms of section 113 are that:

- there must be doubt whether the accused is in law guilty of the offence he pleaded on

- it must appear to the court that the accused does not admit an allegation in the charge

-the accused has incorrectly admitted any such allegation

- the accused has a valid defence to the charge

- the court is of the opinion for any reason that accused's plea of guilty should be changed to not guilty.

There must be basis for presiding officer to record a plea of not guilty in terms of section 113. The presiding officer will be guided by what the accused tells the court during questioning by court.

Section 114 - Committal by magistrate's court of an accused for sentence by regional court after plea of guilty

(1) If a magistrate's court, after conviction following on a plea of guilty but before sentence, is of the opinion –

(a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of magistrate's court, or

(b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of magistrate's court; or

(c) that the accused is a person referred to in section 286A (1)

the court shall stop the proceedings and convict the accused for sentence by a regional court having jurisdiction.

(2) where an accused is committed under subsection (1) for sentence by a regional court, the record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received and form part of the record of that court, and the guilty plea and any admission shall stand unless the accused satisfies the court that such admission was incorrectly recorded.

(3) (a) Unless the regional court concerned -

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he has been convicted and in respect of which he has been committed for sentence, the court shall make a formal finding of guilty and sentence the accused.

(b) If the court is satisfied that a plea of guilty or any admission by the accused which is

material to his guilt was incorrectly recorded, the court shall enter a plea of not guilty

and proceed with the trial or summary trial in that court, provided that any admission

by the accused of the recording of which is not disputed by the accused, shall stand as proof

of the fact thus admitted.

(4) The provisions of section 112(3) shall apply with reference to the proceedings under this section.

Section 115 - Plea of not guilty and procedure with regard to issues

(1) Where an accused at summary trial pleads not guilty to the offence charged, the presiding officer may ask him or her whether he wishes to make statement indicating the basis of his or her defence.

(2) (a) where an accused does not make statement in terms of subsection (1), or does so and it is not clear from the statement to what extent he or she denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.

(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.

(3) Where the legal advisor of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused shall be required by the court to declare whether he or she confirms such reply or not.

This section gives procedure on what should happen after accused has chosen section 106 (1)(b) and as such, this section gives accused opportunity to can explain the basis of his denial of the allegations against him or her. However, accused is not obliged to give an explanation, and as such the prosecutor can proceed to lead evidence without any plea explanation by the accused.

- The aim of section 115 is to give the accused an opportunity to put forward his or her defence. Common-law and statutory procedural rights which are affected by section 115 must be explained to an accused who appears without legal representation. A court is not obliged to question an accused who has pleaded not guilty.
- The presiding officer should inform the accused that he is under no obligation to make a statement indicating the basis of his defence. The accused is also under no obligation to answer any question from the presiding officer for the purpose of plea explanation.
- Should accused agree, the formal admissions made during questioning shall be formally recorded in terms of section 220 and the prosecutor shall be relieved from proving same. Formal admissions which cover all the elements of the offence eliminate the necessity for State to adduce evidence in support of its allegations.

- The accused's silence during the explanation of plea simply means that the State must prove all its allegations.

Section 115A - Committal of accused for trial by the regional court

(1) Where an accused pleads not guilty in a magistrate's court, the court shall, subject to the provisions of section 115, at the request of the prosecutor, made before any evidence is tendered, refer the accused for trial to a regional court having jurisdiction.

(2) The record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court.

Section 116 - Committal of accused for sentence by regional court after trial in magistrate's court

(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion

(a) that the offence in respect of which the accused has been convicted is of such nature or magnitude that it merits punishment in excess of the jurisdiction of magistrate's court;

(b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of magistrate's court; or

(c) that the accused is a person referred to in section 286A (1),

the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.

(2) The record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court.

(3) (a) The regional court shall, after considering the record of the proceedings in the magistrate's court, sentence the accused, and the judgement of the magistrate's court shall stand for this purpose and be sufficient for the regional court to pass any competent sentence: Provided that if the regional magistrate is of the opinion that the proceedings are not in accordance with justice he or she may request the presiding officer in the magistrate's court to provide him or her with the reasons for conviction, and if after considering the reasons, the regional magistrate is satisfied he or she may sentence the accused, but if not satisfied he or she shall, without sentencing the accused, record the reasons for his or her opinion and transmit the matter to the registrar of provincial division having jurisdiction, and such registrar shall lay the same in chambers before a judge who shall have the same powers in respect of such proceedings as if the record had been laid before him or her under section 303.

(b) If a regional magistrate acts under the proviso to paragraph (a), he or she shall inform the accused accordingly and postpone the case to some future date, and if the accused is in custody, the regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.

In terms of **S v Duma 2012 (2) SACR 585 (KZP) at [11]; S v Davids & another 2020 (1) SACR 134 (WCC),** '*an order made by a district-court magistrate in terms of either section 116 or section 114 referring a case to the regional court for sentencing purposes, is merely a ruling of a procedural nature seeking to direct the future conduct of the proceedings and does not dispose, or seek to dispose of the case*'.

Section 117 - Committal to Superior Court in special case

Where an accused in a lower court pleads not guilty to the offence charged against him and a ground of his defence is the alleged invalidity of a provincial ordinance or a proclamation of the State President on which the charge against is founded and upon the validity of which a magistrate's court is in terms of section 110 of the magistrate's courts Act, 1944 (Act 32 of 1944), not competent to pronounce, the accused shall be committed for a summary trial before a superior court having jurisdiction.

A lower court is competent to pronounce upon validity of any statutory regulation, order or by-law, but must assume – and is incompetent to pronounce upon – the validity of a provincial ordinance or of a statutory proclamation of the State President. Cases in which section 117 will be invoked are 'rare' and where it is invoked 'the accused must be committed for trial in the High Court' **(S v John (unreported, WCC case no A610/2002, 27 August 2003) at [117])**.

Section 118 - Non-availability of judicial officer after plea of not guilty

If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court.

Section118 should be read with section 106(4). It would seem as if real purpose of s 118 is merely to ensure that an explanation of plea can be taken by one magistrate and that the actual trial can then be commenced before a different magistrate. *See generally* **S v Stokffels & 11 Similar cases 2004 (1) SACR 176(C) 177a** *and* **S v Mokoena 2005 (2) SACR 280 (O) at [2]** *as well as* **S v Masumpa 2005 (2) SACR 512(CK) at [8]**.

In **S v Moses 2019 (1) SACR 75 (WCC) at [32]** *the court held that 'should a judicial officer for any reason nevertheless feel uncomfortable about proceeding with the matter with knowledge of the accused's previous convictions after altering the plea in terms of s 113, he or she may*

properly recuse themselves and, provided that they do so before any evidence has been adduced, the trial may continue before a substitute in terms of s118 of the Act.

Plea in Magistrate's Court on Charge Justiciable in Superior Court (ss 119-122)

Section 119 - Accused to plead in magistrate's court on instructions of DPP

When an accused appears in a magistrate's court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court, the prosecutor may, notwithstanding the provisions of section 75, on the instructions of DPP, put the charge as well as any other charge which shall, in terms of section 82, be disposed of in a superior court, to the accused in the magistrate's court, and the accused shall, subject to the provisions of section 77 and 85 be required by the magistrate to plead thereto forthwith

It was held in **DPP Transvaal versus Viljoen 2005 (1) SACR 505 (SCA) at [43]***: In terms of section 35 (3) (h) an accused has the right to fair trial, which includes the right to remain silent (not a right to be informed of the right to remain silent).The right is clearly one that can be waived. A failure to inform accused of the right to remain silent may result in the trial being unfair* (**DPP Natal, v Magidela & another 2000 (1) SACR 458 (SCA)**) Section 119 proceedings only serve as aid to the DPP who determines the charge and the decision on the prosecution rests with him in terms of section 122 (1) of the Act.

Section 120 - Charge sheet and proof of record

The proceedings shall be commenced by the lodging of a charge-sheet with the clerk of the court in question and the provisions of subsections (2) and (3) of section 76 shall mutatis mutandis apply with reference to the charge-sheet and the record of the proceedings.

Section 121 - Plea of guilty

(1) Where an accused under section 119 pleads guilty to the offence charged, the presiding magistrate shall question him in terms of the provisions of paragraph (b) of section 112(1).

(2) (a) if the magistrate is satisfied that the accused admits the allegations stated in the charge, he shall stop the proceedings.

(b) If the magistrate is not satisfied as provided in paragraph (a), he shall record in what respect he is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122(1): Provided that an allegation

with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(3) If the magistrate is satisfied as provided in subsection (2)(a), he shall adjourn the proceedings pending the decision of the attorney-general, who may—

(a) arraign the accused for sentence before a superior court or any other court having jurisdiction, including the magistrate's court in which the proceedings were stopped under subsection (2)(a);

(b) decline to arraign the accused for sentence before any court but arraign him for trial on any charge at a summary trial before a superior court or any other court having jurisdiction, including the magistrate's court in which the proceedings were stopped under subsection (2)(a);

(c) institute a preparatory examination against the accused.

(4) The magistrate or any other magistrate of the magistrate's court concerned shall advise the accused of the decision of the attorney-general and, if the decision is that the accused be arraigned for sentence—

(a) in the magistrate's court concerned, dispose of the case on the charge on which the accused is arraigned; or

(b) in a regional court or superior court, adjourn the case for sentence by the regional court or superior court concerned.

(5) (a) The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for sentence, be received as part of the record of that court against the accused or, if the accused is arraigned in the magistrate's court in which the proceedings were stopped under subsection (2)(a), the record of such proceedings shall stand as the record of that court, and the plea of guilty and any admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(aA) The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such admission was incorrectly recorded.

(b) Unless the accused satisfies the court that a plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his plea of guilty of the offence to which he has pleaded guilty and impose any competent sentence.

(6) If the accused satisfies the court that the plea of guilty or an admission which is material to his guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(7) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

Section 122 - Plea of not guilty

(1) Where an accused under section 119 pleads not guilty to the offence charged, the court shall act in terms of section 115 and when that section has been complied (with), the magistrate shall stop the proceedings and adjourn the case pending the decision of the DPP.

(2) Where the proceedings have been adjourned under subsection (1) the DPP may-

(i) arraign the accused on any charge at a summary trial before a superior court or any other court having jurisdiction, including the magistrate's court in which the proceedings were adjourned under subsection (1); or

(ii) institute a preparatory examination against the accused, and the DPP shall advise the magistrate's court concerned of his decision.

(3) The magistrate, who need not be the magistrate before whom the proceedings under section 119 or 122(1) were conducted, shall advise the accused of the decision of the DPP, and if the decision is that the accused be arraigned –

(a) in the magistrate's court concerned, require the accused to plead to that charge, and, if the plea to that charge is one of guilty or the plea in respect of an offence of which the accused may on such charge be convicted is one of guilty and the prosecutor accepts such plea, deal with the matter in accordance with the provisions of section 112, in which event the provisions of section 114(1) shall not apply, or, if the plea is one of not guilty, deal with the matter in accordance with the provisions of section 115 and proceed with the trial;

(b) in a regional court or a superior court, commit the accused for a summary trial before the court concerned.

(4) The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand at the trial of the accused as proof of such an admission.

In **S v Sesetse 1981 (3) SA 353 (A**) *it was pointed out that if an accused, who has spontaneously made an admission after he was required to plead in terms of s 119 but before*

the procedure prescribed by s122 was followed, should consent, after questioning by the magistrate in terms of s115(2)(b), to the admission being recorded such admission becomes an admission in terms of section 220. Where consent is not given, the admission should be treated as an informal admission.

Plea in Magistrate's Court on Charge to be Adjudicated in Regional Court (ss 122A – 122D)

Section 122A - Accused to plead in magistrate's court on charge to be tried in regional court

When an accused appears in a magistrate's court and the alleged offence may be tried by a regional court but not by a magistrate's court or the prosecutor informs the court that he is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court but not of the jurisdiction of a regional court, the prosecutor may notwithstanding the provisions of section 75, put the relevant charge, as well as any other charge which shall, in terms of section 82, be disposed of by a regional court, to the accused, who shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith

See **S v Lethopa 1994 (1) SACR 553 (O)** wherein accused had pleaded not guilty under section 122A, matter was provisionally withdrawn by the DPP, but later reinstated and accused was asked to plead again, this time he pleaded guilty but this second proceedings were set aside by the full bench.

Section 122B - Charge-sheet and proof of record

The provisions of section 120 shall mutatis mutandis apply with reference to the proceedings under section 122A and the record of the proceedings.

Section 122C - Plea of guilty

(1) Where an accused under section 122A pleads guilty to the offence charged, the presiding magistrate shall question him in terms of the provisions of paragraph (b)of section 112(1)

(2)(a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, he shall adjourn the case for sentence by the regional court concerned.

(b) If the magistrate is not satisfied as provided in paragraph (a), he shall record in what respect he is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122D (1).

(3)(a) The record of the proceedings in the magistrate's court shall, upon proof thereof in the regional court in which the accused is arraigned for sentence, be received as part of the record of that court against the accused, and the plea of guilty and any admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his plea of guilty of the offence to which he has pleaded guilty, and impose any competent sentence

(4) If the accused satisfies the court that the plea of guilty or an admission which is material to his guilt was incorrectly recorded, the court shall record a plea of not guilty and proceed with the trial with as a summary trial in that court.

(5) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purpose of determining an appropriate sentence.

In **S v M 1980 (4) SA 404 (O)** *it was held that the expression 'he shall adjourn the case for sentence' in s 122C(2)(a) and the expression 'arraigned for sentence' in s 122C(3)(a) do not mean that the accused must be convicted in the magistrate's court before he is referred to the regional court.* The effect of ss 122A-C is that the conviction must be entered by the regional court. See also **S v Ndlolo & others 1992 (2) SACR 658 (CK).**

Section 122D - Plea of not guilty

(1) Where an accused under section 122A pleads not guilty to the offence charged, the court shall act in terms of section 115 and when that section has been complied with, the magistrate shall commit the accused for a summary trial in the regional court concerned on the charge to which he has pleaded not guilty or on the charge to which he has pleaded not guilty or on the charge in respect of which a plea of not guilty has been entered under section 122C(2)(b).

(2) The regional court may try the accused on the charge in respect of which he has been committed for a summary trial under subsection (1) or on any other or further charge which the prosecutor may prefer against the accused and which the court is competent to try.

(3) The record of proceedings in the magistrate's court shall, upon proof thereof in the regional court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand at the trial of the accused as proof of such admission.

Preparatory Examination (ss123 -143)

Section 123 - DPP may instruct that preparatory examination be held

If DPP is of the opinion that it is necessary for the more effective administration of justice –

(a) that a trial in a superior court be preceded by a preparatory examination in a magistrate's court into the allegations against the accused, he may, where he does not follow the procedure under section 119, or, where he does follow it and the proceedings are adjourned under section 121(3) or 122(1) pending the decision of the DPP, instruct that a preparatory examination be instituted against the accused;

(b) that a trial in a magistrate's court or a regional court be converted into a preparatory examination, he may at any stage of the proceedings, but before sentence is passed, instruct that the trial be converted into preparatory examination.

The decision to hold a preparatory examination, or convert a magistrate's court or regional court trial into a preparatory examination, is in the sole discretion of the DPP- the only issue to be considered is whether such preparatory examination is necessary for the more effective administration of justice.

Section 124 - Proceedings preceding holding of preparatory examination to form part of preparatory examination record

Where a DPP acts under paragraph (a) or (b) of section 123-

(a) the record of any proceedings under section 121(1) or 122(1), or of any proceedings in the magistrate's court or regional court before the trial was converted into a preparatory examination, shall form part of the preparatory examination record;

(b) and the accused has pleaded to a charge, the preparatory examination shall continue on the charge to which the accused has pleaded: provided that where evidence is led at such preparatory examination which relates to an offence, other than the offence contained in the charge to which the accused has pleaded, allegedly committed by the accused, such evidence shall not be excluded on the ground only that the evidence does not relate to the offence to which the accused has pleaded.

Section 125 - DPP may direct that preparatory examination be conducted at a specified place

(1) Where a DPP instructs that a preparatory examination be instituted or that a trial be converted into a preparatory examination, he may, if it appears to him expedient on account of the number of accused involved or of excessive inconvenience or of possible disturbance of the public order, that the preparatory examination be held within his area of jurisdiction in a court other than the court in which the relevant proceedings were commenced, direct that the preparatory examination be instituted in such other court, or where a trial has been converted into a preparatory examination, be continued in such other court

(2) The magistrate or regional magistrate shall, after advise of the decision of the DPP, advise the accused of the decision of the DPP and adjourn the proceedings to such other court, and thereafter forward a copy of the record of the proceedings, certified as correct by the clerk of the court, to the court to which the proceedings have been adjourned.

(3) The court to which the proceedings are adjourned under subsection (2), shall receive the copy of the record referred to in that subsection, which shall then form part of the proceedings of that court of that court, and shall proceed to conduct the preparatory examination as if it were a preparatory examination instituted in that court.

Section 126 - Procedure to be followed by magistrate at preparatory examination

Where a DPP instructs that a preparatory examination be held against an accused, the magistrate or regional magistrate shall, after advice of the decision of DPP, advise the accused of the DPP and proceed in the manner hereinafter described to enquire into the charge against the accused.

Section 127 - Recalling of witnesses after conversion of trial into preparatory examination

Where a DPP instructs that a trial be converted into a preparatory examination, it shall not be necessary for the magistrate or regional magistrate to recall any witness who has already given evidence at the trial, but the record of the evidence thus given, certified as correct by the magistrate or regional magistrate, as the case may be, or if, such evidence was recorded in short hand or by mechanical means, any document purporting to be a transcription of the original record of such evidence and purporting to be certified as correct under the hand of the person who transcribed it, shall have the same legal force and effect and shall be admissible in evidence in the same circumstances as the evidence given in the course of a preparatory examination: Provided that if it appears to the magistrate or regional magistrate concerned that it may be in the interest of justice to have a witness already examined recalled for further examination, then such witness shall be recalled and further examined and the evidence given by him shall be recorded in the same manner as other evidence given at a preparatory examination.

Section 128 - Examination of prosecution witnesses at preparatory examination

The prosecutor may, at a preparatory examination, call any witness in support of the charge to which the accused has pleaded or to testify in relation to any other offence allegedly committed by the accused.

Section 129 - Recording of evidence at preparatory examination and proof of record

(1) The evidence given at a preparatory examination shall be recorded, and the document purporting to be certified copy shall have the same legal force and effect as such original record.

(2) The record of a preparatory examination may be proved in a court by the mere production thereof or of a copy thereof in terms of section 235.

Section 130 - Charge to be put at conclusion of evidence for prosecution*The prosecutor shall, at the conclusion of the evidence in support of the charge, put to the accused such charge or charges as may arise from the evidence and which the prosecutor may prefer against the accused.*

Section 131 - Accused to plead to charge

The magistrate or regional magistrate, as the case may be, shall, subject to the provisions of section 77 and 85, require an accused to who a charge is put under section 130 forthwith to plead to the charge.

Section 132 - Procedure after plea

(1) (a) Where an accused who has been required under section 131 to plead to a charge to which he has not pleaded before, pleads guilty to the offence charged, the presiding officer shall question him in accordance with the provisions of section 112 (1)(b).

(b) If the presiding judicial officer is not satisfied that the accused admits all the allegations in the charge, he shall record in what respect he is not so satisfied and enter a plea of not guilty: provided that the recorded admissions shall stand at the trial of accused as proof of such allegation

(2) Where an accused who has been required under section 131 to plead to a charge to which he has not pleaded before, pleads not guilty to the offence charged, the presiding judicial officer shall act in accordance with the provisions of section 115.

Section 133 - Accused may testify at preparatory examination

An accused may, after the provisions of section 132 have been complied with but subject to the provisions of section 151 (1)(b) which shall mutatis mutandis apply, give evidence or make an unsworn statement in relation to a charge put to him under section 130, and the record of such evidence or statement shall be received in evidence before any court in criminal proceedings against the accused upon its mere production without further proof.

Section 134 - Accused may call witnesses at preparatory examination

An accused may call any competent witness on behalf of the defence.

This section is – in terms of section 9(2) of the Extradition Act 67 of 1967- also applicable to extradition enquiry – see case of **Garrido v Director of Public Prosecutions, Witwatersrand Local Division, & others 2007 (1) SACR 1 (SCA) at [24]**.

Section 135 - Discharge of accused at conclusion of preparatory examination

As soon as a preparatory examination is concluded and the magistrate or regional magistrate is upon the whole of the evidence of the opinion that no sufficient case ha been made out to put the accused on trial on any charge put to the accused under section 130 or upon any charge in respect of an offence of which the accused may on such charge be convicted, he may discharge the accused in respect of such charge.

Section 136 - Procedure with regard to exhibits at preparatory examination

The magistrate or regional magistrate shall cause every document and every article produced or identified as an exhibit by any witness at a preparatory examination to be inventoried and labelled or otherwise marked, and shall cause such documents and articles to be kept in safe custody pending any trial following upon such preparatory examination.

Section 137 - Magistrate to transmit record of preparatory examination to Director of Public Prosecutions

The magistrate or regional magistrate shall at the conclusion of a preparatory examination and whether or not the accused is under section 135 discharged in respect of any charge, send a copy of the record of the preparatory examination to the DPP and, where the accused is not discharged in respect of all the charges put to him under section 130, adjourn the proceedings pending the decision of the DPP.

Section 138 - Preparatory examination may be continued before different judicial officer

A preparatory examination may at any stage be continued by a judicial officer other than the judicial officer before whom the proceedings were commenced, and , if necessary, again be continued by the judicial officer before whom the proceedings were commenced.

Section 139 - Director of Public Prosecutions may arraign accused for sentence or trial

After considering the record of a preparatory examination transmitted to him under section 137, the DPP may –

(a) in respect of any charge to which the accused has under section 131 pleaded guilty, arraign the accused for sentence before any court having jurisdiction;

(b) arraign the accused for trial before any court having jurisdiction, whether the accused has under section 131 pleaded guilty or not guilty to any charge and whether or not he has been discharged under section 135;

(c) decline to prosecute the accused,

and the DPP shall advise the lower court concerned of his decision.

Section 140 - Procedure where accused arraigned for sentence

(1) Where an accused is under section 139(a) arraigned for sentence, any magistrate or regional magistrate of the court in which the preparatory examination was held shall advice the accused of the decision of the DPP and, if the decision is that the accused be arraigned –

(a) in the court concerned, dispose of the case on the charge on which the accused is arraigned; or

(b) in a court other than the court concerned, adjourn the case for sentence by such other court.

(2)(a) The record of preparatory examination shall, upon proof thereof in the court in which the accused is arraigned for sentence, be received as part of the record of that court against the accused unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his plea of guilty and impose any competent sentence.

(3) If the accused satisfies the court that that the plea of guilty or an admission which is material to his guilt was incorrectly recorded, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court.

(4) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence including evidence or statement by or on behalf of the accused, with regard to sentence.

Section 141 - Procedure where accused arraigned for trial

(1) where an accused is under section 139(b) arraigned for trial, a magistrate or regional magistrate of the court in which the preparatory examination was held shall advise the accused of the decision of the DPP and, if the accused is to be arraigned in a court other than the court concerned, commit the accused for trial by such other court.

(2) where an accused is arraigned for trial after a preparatory examination, the case shall be dealt with in all respects as with a summary trial.

(3) The record of the preparatory examination shall, upon proof thereof in the court in which the accused is arraigned for trial, be received as part of the record of that court against accused, provided that the evidence adduced at such preparatory examination shall not form part of the record of the trial of the accused, unless –

(a) the accuse pleads guilty at his trial for the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea; or

(b) the parties to the proceedings agree that any part of such evidence be admitted to the proceedings.

(4) (a) where an accused who has been discharged under section 135is arraigned for trial under section 139(b), the clerk of the court where the preparatory examination was held shall issue to him a written notice to that effect and stating the place, date and time for the appearance of the accused in that court for committal for trial, or, if he is to be arraigned in that court, to plead to the charge on which he is to be arraigned.

(b) The notice referred to in paragraph (a) shall be served on the accused in the manner provided for in sections 54(2) and (3) for the service of a summons in a lower court and the provisions of sections 55(1) and (2) shall mutatis mutandis apply with reference to such notice.

(c) If the accused is committed for trial by another court, the court committing the accused may direct that he be detained in custody, whereupon the provisions of chapter 9 shall apply with reference to the release of the accused on bail.

In **S v Sterrenberg 1980 (2) SA 888 (A) 829H – 893A** *it was held that neither the prosecution nor the accused is obliged to adduce the preparatory examination record in evidence. It was also held that there is no duty or discretion resting on the trial court* ***mero motu*** *to receive it in evidence or have regard to it.*

Section 142 - Procedure where the DPP declines to prosecute

Where the DPP under section 139(c) declines to prosecute an accused, he shall advise the magistrate of the district in which the preparatory examination was held of his decision, and such magistrate shall forthwith have the accused released from custody or, if the accused is not in custody, advise the accused in writing of the decision of the DPP, whereupon no criminal proceedings shall again be instituted against the accused in respect of the charge in question.

Effect of DPP's decision to decline to prosecute in terms of section 139(c) read with section 142, should for all practical purposes be equated to an acquittal on merits by a court of law, i.e. the accused will at a' re-trial' in respect of the same subject matter be able to rely on the plea of autrefois acquit under section 106.

Section 143 - Accused may inspect preparatory examination record and is entitled to copy thereof

(1) An accused who is arraigned for sentence or for trial under section 139 may, without payment, inspect the record of the preparatory examination at the time of his arraignment before the court.

(2) (a) An accused who is for sentence or for trial under section 139 shall be entitled to a copy of the record of the preparatory examination upon payment, except where a legal practitioner under the Legal Aid South Africa Act,2014, or pro deo counsel is appointed to defend the accused or where the accused is not legally represented, of a reasonable amount not exceeding amount determined.

(b) The clerk of the court shall provide the accused or his legal adviser with the preparatory examination record in accordance with the provisions of paragraph (a).

Section 143 confirms he principle that an accused should be informed of the allegations against him and where such allegations are contained in a preparatory examination, he is entitled to have access to the record.

Trial before Superior Court (Sections 144 -149)

Section 144 - Charge in Superior court to be laid in an indictment

(1) Where the DPP arraigns an accused for sentence or trial by a superior court, the charge shall be contained in a document called an indictment, which shall be framed in the name of the DPP.

(2) The indictment shall, in addition to the charge against the accused, include the name and, where known and where applicable, the address, gender, nationality and age of the accused.

(3)(a) Where the DPP under section 75, 121(3)(b) or 122(2)(i) arraigns an accused for a summary trial in a Superior court, the indictment shall be accompanied by summary of the substantial facts of the case, as well as a list of the names and addresses of the witnesses in the case, provided that

(i) this provision shall not be construed that the State shall be bound by the contents of summary

(ii) the DPP may withhold the name and address of a witness if he is of the opinion that such witness may be tempered with or be intimidated or that it would be in the interest of the security of the State

(iii) the omission of the name or address of a witness from such list shall not affect validity of the trial.

(b) Where the evidence for the State at the trial of the accused differs in material respect from the summary referred to in paragraph (a), the trial court may, at the request of the accused, adjourn the trial for such period as the court may seem adequate.

(4)(a) An indictment shall be served on an accused at least ten days (Sundays and public holidays excluded) before the date appointed for trial –

(i) in accordance with the procedure and manner laid down by the rules of court,

(ii) by the magistrate or regional magistrate committing him to the Superior court by handing it to him.

(b) A return of the mode of service by the person who served the indictment and the notice of trial, or if the said documents were served in court on the accused by a magistrate or regional magistrate, an endorsement

to that effect, upon the failure of the accused to attend the proceedings in the Superior court, be handed in at the proceedings and shall be prima facie proof of service.

(c) The provisions of section 55(1) and (2) shall mutatis mutandis apply with reference to a notice of trial served on an accused in terms of this subsection.

In **S v Makayi 2021 (2) SACR 197 (ECB) at [67]** *the court held that although the State is not bound by the summary of substantial facts, the prosecution is expected to either supplement or present an opening address where the evidence of facts which are not in the summary.*

Section 145 - Trial in Superior court by Judge sitting with or without assessor

(1)(a) Except as provided in section 148, an accused arraigned before a Superior court shall be tried by a judge of that court sitting with or without assessors in accordance with the provisions set out hereunder.

(b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial.

(2) Where a DPP arraigns an accused before a superior court –

(a) for trial and the accused pleads not guilty; or

(b) for sentence, or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge, the presiding judge may summon not more than two assessors to assist him at the trial.

(3) No assessor shall hear any evidence unless he first takes an oath or, an affirmation that he will give a true verdict upon the issues to be tried

(4) An assessor who takes an oath or makes an affirmation shall be a member of the court.

(5) If an assessor is not in the full-time employment of the State, he shall be entitled to such compensation as the Minister, in consultation with the Minister of finance, may determine in respect of expenses incurred by him in connection with his attendance at the trial, and in respect of his services as assessor.

The interpretation of the term 'a person experienced in the administration of justice' in practice leads to the appointment of advocates, magistrates, attorneys and legal academics as assessors, persons with a specific skill will include accountants or auditors, but significant cost implications are worrying. (section 145(1)(b))

On the use, purpose and functions of assessors, *see* **S v Mncwengi & others 2019 (2) SACR 583 (SCA) at [19]**.

Section 146 - Reasons for decision by Superior Court in criminal matters

A judge at a criminal trial in a superior court shall give the reasons for the decision or finding of the member of court who is in the minority or, where the presiding judge sits with only one assessor of such an assessor.

Section 147 - Death or incapacity of assessor

(1) If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct –

(a) that the trial proceed before the remaining member or members of the court; or

(b) that the trial start de novo, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor.

(2) Where the presiding judge acts under subsection (1)(b), the plea already recorded shall stand.

Section 148…

repealed

Section 149 - Change of venue in Superior court after indictment has been lodged

(1) A superior court may, at any time after an indictment has been lodged with the registrar of that court and before the date of trial, upon application by either prosecution or accused, order that the trial be held at a place within the area of jurisdiction of such court, other than the place determined for the trial, and that it be held on a date and time, other than the date and time determined for the trial.

(2) If the accused is not present or represented at such an application or if the prosecution is not present at such an application by the accused, the court shall direct that a copy of the order be served on either prosecution or accused, as the case may be.

Conduct of Proceedings (ss 150-178)

Section 150 - Prosecutor may address court and adduce evidence

(1) The prosecutor may at any trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating, without comment, to the court what evidence he intends adducing in support of the charge.

(2)(a) The prosecutor may then examine the witnesses for the prosecution and adduce such evidence as may be admissible to prove that the accused committed the offence referred to in the charge or that he committed an offence of which he may be convicted on the charge.

(b) Where any document may be received in evidence before any court upon its mere production, the prosecutor shall read out such document in court unless the accused is in possession of a copy of such document or dispenses with the reading out thereof.

Section 179(2) of the Constitution provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings.

Section 179(4) makes provision for the enactment of national legislation that ensures that the prosecuting authority exercises its functions 'without fear, favour or prejudice'. The prosecutorial responsibility has duty to act fairly and to serve the broader interests of justice and to guard against the conviction of innocent persons.

The prosecutor has duty to inform court about the case which is before court and which the State has to prove, by means of bringing in evidence which the court must be satisfied that the State has indeed proved its case beyond any reasonable doubt. The prosecutor will have to bring in the facts of the case through witnesses, thereafter address the court, in line with what the law says. It is also the responsibility of the prosecutor to address the court and bring it to the attention of the court if accused has to be discharged because the State did not succeed in proving the case beyond reasonable doubt.

The general roles, functions, powers and duties of the prosecution are summed up in the *International Association of Prosecutors' Standards, referred to in* **S v Van der Westhuizen 2011 (2) SACR 26 (SCA)** *and* **Mohan v Director of Public Prosecutions Kwazulu-Natal & others 2017 (2) SACR 76 (KZD) at [41]** *where Chetty J indicated to the effect that 'prosecutors shall perform their duties fairly, consistently and expeditiously, and in the institution of criminal proceedings only to proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible and will not continue with the prosecution in the absence of such evidence.*

The above mentioned case makes it is clear that a prosecutor shall proceed with prosecution only where there is evidence to prove the allegations. A prosecutor must be honest when addressing the court in terms of section 150, because this is to be viewed in line with constitutional obligation as set out in section 179 above. The requirement that the prosecutor must act impartially entails that he or she must avoid discrimination as part of the general duty

to act without fear, favour or prejudice, also provided for in section 32(1)(a) of the National Prosecuting Authority Act, 32 of 1998.

In **S v Makayi 2021 (2) SACR 197 (ECB) at [69]** *Stretch J set out at length some of the many duties and responsibilities of the prosecutors, warning that the decision to prosecute must be taken with care because it may have profound consequences for victims, witnesses, accused and their families, and that a wrong decision may undermine the community's confidence in the criminal justice system.*

Section 151 - Accused may address court and adduce evidence

(1)(a) If an accused is not under section 174 discharged at the close of the case of the prosecution, the court shall ask him whether he intends adducing any evidence on behalf of the defence, and if so, he may address the court for the purpose of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence.

(b) The court shall also ask the accused whether he himself intends giving evidence on behalf of the defence ; and –

(i) If accused so wish, he shall be called as a witness before any other witness for the defence; or

(ii) If the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.

(2)(a) The accused may then examine any other witness for the defence and adduce such other evidence on behalf of the defence.

(b) Where any document may be received in evidence before any court upon its mere production and the accused wishes to place such evidence before the court, he shall read out the relevant document in court unless the prosecutor is in possession of a copy or dispenses with reading.

Similar to the functions of the prosecutor in section 150, it also follows that the accused can also address the court and lead evidence about his or her defence in terms of section 151. He can even bring in evidence favourable to his case through witnesses or any other type of evidence. Therefore, the accused shall have opportunity to adduce evidence if at the end of the State's case, he or she is not discharged in terms of section 174. An undefended accused must be informed of his or her rights and any possible competent verdicts, and he must be advised of any onus which may be placed on him or her. In **S v Ramulifho 2013 (1) SACR 388 (SCA)**, *it was stated that in order to ensure fair trial, a judicial officer must not be a 'passive*

observer of the trial' at [5]: he or she is obliged to ensure fairness and justice and, if necessary, to intervene to achieve this.

The accused cannot be forced to give evidence. *Section 196(1) makes him competent witness on his own application. In* **S v Zuma & others 1995 (1) SACR 568 (CC); 1995 (2) SA 642 (CC)***, Kentridge AJ referred to some presumptions which may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove. This decision shows that there are some presumptions which the court recognized, the court recognized that there are pressing social need for the effective prosecution and that in some cases the prosecution may require reasonable presumptions to assist in this task.*

Section 152 - Criminal proceedings to be conducted in open court

Except where otherwise expressly provided by this Actor any other law, criminal proceedings in any court shall take place in open court and may take place any day.

It has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. This openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective, so that people can discuss, endorse, criticize, applaud or castigate the conduct of their courts. Therefore, it means that each and every person is allowed as a member of public to get inside the court and listen to the criminal proceedings, unless specific restrictions are imposed like when the child testifies or where the presiding officer rules that matter be heard in camera.

Section 153 - Circumstances in which criminal proceedings shall not take place in open court

(1) In addition to the provisions of section 63(5) of the Child Justice Act,2008, if it appears to any court that it would be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.

(2) If it appears to any court at criminal proceedings that there is likelihood that harm might

result to any person, other than accused, if he testifies at such proceedings, the court may

direct –

(a) that such person shall testify behind closed doors…

(b) that the identity of such person shall not be revealed …

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit –

(a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and related Matters) Amendment Act,2007, towards or in connection with any other person;

(b) any act for the purpose of furthering the commission of a sexual offence, as contemplated in section 1 of Sexual Offences Act, towards or in connection with any other person; or

(c) extortion or any statutory offence demanding from any other person some advantage which was not due and by inspiring fear in the mind of such other person, compelling him to render such advantage,

the court before which such proceedings are pending may, at the request of such other person, or if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings, shall not be present, provided that judgement shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary shall not be admitted at such proceedings, while the other person referred to, is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person in loco parentis, requests otherwise.

(4) …

substituted

(5) Where a witness at criminal proceedings before any court is under the age of 18 years, the court may direct that no person, other than such witness and his parent/ guardian shall be present at such proceedings, unless his presence is necessary and the court authorized such.

(6) The court may direct that no person under the age of eighteen years shall be present at criminal proceedings before the court, unless he is a witness and is authorized by court.

Section 154 - Prohibition of publication of certain information relating to criminal proceedings

(1) Where a court under section 153(1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings or part thereof, the court may direct that no information relating to the proceedings or any part thereof held behind closed doors shall be published in any manner whatever: Provided that a direction by the court shall not prevent the publication of information relating to the name and personal particulars of the accused, the charge against him, the plea, the verdict and the sentence, unless the court is of the opinion that the publication of any part of such information might defeat the object of its direction under section 153(1), in which event the court may direct that such part shall not be published.

(2) (a) Where a court under section 153(3) directs that any person or class, of persons shall not be present at criminal proceedings or where any person is in terms of section 153(3A) not admitted at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he is of the opinion that such publication would be just and equitable.

(b) No person shall at any stage before the appearance of an accused in a court upon any charge referred to in section 153(3) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information relating to the charge in question.

(3) (a) No person shall before, during or at any stage after the conclusion of criminal proceedings, in any manner, including on any social media or electronic platform publish any information which reveals or may reveal the identity of—

(i) an accused who is or was under the age of 18 years at the time of the alleged commission of an offence;

(ii) a witness who is or was under the age of 18 years at the time of the alleged commission of an offence; or

(iii) a person against whom an offence has allegedly been committed who is or was under the age of 18 years at the time of the alleged commission of the offence,

unless the publication of such information is authorised in terms of subsection (3B).

(b) Subject to paragraph (a), the presiding judge or judicial officer at such criminal proceedings, may authorise the publication of as much of any information relating to the proceedings as he or she may deem fit, if the publication thereof would in his or her opinion be just and equitable and in the interest of any particular person.

(3A) Notwithstanding subsection (3)(a), and in the event where substantial injustice would result and no other means are available, information may be published by a police official or by any other person, who is authorised by the National Commissioner of the South African Police Service or a person delegated by him or her—

(a) which reveals or may reveal the identity of an accused under the age of 18 years, if—

(i) (aa) there are reasonable grounds to suspect that the accused committed an offence listed in Schedule 3 to the Child Justice Act, 2008 (Act 75 of 2008), or an offence which, if committed by an adult, would have justified a term of imprisonment exceeding 10 years; or

(bb) the accused escaped from lawful custody or any other place of detention or was released on bail or a warning and failed to appear or remain in attendance at the proceedings, as contemplated in section 67(1);

(ii) the South African Police Service has been unsuccessful in locating the whereabouts of the accused;

(iii) the information so published does not reveal the age of the accused or the fact that the accused is involved in the commission of the offence; and

(iv) it is necessary as a measure to locate the whereabouts of the accused;

(b) which reveals or may reveal the identity of a witness under the age of 18 years, if—

(i) it is necessary as a measure to locate the whereabouts of the witness to obtain a statement from him or her concerning the commission of any alleged offence, or to testify in criminal proceedings; and

(ii) the information so published does not reveal the age of the person or the fact the he or she may be a witness at criminal proceedings;

(c) which reveals or may reveal the identity of a person under the age of 18 years against whom an offence has allegedly been committed, if—

(i) it is necessary to locate the whereabouts of the person to prevent harm to such a person; and

(ii) the information so published is reasonably necessary in the circumstances to identify the person, or any other person who may have relevant information about the alleged offence or whereabouts of the person; or

(d) which reveals or may reveal the identity of a person under the age of 18 years, whether or not an offence has allegedly been committed against the person, if—

(i) it is necessary to locate the whereabouts of the person to prevent harm to such a person; and

(ii) the information so published is reasonably necessary in the circumstances to identify the person, or any other person who may have relevant information about—

(aa) an alleged offence which may have been committed against the person; or

(bb) the whereabouts of the person.

(3B) (a) The court before which criminal proceedings contemplated in subsection (3) have been concluded may, on application of an accused, a witness or a person contemplated in subsection (3)(a) who has attained the age of 18 years and where the court has granted an order that extends into adulthood, grant an order authorising the publication of information which reveals the identity of the applicant, if the court is satisfied that the applicant understands the nature and effect of a court order in terms of this subsection.

(b) The High Court before which, or in whose area of jurisdiction, the criminal proceedings contemplated in subsection (3) have been concluded may, on the application of an interested person, grant an order authorising the publication of information which may reveal the identity of a person contemplated in subsection (3)(a).

(c) In determining whether an order may be granted, a court referred to in paragraph (a) or (b) must take into account all relevant factors, including—

(i) the nature of the charges against the accused;

(ii) the age of the persons referred to in subsection (3)(a);

(iii) the period which has elapsed since completion of the criminal proceedings and the application;

(iv) the interest of the public or any person or category of persons in the publication of such information;

(v) the interest of society to encourage the reporting of offences and the participation of witnesses and victims of offences in criminal justice processes;

(vi) the likelihood that the publication of such information, which reveals the identity of a person contemplated in subsection (3)(a), will also reveal the identity of any other person contemplated in subsection (1), (2), (3)(a) or (5);

(vii) the nature and extent of any hardship that a person contemplated in subsection (3)(a) or any person related to such person may suffer if such information is published; and

(viii) the effect of the order on—

(aa) a person's freedom of expression; and

(bb) the dignity, security and privacy of a person referred to in subsection (3)(a) or any person related to such person.

(d) A court may, if it deems it in the interest of the administration of justice, hold a hearing to determine whether an order should be granted.

(e) A hearing contemplated in paragraph (d) must take place behind closed doors and no person shall be present at such hearing, unless his or her presence is necessary in connection with such hearing or is authorised by the court.

(f) The verdict of the court must be delivered in open court: Provided that the court may decline to state in open court all or any of the facts, reasons or other considerations that it has taken into account in reaching its verdict, if it is of the opinion that the identity of a person contemplated in subsection (3)(a) may be revealed thereby.

(g) No person shall in any manner disclose—

(i) the contents of an application;

(ii) any evidence taken, information provided or submissions made at the hearing; or

(iii) any other information that may reveal the identity of a person contemplated in subsection (3)(a),

unless it is authorised by the court or required in the course of further legal proceedings relating to the hearing or in the course of the administration of justice.

(4) No prohibition or direction under this section shall apply with reference to the publication in the form of a bona fide law report of—

(a) information for the purpose of reporting any question of law relating to the proceedings in question; or

(b) any decision or ruling given by any court on such question,

if such report does not mention the name of the person charged or of the person against whom or in connection with whom the offence in question was alleged to have been committed or of any witness at such proceedings, and does not mention the place where the offence in question was alleged to have been committed.

(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153(2), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for

a period not exceeding three years or to both such fine and such imprisonment if the person in respect of whom the publication or revelation of identity was done, is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(6) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (5) and if—

(a) the criminal proceedings that gave rise to the publication of information or the revelation of identity as contemplated in that subsection related to a charge that an accused person committed or attempted to commit any sexual act as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person or any act for the purpose of procuring or furthering the commission of a sexual act, as contemplated in that Act, towards or in connection with any other person; and

(b) the other person referred to in paragraph (a) suffered any physical, psychological or other injury or loss of income or support

Section 155 - Persons implicated in same offence may be tried together

(1) Any number of participants in the same offence may be tried together and any number of accessories after the same fact/accessories after the fact/ participants and each may be charged at such trial with the relevant substantive offence alleged against him.

(2) A receiver of property obtained by means of an offence shall for purposes of this section be deemed to be a participant in the offence in question.

There are some instances wherein we find people committing offences at almost same place and time, having agreed or without any agreement. It becomes convenient to have those different accused tried at the same time because we will find that same witnesses are to testify in respect of the same event.

We have perpetrator and co-perpetrator and these are the persons whose actions and intent must satisfy all the definitional aspects of crime. The liability of perpetrator or co-perpetrator is founded on his own act and his own intention

Co-perpetrators and common purpose: the doctrine of common purpose allows for the imputation of the conduct of one party to the other party, in either of two situations; The first situation is where there is an agreement or mandate between those parties to do the act in question, and act falls within the borders of what has been so expressly or impliedly agreed. *In* **S v Tilayi 2021 (2) SACR 350 (ECM) *at* [25]**, *DJP Van Zyl said the mandate 'would encompass not only acts which were expressly or impliedly agreed upon, but also acts which*

were necessary to give effect to the common objective, or which are the natural consequences of the execution of the common unlawful enterprise'. The notion of agreement or mandate is a subjective one. It deals with a meeting of minds. The doctrine of common purpose constitutes an exception to the rule that one is, in our criminal law, responsible for one's own conduct. It creates a model in terms of which one may be responsible for the conduct of another.

The second situation is where, even if no actual agreement, whether express or implied, existed between the parties, the remote party actively associated himself with the conduct of the immediate party by actually committing some act of association with the intention of associating himself with the conduct of the immediate party, i.e the active association of common purpose.

Accomplices as well as Accessories after the fact, can also be joined in as accused together with perpetrators and co-perpetrators. An accessory after the fact is a person who knowingly renders assistance after the completion of the crime. Accomplice is a person who takes part in the commission of an offence but who is neither a perpetrator or a co-perpetrator, nor accessory after the fact.

Section 156 - Persons committing separate offences at same time and place may be tried together

Any number of persons charged in respect of separate offences committed at the same place and at the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will also be admissible at the trial of any other such person or such persons

Section 156, like 155 seeks to avoid successive trials involving different accused but based essentially on the same evidence on behalf of the prosecution.

Section 157 - Joinder of accused and separation of trials

(1) An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question.

(2) Where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct

that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.

It is necessary that accused persons who committed similar offences at the same time should be tried together.

There are instances where you find that only one accused is arrested but has committed offence with another one and the first accused is being prejudiced by waiting for the arrest of second accused, therefore the trial may commence, and whilst busy with the trial, the second accused is arrested, then the second one should be joined in as accused number two, if the evidence has not been led against the first accused.

A trial may not commence de novo simply because further accused were added after evidence had been led **(S v Nkosi & another 1994 (2) SACR 429(N))**. The new accused should be advised as to the plea and any explanation of plea made by existing accused. This procedure is not permissible where the original accused pleaded guilty.

The joinder of accused saves time for trial so that witnesses should not testify against first accused and then in separate trial against second accused.

The main test in deciding whether to grant an application for separation is whether the applicant will suffer prejudice if a joint trial takes place. A bare possibility of prejudice is not sufficient to justify reparation.

Where a joint trial may give rise to evidence which is inadmissible against one accused, thus giving rise to prejudice, this may give grounds for separation of trials*. In* **S v Nongogo [2021] ZASCA 166 (Unreported, SCA case no 852/2020, 3 December 2021)** *it was held that a separation was the correct procedure where the two accused were represented by the same legal representative as inevitably a conflict of interest would have arisen. The main test was whether any of the accused would be likely to suffer prejudice if a separation of trials took place.*

In **S v Msiza (unreported, GO case no CC11/2021, 23 March 2022)** *the court considered the mechanics of the process of appealing against an order refusing an application for a separation of trials. The court accepted it as trite that such an order was interlocutory.*

Section 158 - Criminal proceedings to take place in presence of accused

(1) All criminal proceedings in any court shall take place in the presence of accused, unless expressly provided otherwise by this Act.

(2)(a) A court may, subject to section 153, on its own initiative or on application by the prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.

(b) A court may make a similar order on the application of an accused or a witness.

(3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would –

(a) prevent unreasonable delay;

(b) save costs;

(c) be convenient;

(d) be in the interests of justice; or

(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

(4) The court may make the giving of evidence in terms of subsection (2) subject to necessary conditions, provided that the prosecutor and the accused have the right to question a witness and to observe the reaction of that witness.

(5) The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of close circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings.

(6) For purposes of this section, a witness who is outside the Republic and who gives evidence by means of CCTV or similar electronic media, is regarded as witness who was subpoenaed to give evidence in such court.

Section 159 - Circumstances in which criminal proceedings may take place in absence of accused

(1) If an accused conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence.

(2) If two or more accused appear jointly at criminal proceedings and –

(a) the court is at any time satisfied, upon application made to it by any accused in person or by his representative –

(i) that the physical condition of that accused is such that he is unable or undesirable that he should attend the proceedings

(ii) that circumstances relating to the illness or death of a member of the family of that accused make his absence necessary; or

(b) any of the accused is absent from the proceedings without leave of the court, the court may –

(aa) in the case of paragraph (a), authorize the absence of the accused for a period determined by the court upon necessary conditions; and

(bb) direct that proceedings be proceeded with in the absence of the accused concerned.

(3) Where an accused becomes absent in the circumstances referred to in subsection (2), the court may upon application by the prosecution, direct that there be separation of proceedings in respect of absent accused, and thereafter when such accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent.

(4) If an accused who is in custody in terms of an order of court cannot, by reason of his physical indisposition or other physical condition, be brought before a court for purposes of obtaining an order for his further detention, the court may upon application by the prosecution prior to expiry of the order of his detention wherein the circumstances surrounding the indisposition or other condition are set out, supported by a certificate from a medical practitioner, order, in the absence of such accused, that he be detained at a place indicated by the court and for the period which the court deems necessary in order that he can recover and thereafter be brought before court for purposes of further detention and for trial.

Criminal proceedings shall take place in the presence of the accused, however, if circumstances demands, then accused can be removed or proceedings can take place in his or her absence so that there cannot be unnecessary delays. Before an accused is removed, the accused should be warned, the warning should be on the record and the accused should be given a last chance at the conclusion of the State case to ask him if he wishes to lead evidence.

Other relevant sections: ss 158 and 160.

Section 159A - Postponement of certain criminal proceedings through audiovisual link

(1) For purposes of this section and sections 159B, 159C and 159D, unless the context indicates otherwise—

(a) ***'appropriate person'*** *means any court official or any other person at the court point and remote point who is required to be, or may be, present at the proceedings, including the presiding officer, the prosecutor, the accused person's legal representative, any technical assistant, the clerk of the court, any witnesses, and members of the public who are entitled to be present;*

*(b) **'audio link'** means a live telephone link between the court point and the remote point which are both equipped with facilities which will enable audio communication between all appropriate persons at the court point and the remote point;*

*(c) **'audiovisual link'** means a live television link between the court point and the remote point which are both equipped with facilities which will enable all appropriate persons at the court point and the remote point to follow the proceedings and see and hear all the appropriate persons;*

*(d) **'court point'** means the courtroom or other place where the court having jurisdiction is sitting;*

*(e) **'correctional facility'** means a correctional facility as defined in the Correctional Services Act, 1998 (Act 111 of 1998), but does not include a police cell or lock-up; and*

*(f) **'remote point'** means the room or place at the designated correctional facility where the accused person appearing through audiovisual link is located.*

(2) An accused person—

(a) who is over the age of 18 years;

(b) who is in custody in a correctional facility in respect of an offence;

(c) who has already appeared before a court;

(d) whose case has been postponed and who is in custody pending his or her trial; and

(e) who is required to appear or to be brought before a court in any subsequent proceedings (whether before, during or after the trial or conviction and sentence) for the purpose of—

(i) a further postponement of the case; or

(ii) consideration of release on bail in terms of section 60, 63, 63A, 307, 308A or 321, where the granting of bail is not opposed by the prosecutor or where the granting of bail does not require the leading of evidence,

is not required to appear or to be brought physically before the court but may, subject to the provisions of this section, sections 159B, 159C and 159D, appear before court by audiovisual link and is deemed to be physically before court, unless the court directs, in the interests of justice, that he or she appears or be brought physically before it.

(3) Any proceedings in terms of subsection (2) shall be regarded as having been held in the presence of the accused person if, during the proceedings, that person—

(a) is held in custody in a correctional facility; and

(b) is able to follow the court proceedings and the court is able to see and hear the accused person by means of audiovisual link.

(4) The remote point shall be regarded as being a part of the court.

Section 159B - Requirements for audiovisual appearance by accused person

(1) An accused person appearing before a court by audiovisual link must do so from a place at which the requirements referred to in subsections (2) and (3) and section 159C are complied with.

(2) The Minister may, subject to the provisions of this section, designate any correctional facility which has been suitably equipped as a place where proceedings in terms of section 159A can be held.

(3) Both the court point and the remote point in the correctional facility designated in terms of subsection (2) must be equipped with facilities that, in accordance with any requirements prescribed by regulations and any directions of the court referred to in section 159C, allow—

(a) private communication to take place between the accused person and any

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legal practitioner representing that person in the proceedings at the court point; and

(b) documents to be transmitted between both points by the persons referred to in paragraph (a)—

(i) at any time during the proceedings;

(ii) during any adjournment of the hearing in the proceedings referred to in paragraph (a); or

(iii) at any time on the day of a hearing, shortly before or after the hearing.

(4) The court must, at every appearance of an accused person in terms of section 159A, inquire into the physical and mental well-being of the accused person and for that purpose may, where necessary, direct that the facilities referred to in section 159C be used in such a manner which will enable the presiding officer to satisfy himself or herself as to the accused person's well-being as that presiding officer would be able to do if the accused person were physically before the court.

Section 159C - Technical requirements for use of audiovisual link

Section 159D - Protection of communication between accused person and legal representative

Section 160 - Procedure at criminal proceedings where accused is absent

(1) If an accused referred to in section 159(1) or (2) again attends the proceedings in question, he may, unless he was legally represented during his absence, examine any witness who testified during his absence, and inspect the record of the proceedings or require the court to have such record read over to him.

(2) If the examination of a witness under subsection (1) takes place after the evidence on behalf of the prosecution or any co-accused has been concluded, the prosecution or such co-accused may in respect of any issue raised by the examination, lead evidence in rebuttal of evidence relating to the issue so raised.

(3) (a) When the evidence on behalf of all the accused, other than an accused who is absent from the proceedings, is concluded, the court shall, subject to the provisions of paragraph (b), postpone the proceedings until such absent accused is in attendance and, if necessary, further postpone the proceedings until the evidence, if any, on behalf of that accused has been led.

(b) If it appears to the court that the presence of an absent accused cannot reasonably be obtained, the court may direct that the proceedings in respect of the accused who are present be concluded as if such proceedings had been separated from the proceedings at the stage at which the accused concerned became absent from the proceedings, and when such absent accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

(c) When, in the case of a trial, the evidence on behalf of all the accused has been concluded and any accused is absent when the verdict is to be delivered, the verdict may be delivered in respect of all the accused or be withheld until all the accused are present or be delivered in respect of any accused present and withheld in respect of the absent accused until he is again in attendance.

Section 161 - Witness to testify viva voce

(1) A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence viva voce.

(2) In this section the expression 'viva voce' shall—

(a) in the case of a witness lacking the sense of hearing or the ability to speak, be deemed to include gesture-language; and

(b) in the case of a witness under the age of eighteen years or a witness who suffers from a physical, psychological, mental or emotional condition, which inhibits the ability of that witness to give his or her evidence viva voce, be deemed to include demonstrations, gestures or any other form of non-verbal expression.

One of the purposes of witness to testify viva voce, is that the court must be in position to observe and hear what the witness is saying, so that it can assess the demeanour of that witness including all gestures that may assist court in deciding on the matter.

However, demeanour is not decisive, since all factors have to be considered when determining credibility of a witness.

A witness is allowed to refresh his or her memory before entering the witness box. This is done by allowing witness to go through his or her statement, during consultation with the prosecutor, which was made and become part of the docket.

It is irregular for the prosecutor to consult with State witnesses who have already been sworn in **(S v Jacobs 2007 (1) SACR 474 (C))**. It was held in **S v Roux 2007 (1) SACR 379 (C)** *that it had not been the intention of the legislature to set out in section 161(2) a numerus clausus of what would constitute viva voce communication. Interpreters were routinely employed in the courts to translate evidence into a language with which the court and the accused were familiar, and the courts, had over the years, adopted a wide interpretation of the concept of viva voce evidence as described in section 161.*

The purpose of this section was to prevent the exclusion of evidence simply because it was not understandable to the court, the accused and court officials, if a method existed that would render it comprehensible.

Section 162 - Witness to be examined under oath

(1) subject to the provisions of sections 163 and 164, no person shall be examined as a witness unless he is under oath, which shall be administered by the presiding judicial officer or, or presiding judge or the registrar of the court, and which shall be in the following form: -

'I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.'

(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so

No one can be examined as a witness unless the oath has been administered, except where the provisions of sections 163 and 164 apply. Courts usually administer oaths through court interpreters. A failure to administer the oath to a witness or an oath administered through an interpreter who has not been sworn in results in the 'evidence' being inadmissible. The administration of the oath is essential for the admissibility of evidence given by a witness, and the absence of this requirement will lead a court to treat the evidence as though it never existed.

Section 163 - Affirmation in lieu of oath

(1) Any person who is or may be required to take oath and –

(a) who objects to the taking of oath;

(b) who objects taking the oath in prescribed form;

(c) who does not consider the oath in the prescribed form to be binding on his conscience; or

(d) who informs the presiding judge or presiding officer that he has no religious belief or that the taking of oath is contrary to his religious belief,

shall make an affirmation in the following words: -

' I solemnly affirm that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth'.

(2) Such affirmation shall have the same legal force and effect as if the person had taken an oath.

(3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.

Section 164 - When unsworn or unaffirmed evidence admissible

(1) Any person, who is found not to understand the nature and import of the oath or affirmation, may be admitted to give evidence without taking the oath or affirmation, provided that such person shall be admonished by presiding judge or presiding officer to speak the truth.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.

Section 165 - Oath, affirmation or admonition may be administered by or through interpreter or intermediary

Where the person concerned is to give evidence through an interpreter or an intermediary appointed under section 170A(1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer.

Section 166 - Cross-examination and re-examination of witnesses

(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies or any witness called on behalf of such co-accused and the prosecutor may cross-examine any witness, including accused, called on behalf of the defence, and a witness called on behalf of

prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence may likewise be re-examined by the accused.

(2) The prosecutor and the accused may, with leave of the court, examine or cross-examine any witness called by the court at criminal proceedings.

(3)(a) If it appears to a court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits on the examination regarding the length thereof or regarding any particular line of examination.

(b) The court may order that any submission regarding the relevancy of the cross-examination be heard in absence of the witness.

The purpose of cross examination is to elicit evidence favourable to the party cross-examining and to challenge the truth or accuracy of the evidence. A concession made during cross-examination by a witness may, like any other evidence, either be conclusive or count for nothing. Cross-examination is one of the essential components of the adversary system of procedure. It is a crucial adversarial tool for ascertaining truth, is a feature of the right to a fair trial and is guaranteed under section 35(3) of the Constitution.

In **S v Msimango & another 2010 (1) SACR 544 (GSJ) at [4]***, Moshidi J stressed that the right of an accused person to adduce and challenge evidence, per section 35(3)(j) of the Constitution, undoubtedly included the right to cross- examination. The court further indicated that a careful reading of section 166(1) invests reciprocal rights in both the accused and the prosecution to cross examine opposing witnesses, and to re-examine their own witnesses, and that the right to cross-examine a co-accused or witness called on behalf of the co-accused is also extended to both an accused and the prosecution. Failure to allow cross-examination is a gross irregularity.*

However, the right to cross-examine is not an absolute right, the court retains a discretion to disallow questioning which is irrelevant, unduly repetitive, oppressive or otherwise improper- *see* **K v The Regional Court Magistrate NO & others 1996 (1) SACR 434 (E) at 442***. Also see sections 166(3), 170A, and 227(2). A cross-examiner who fails to put contested points to a witness in cross-examination runs the risk of having his or her witness criticized for recent fabrication when that witness later testifies and, in appropriate cases, of having an adverse inference drawn from the failure to cross-examine on the contested issues* **(S v Mkhize [2019] ZASCA 56 (unreported, SCA case no 390/18, 1 April 2019) at [15])***. The rule and its*

rationale were set out in **S v Scott- Crossley 2008 (1) SACR 223 (SCA) 237-8**, *where reliance was placed on the view of Phipson Evidence 7 ed 460, where the court cited the* **South African Rugby Football Union case** *as authority: 'The cross-examiner must put his defence on each and every aspect which he wishes to put in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as catch-can, or should it be turned into a forensic ambush'.*

There is an ethical duty on a prosecutor to disclose material discrepancies between the evidence of a witness and his previous statement. With regard to docket privilege and the constitutional challenge, the court said in the case of **Nohour & another v Minister of Justice and Constitutional Development 2020 (2) SACR 229 (SCA) at [9]**, *where the court pointed out that constitutional values now inform this rule and that the State is obliged to furnish the defence with a copy of the witness statement for cross-examination purposes.*

Section 167 - Court may examine witness or person in attendance

The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.

Section 168 - Court may adjourn proceedings to any date

A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act.

Section 169 - Court may adjourn proceedings to any place

A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient that the proceedings be continued be continued at any place within its area of jurisdiction other than the one where the court is sitting, adjourn the proceedings to such other place, whether within or outside the area of jurisdiction of such court, for the purpose of performing at such place any function of the court relevant to such circumstance.

Section 170 - Failure of accused to appear after adjournment or to remain in attendance

(1) An accused who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and when he appear or so to remain in attendance and, unless the accused satisfies the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine or imprisonment not exceeding three months.

Section 170A - Evidence through intermediaries

(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness—

(a) under the biological or mental age of eighteen years;

(b) who suffers from a physical, psychological, mental or emotional condition; or

(c) who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act 13 of 2006),

to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary, except examination by the court, may take place in any manner other than through that intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place—

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4) (a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine.

(5) (a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.

(b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to—

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

(6) (a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.

(b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection—

(i) the trial court; or

(ii) the court considering an appeal or review,

has not delivered judgment.

(7) (a) The court must provide reasons for refusing any application or request by the public prosecutor or a witness referred to in subsection (1), for the appointment of an intermediary, immediately upon refusal, which reasons must be entered into the record of the proceedings.

(b) A court may, on application by the public prosecutor and if it is satisfied that there is a material change in respect of any fact or circumstance that influenced the refusal contemplated in paragraph (a), review its decision.

(8) An intermediary referred to in subsection (1) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.

(9) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court—

(a) is for any reason absent;

(b) becomes unable to act as an intermediary in the opinion of the court; or

(c) dies,

the court may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor—

(i) postpone the proceedings in order to obtain the intermediary's presence;

(ii) summons the intermediary to appear before the court to advance reasons for being absent;

(iii) direct that the appointment of the intermediary be revoked and appoint another intermediary; or

(iv) direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary.

(10) The court shall immediately give reasons for any direction or order referred to in subsection (9)(iv), which reasons shall be entered into the record of the proceedings.

(11) Subject to subsection (13), any person who is competent to be appointed as an intermediary in terms of subsection (4)(a) must, before commencing with his or her functions in terms of this section, take an oath or make an affirmation subscribed by him or her, in the form set out below before the judicial officer presiding over the proceedings:

'I, ... do hereby swear/truly affirm that, whenever I may be called upon to perform the functions of an intermediary, I shall, truly and correctly to the best of my knowledge and ability—

(a) perform my functions as an intermediary; and

(b) convey properly and accurately all questions put to witnesses and, where necessary, convey the general purport of any question to the witness, unless directed otherwise by the court'.

(12) (a) Subject to subsection (13), before a person is appointed to perform the functions of an intermediary—

(i) in a magistrate's court for any district or for any regional division, the magistrate presiding over the proceedings; or

(ii) in a Superior Court, the judicial officer presiding over the proceedings, must enquire into the competence of the person to be appointed as an intermediary.

(b) The enquiry contemplated in paragraph (a) must include, but is not limited to, the person's—

(i) fitness as a person to be an intermediary;

(ii) experience which has a bearing on the role and functions of an intermediary;

(iii) qualifications;

(iv) knowledge which has a bearing on the role and functions of an intermediary;

(v) language and communication proficiency; and

(vi) ability to interact with a witness under the biological or mental age of eighteen years or a witness who suffers from a physical, psychological, mental or emotional condition, or a witness who is an older person as defined in section 1 of the Older Persons Act, 2006.

(13) (a) The head of a court may, at his or her discretion and after holding an enquiry contemplated in subsection (12), issue a certificate in the form prescribed by the Minister by notice in the Gazette, to a person whom he or she has found to be competent to appear as an intermediary in the court concerned.

(b) Before the head of a court issues the certificate referred to in paragraph (a), he or she must cause the person who has been found competent to be appointed as an intermediary to take the oath or make the affirmation referred to in subsection (11) and must endorse the certificate with a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

(c) A certificate contemplated in paragraph (a) may be accepted as proof—

(i) of the competency of a person to be appointed as an intermediary in the court concerned; and

(ii) of the fact that the person has taken the oath or made the affirmation contemplated in subsection (11),

for purposes of this section, in any subsequent proceedings in terms of this Act, before the court concerned in respect of which a certificate contemplated in paragraph (a) was issued by the head of a court and it is not necessary for the magistrate or the judicial officer presiding over the proceedings of the court in question to administer the oath or affirmation or to hold an enquiry into the competence of the person to be appointed as an intermediary.

(d) Paragraph (c) must not be construed as prohibiting a magistrate or a judicial officer presiding over proceedings from holding an enquiry, at any stage of the proceedings, regarding the competence of a person to act as an intermediary.

(e) For the purposes of this section, 'head of a court' means the most senior judicial officer of that court.

Section 171 - Evidence on commission

(1)(a) Whenever criminal proceedings are pending before any court and it appears to such court on application made to it that the examination of any witness who is resident in the Republic is necessary in the interests of justice and that the attendance of such witness cannot be obtained without undue delay, expense or inconvenience the court may dispense with such attendance and issue a commission to any magistrate.

(b) …

(c) …

(2) (a) The magistrate to whom the commission is issued, shall proceed to the place where the witness is or shall summon the witness before him or her, and take down the evidence in the manner set out in paragraph (b).

(b) The witness shall give his or her evidence upon oath or by affirmation, and such evidence shall be recorded and read over to the witness, and if he or she adheres thereto, be subscribed by him or her and the magistrate concerned.

International Co-operation in Criminal Matters Act 75 of 1996 is relevant for this section. Evidence of witnesses who are in foreign States are more suitable to be obtained on commission.

Section 172 - Parties may examine witness

Any party to proceedings in which a commission is issued under section 171, may –

(a) transmit interrogatories in writing which the court issuing the commission may think relevant to the issue, and the magistrate to whom the commission is issued, shall examine the witness upon such interrogatories; or

(b) appear before such magistrate, either by a legal representative or, in the case of an accused who is not in custody or in the case of a private prosecutor, in person, and examine the witness.

Section 173 - Evidence on commission part of the court record

The magistrate shall return the evidence in question to the court which issued commission, and such evidence shall be open to the inspection of the parties to the proceedings and shall, in so far as it is admissible as evidence in such proceedings, form part of the record of such court.

Section 174 - Accused may be discharged at close of case for prosecution

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

The words 'no evidence' have been interpreted to mean no evidence upon which a reasonable man acting carefully may convict.

Section 175 - Prosecution and defence may address court at conclusion of evidence

(1) After all the evidence has been adduced, the prosecutor may address the court and thereafter the the accused may address the court.

(2) The prosecutor may reply on any matter of law raised by the accused in his address, and may, with leave of the court, reply on any matter of fact raised by the accused in his address.

S v Kwinda 1993 (2) SACR 408 (V) *'a failure by the court to afford the accused the opportunity of addressing the court was held to be a gross irregularity and the proceedings were set aside as there was nothing on record to show that the accused was not prejudiced by this irregularity or that the omission was due to his fault or that he waived his right to address.'*

Section 176 - Judgment may be corrected

When by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgment.

The general principle is that once a judicial officer has given his judgment, he is functus officio and it follows that he cannot alter or revoke an order that he might have had (**Firestone SA (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A)).** This section, however, allows for the amendment of judgments in prescribed circumstances.

Section 177 - Court may defer final decision

The court may at criminal proceedings defer its reasons for any decision on any question raised at such proceedings, and the reasons so deferred shall be deemed to have been given at the time of the proceedings.

Judicial officers have a duty to give reasons for their decisions. The importance of this duty was stressed by the Supreme Court of Appeal *in* **State versus Mokela 2012 (1) SACR 431 (SCA) at [12].**

Also see section 146.

Section 178 - Arrest of person committing offence in court and removal from court of person disturbing proceedings

(1) Where an offence is committed in the presence of the court, the presiding judge or judicial officer may order the arrest of the offender.

(2) If any person, other than an accused, who is present at criminal proceedings, disturbs the peace or order of the court, the court may order that such person be removed from the court and that he be detained in custody until the rising of the court.

Section 178 must not be invoked by judicial officer in order to assuage feelings of anger or frustration, as it happened in **re Detention of Candidate Attorney in Court Cells 2021 (1) SACR 655 (ECG)**, where the magistrate ordered that candidate attorney from the Legal Aid Board be detained for refusing to represent accused as she said she does not have instructions. Roberson J indicated that the magistrate committed a gross irregularity which led to a serious invasion of the right to liberty and dignity, which must have been *'frightening, shocking and humiliating'* for the candidate attorney.

The behaviour of magistrate in **Minister of Justice and Constitutional Development & another v Masia 2021 (2) SACR 425 (GP**) was regarded by the court as a *'bullying tactic which constituted a 'clear abuse of judicial power' and was, moreover, 'malicious' (at [43*]). Here, the respondent in maintenance case was detained without a warrant and without charge, for offering to settle arrears in instalment of R300-00 monthly.

Witnesses (Sections 179- 207)

Section 179 - Process for securing attendance of witness

(1) (a) The prosecutor or an accused may compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings by taking out of the office prescribed by the rules of the court the process of court for that purpose.

(b) If any police official has reasonable grounds for believing that the attendance of any person is or will be necessary to give evidence or to produce any book, paper or document in criminal proceedings in a lower court, and hands to such person a written notice calling upon him to attend such criminal proceedings on the date and at the time and place specified in the notice, to give evidence or to produce any book, paper or document, likewise specified, such person shall, for the purposes of this Act, be deemed to have been duly subpoenaed so to attend such criminal proceedings.

(2) Where an accused desires to have any witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena shall be deposited with the prescribed officer of the court.

(3) (a) Where an accused desires to have any witness subpoenaed and he satisfies the prescribed officer of the court—

(i) that he is unable to pay the necessary costs and fees; and

(ii) that such witness is necessary and material for his defence,

such officer shall subpoena such witness.

(b) In any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he has heard other evidence in the case.

(4) For the purposes of this section 'prescribed officer of the court' means the registrar, assistant registrar, clerk of the court or any officer prescribed by the rules of court.

Section 180 - Service of subpoena

(1) A subpoena in criminal proceedings shall be served in the manner provided by the rules of the court by a person empowered to serve a subpoena in criminal proceedings.

(2) A return by the person empowered to serve a subpoena in criminal proceedings, that the service thereof has been duly effected may, upon the failure of a witness to attend the relevant proceedings and shall be prima facie proof of such service.

Rules of the court; - Supreme Court Rules 54(5) – (8); and Rule 64 of the Magistrates' Courts Rules, are relevant here.

Section 181 - Pre-payment of witness expenses

Where a subpoena is served on a witness at a place outside the magisterial district from which the subpoena is issued, or, in the case of a superior court, at a place outside the magisterial district in which the proceedings at which the witness is to appear are to take place, and the witness is required to travel from such place to the court in question, the necessary expenses to travel to and from such court and of sojourn at the court in question, shall on demand be paid to such witness at the time of service of the subpoena.

Section 182 - Witness from prison

A prisoner who is in prison shall be subpoenaed as a witness on behalf of the defence or private prosecutor only if the court authorizes that the prisoner be subpoenaed as a witness, and the court shall give such authority only if it is satisfied that the evidence in question is necessary and material for the defence or the private prosecutor, and that the public safety or order will not be endangered by the calling of the witness.

Section 183 - Witness to keep police informed of whereabouts

Any person who is advised in writing by any police official that he will be required as a witness in criminal proceedings shall keep such police official informed at all times of his full residential address or any other address where he may conveniently be found, until such criminal proceedings have been finally disposed of or until he is officially advised that he will no longer be required as a witness.

Section 184 - Witness about to abscond and witness evading service of summons

(1) Whenever any person is likely to give material evidence in criminal proceedings, any magistrate, regional magistrate or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is about to abscond, issue a warrant for his or her arrest.

(2) If a person referred to in subsection (1) is arrested, the presiding officer or judge, may warn him to appear at the proceedings in question at a stated place, time , date and release him on any condition referred to in paragraph (a) (b) or (e) of section 62.

(3)(a) A person who fails to comply with a warning under subsection (2) shall be guilty of an offence and liable to the punishment contemplated in paragraph (b) of this subsection

(b) The provisions of section 170 (2) shall mutatis mutandis apply with reference to any person who is guilty of an offence under paragraph (a) of this subsection.

(4) Whenever any person is likely to give material evidence in criminal proceedings, any presiding officer or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is evading service of the relevant subpoena, issue a warrant for his arrest, whereupon the provisions of subsections (2) and (3) shall mutatis mutandis apply with reference to such person.

Section 185 - Detention of witness

(1) (a) Whenever any person is with reference to any offence referred to in Part III of Schedule 2 in the opinion of the attorney-general likely to give evidence on behalf of the State at criminal proceedings in any court, and the attorney-general, from information placed before him—

(i) is of the opinion that the personal safety of such person is in danger or that he may abscond or that he may be tampered with or that he may be intimidated; or

(ii) deems it to be in the interests of such person or of the administration of justice that he be detained in custody,

the attorney-general may by way of affidavit place such information before a judge in chambers and apply to such judge for an order that the person concerned be detained pending the relevant proceedings.

(b) The attorney-general may in any case in which he is of the opinion that the object of obtaining an order under paragraph (a) may be defeated if the person concerned is not detained without delay, order that such person be detained forthwith but such order shall not endure for longer than seventy-two hours unless the attorney-general within that time by way of affidavit places before a judge in chambers the information on which he ordered the detention of the person concerned and such further information as might become available to him, and applies to such judge for an order that the person concerned be detained pending the relevant proceedings.

(c) The attorney-general shall, as soon as he applies to a judge under paragraph (b) for an order of detention, in writing advise the person in charge of the place where the person concerned is being detained, that he has so applied for an order, and shall, where a judge under subsection (2)(a) refuses to issue a warrant for the detention of the person concerned, forthwith advise the person so in charge of such refusal, whereupon the person so in charge shall without delay release the person detained.

(2) (a) The judge hearing the application under subsection (1) may, if it appears to him from the information placed before him by the attorney-general—

(i) that there is a danger that the personal safety of the person concerned may be threatened or that he may abscond or that he may be tampered with or that he may be intimidated; or

(ii) that it would be in the interests of the person concerned or of the administration of justice that he be detained in custody,

issue a warrant for the detention of such person.

(b) The decision of a judge under paragraph (a) shall be final: Provided that where a judge refuses an application and further information becomes available to the attorney-general concerning the person in respect of whom the application was refused, the attorney-general may again apply under subsection (1)(a) for the detention of that person.

(3) A person in respect of whom a warrant is issued under subsection (2), shall be taken to the place mentioned in the warrant and, in accordance with regulations which the Minister is hereby authorized to make, be detained there or at any other place determined by any judge from time to time, or, where the person concerned is detained in

terms of an order by the attorney-general under subsection (1)(b), such person shall, pending the decision of the judge under subsection (2)(a), be taken to a place determined by the attorney-general and detained there in accordance with the said regulations.

(4) Any person detained under a warrant in terms of subsection (2) shall be detained for the period terminating on the day on which the criminal proceedings concerned are concluded, unless—

(a) the attorney-general orders that he be released earlier; or

(b) such proceedings have not commenced within six months from the date on which he is so detained, in which case he shall be released after the expiration of such period.

(5) No person, other than an officer in the service of the State acting in the performance of his official duties, shall have access to a person detained under subsection (2), except with the consent of and subject to the conditions determined by the attorney-general or an officer in the service of the State delegated by him.

(6) Any person detained under subsection (2) shall be visited in private at least once during each week by a magistrate of the district or area in which he is detained.

(7) For the purposes of section 191 any person detained under subsection (2) of this section shall be deemed to have attended the criminal proceedings in question as a witness for the State during the whole of the period of his detention.

(8) . . .

[Deleted by Act 88 of 1996.]

(9) (a) In this section the expression 'judge in chambers' means a judge sitting behind closed doors when hearing the relevant application.

(b) No information relating to the proceedings under subsection (1) or (2) shall be published or be made public in any manner whatever.

Section 185A …

Witness protection.

Section 186 - Court may subpoena witness

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings if the evidence of such witness appears to the court essential to the just decision of the case.

Court has discretionary power to subpoena a witness only if evidence of such witness is essential. The discretionary power allows a judge to call a witness who is useful but not

essential to the just decision of the case – see **R v Majosi & others 1956 (1) SA 167 (N) at 173**. The inexperience of prosecutor might create the necessity for calling a witness so that the court can ensure that justice is done.

Other relevant section: 167

Section 187 - Witness to attend proceedings and to remain in attendance

Whenever a witness is subpoenaed to attend criminal proceedings, he or she shall attend the proceedings and remain in attendance until excused by the court. This applies also to a witness who was previously warned by the court to attend proceedings on that particular day. The court may order that any person, other than accused, who is to be called in as a witness, shall leave the court and remain absent from the proceedings until he is called in.

Section 188 - Failure by witness to attend or remain in attendance

(1) Any person who is subpoenaed to attend criminal proceedings and who fails to attend or to remain in attendance, and any person who is warned by the court to remain in attendance, and any person so subpoenaed or so warned who fails to appear at the place and on date and at the time to which the proceedings in question may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to punishment contemplated in subsection (2).

(2) The provisions of section 170 (2) shall mutatis mutandis apply with reference to any person referred to in subsection (1)

Therefore, any witness who has been subpoenaed is obliged to comply with the subpoena, failure which shall lead to possible punishment by the court if explanation for not complying is not accepted by the court.

Section 189 - Powers of court with regard to recalcitrant witness

(1) If any person at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless such person has just excuse, sentence him or her to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in part III of Schedule 2 to imprisonment for a period not exceeding five years.

(2) After expiration of sentence under subsection (1), such person may from time to time, again be dealt with under that subsection with regard to any further refusal or failure.

(3) A court may at any time on good cause shown remit any punishment or part thereof imposed under subsection (1).

(4) Any sentence imposed under subsection (1) shall be executed and be subject to appeal in the same manner as a sentence imposed in any criminal case, and such sentence shall be served before any other sentence of imprisonment imposed on such person.

(5) The court may conclude criminal proceedings at any time irrespective of action taken under subsection (1)

(6) No person shall be bound to produce any document or book specified in the subpoena unless he has it in court.

(7) Any lower court shall have jurisdiction to sentence any person to the maximum period of imprisonment prescribed by this section.

This section applies to all compellable witnesses and it appears that the only privilege available is that all witnesses are excused from answering incriminating questions. *See section 203. In* **S v Nkosi 1990 (1) SACR 509 (N)** *it was decided that there was no reason in logic or fairness for depriving a witness of the right to legal representation, and in this case failure of the court to so advice the witness resulted in a complete failure of justice. The Constitutional Court held in* **Nel v Le Roux NO and others 1996 (1) SACR 572 (CC); 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC)** *that there was nothing in the provisions of section 205 as read with section 189 which compels or requires an examinee to answer a question or produce a document which would unjustifiably infringe or threaten to infringe chapter 3 rights.*

Section 190 - Impeachment or support of credibility of witness

(1) Any party may in criminal proceedings impeach or support the credibility of any witness called against or on behalf of such party in any manner in which and by any evidence by which the credibility of such witness might on the thirtieth of May 1961, have been impeached or supported by such party.

(2) Any such party who has called a witness who has given evidence may, after such party or the court has asked the witness whether he did or did not previously make a statement with which his evidence in the said proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been given to the witness, prove that he previously made a statement with which such evidence is inconsistent.

Where a party calls a witness who gives evidence which is unfavourable to him there are three options available for such party, i.e. to lead evidence to contradict unfavourable witness; he

may ask the court to declare the witness hostile, thus allowing party who called him to cross-examine him and; he may prove a previous inconsistent statement made by the witness in terms of subsection (2).

Section 191 - Payment of expenses of witness

(1) Any person who attends criminal proceedings is entitled to such allowance as may be prescribed under subsection (3)

(2) the judicial officer or judge may direct that any person who attended such criminal proceedings as a witness for the accused shall be paid such allowance as prescribed regulation, or lesser allowance as the judicial officer or judge may determine.

(3) The Minister, may, in consultation with the Minister of finance, by regulation prescribe different tariffs for witnesses according to their callings, like professions.

(4) The Minister may under subsection (3) empower any officer in the service of the State to authorize the payment of an allowance in accordance with a higher tariff than prescribed.

(5) For the purpose of this section, witness shall include any person necessarily required to accompany any witness on account of his youth, old age or infirmity.

In **S v Zwelibanzi & another 2005 (2) SACR 484 (E)** Jones J ordered that full board and lodging be paid to the accused for the duration of the trial. The learned judge held that no violence was done to the wording of the section if accused is regarded as a person who attends the trial as potential witness for the defence.

It is possible to have accused paid as a witness under certain circumstances like it happened in **Zwelibanzi** case. But generally it would need legislative intervention so that the system of payment is used accountably, otherwise each and every accused may end up demanding payment as a witness/ potential witness for the defence. The purpose behind this section should be looked into which is to ensure that victims of crime should not incur any liability for the wrongs done to them.

Section 191A - Witness services

(1) The Minister has the power to determine services to be provided to a witness who is required to give evidence in any court of law.

(2) The Minister may make regulations relating to –

(a) the assistance of, and support to, witnesses at courts

(b) the establishment of reception centres for witnesses at courts;

(c) the counselling of witnesses; and

(d) any other matter which the Minister deems expedient to prescribe in order to provide services to witnesses at courts

(3) …

(4) …

(5) Any regulation made under this section must be submitted to parliament before publication in gazette.

This section is aimed at ensuring that witnesses are kept in welcoming environment upon arrival in court, there should be waiting room wherein the witnesses will be accommodated whilst they are waiting to be taken inside the courtroom, and they are not supposed to be mingling with accused persons because that may cause more trauma to them. Witnesses should also be catered for by professionals like social workers, psychologists so that they can be helped from different effects they encountered as a result of the crimes committed against them. This is a process of redressing them to almost where they were prior to being victims of crime.

The other relevant legislation is the Witness Protection Act 112 of 1998.

Section 192 - Every witness competent and compellable unless expressly excluded

Every person not expressly excluded by this Act from giving evidence shall, subject to provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

A number of sections such as 195 and 196 contain specific provisions in respect of competence and compellability and section 206 provides that the law as to the competence, compellability or privileges of witness in cases not specifically provided for shall be the law as it stood on 30 May 1961. A competent witness is a witness whose evidence may be received in court, whereas compellable witness is one who is competent and in addition can be forced to testify, and provisions of section 189 must be noted.

In **re R v Demingo & others 1951 (1) SA 36 (A) at 43***, it was decided that judicial officers should not give evidence in cases over which they are presiding.*

In **Caccia v Muller 1929 CPD 77**, *it was decided that advocates and attorneys are competent to give evidence in cases in which they are appearing, but it has been emphasized that this course is highly undesirable.*

In **R v Becker 1929 AD 167**: *'The prosecutor is not an incompetent witness. It is undesirable that he should give evidence.' It is highly irregular for the prosecutor to give evidence in the form of unsworn statement from the bar* **(R v Dunga 1939 CPD 7; R v Kirsten 1950 (3) SA659 (C)**).

Section 193 - Court to decide upon competency of witness

The court in which criminal proceedings are conducted shall decide any question concerning the competency or compellability of any witness to give evidence.

It simply means that it is the duty of that judicial officer or judge to decide on the competency or compellability of the witness to give evidence, since this is a matter of law. Whenever a court is in terms of section 193, required to decide on the competency of a witness due to his or her state of mind, as contemplated in section 194, it now has the power, in terms of section 194A to order that the witness be examined by a medical practitioner, a psychiatrist or a clinical psychologist designated by the court, who would then be required to furnish the court with a report on the competency of the witness to give evidence. The requirement is that this should be done in the interests of justice.

Section 194 - Incompetency due to state of mind

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.

Incompetence only lasts for so long as the mental illness lasts. The fact that a person is deaf and dumb does not make the witness incompetent so long as communication can be made through an interpreter, see **S v Naidoo 1962 (2) SA 625 (A**). It is not always necessary to hold a trial within trial to determine whether a person is a competent witness **(S v Zenzile 1992 (1) SACR 444 (C)**). A court may base its decision on its own observation of the witness **(S v Dladla 2011 (1) SACR 80 (KZP) at [12]**.

Section 194A - Evaluation of competency of witnesses due to state of mind

(1) For purpose of section 193, whenever a court is required to decide on the competency of a witness due to his or her state of mind, the court may order that the witness be examined by a medical practitioner, a psychiatrist, or clinical psychologist designated by the court, who must furnish the court with a report on the competency of the witness to give evidence.

(2) A medical practitioner, psychiatrist or clinical psychologist designated by the court in terms of subsection (1) who is not in the full time service of the State, must be compensated for his or her services in connection with the enquiry from public funds in accordance with a tariff determined by the Minister in consultation with the cabinet member responsible for national financial matters.

(3) If the contents of a report contemplated in subsection (1) are not disputed, the report is admissible as evidence upon production.

Section 194A was inserted by section 10 of Act 8 of 2017, which came into effect on 02 August 2017. It was said in the case of **S v Katoo 2005 (1) SACR 522 (SCA)** that since section 193 requires a court to determine the competence of a witness, the trial court should, before concluding that she was incompetent, have conducted a proper investigation into the cause of what was claimed to be the imbecility of the witness. The procedure in the **Katoo** case is acceptable and recognized as part of our procedural and evidential system of justice.

Section 195 - Evidence for prosecution by husband or wife of accused

(1) The wife or husband of an accused shall be competent, but not compellable, to give evidence for the prosecution, but shall be compellable if he or she is charged with –

(a) any offence committed against the person of either of them or of a child of either of them or who is in care of either of them.

(b) any offence under Chapter 8 of the Child Care Act, 1983 (Act 74 of 1983), committed in respect of any child of either of them.

(c) any contravention of any provision of section 31(1) of the Maintenance Act, 1998

(d) bigamy;

(e) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(f) abduction;

(g) any contravention of any provision of section 17 or 23 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(h) perjury committed in connection with any judicial proceedings or criminal proceedings.

(i) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h).

(2) For the purpose of the law of evidence in criminal proceedings, 'marriage' shall include a customary marriage or customary union concluded under the indigenous law and custom of any of the indigenous people of the Republic of South Africa or any marriage concluded under any system of religious law.

In general, a spouse of an accused person can testify on behalf of the prosecution, but he or she cannot be forced to do so but remains his or her discretion to either testify or not, except for the offences listed under section (1) subsections (a) – (i). At common law the accused's spouse was not a competent witness for either prosecution or the defence. Prior to 03 October 1988, a spouse remained an incompetent and non-compellable witness. Section 195 and 196 were therefore amended by sections 6 and 7 of the Law of Evidence Amendment Act 45 of 1988. The result is that a spouse is now a competent - but not ordinarily a compellable witness - against another spouse in criminal proceedings, whether for the prosecution or a co-accused. *In* **S v Mgcwabe 2015 (2) SACR 517 (ECG)**, *the court ruled that the fact that a marriage relationship has been severely damaged does not negate in any way, the immunity set out in section 195 (1), therefore a spouse remains competent but non-compellable witness against his or her spouse.*

Section 196 - Evidence of accused and husband or wife on behalf of accused

(1) An accused and the wife or husband of an accused shall be a competent witness for the defence at every stage of criminal proceedings, provided that –

(a) an accused shall not be called as a witness except upon his own application;

(b) the wife or husband of an accused shall not be a compellable witness where a co-accused calls that wife or husband as a witness for the defence

(2) The evidence which an accused may give in his own defence at joint criminal proceedings, shall not be inadmissible against a co-accused by reason only that such accused is for any reason not a competent witness for the prosecution against such co-accused.

(3) An accused may not make an unsworn statement at his trial in lieu of evidence but shall, if he wishes to give evidence, do so on oath or, by affirmation.

According to the case law **S v Taylor 1991 (2) SACR 69 (C)**, the term 'husband' and 'wife' includes the former spouse of an accused when required to testify as to events which occurred during subsistence of the marriage. Prior to 3 October 1988, section 196 (1) (b) provided that the spouse of an accused could not be called as a witness for the defence except upon the application of the accused.

Other relevant sections: ss 195, 198

Section 197 - Privileges of accused when giving evidence

An accused who gives evidence at criminal proceedings shall not be asked or required to answer any question tending to show that he has committed or has been convicted or charged with any offence other than the offence with which he is charged, or that he is of bad character, unless-

(a) he or his legal representative asks a witness any question with a view to show his own good character or conduct of the defence involves imputation of character of the complainant or any witness of the prosecution;

(b) he gives evidence against any other person charged with the same offence, or offence with same facts.

(c) the proceedings against him are such as are described in section 240 or 241 and the notice under those sections has been given to him; or

(d) the proof that he has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is charged.

Section 197 gives the accused a shield, which not only gives him a right to refuse to answer certain questions but even prohibits the questions being asked *(see* **R v Sikurlite 1964 (4) SA 788 (FC)**. *There are four classes of questions prohibited which tend to show, (i) that he has committed; (ii) that he has been convicted of, (iii) that he has been charged with any offence other than that which forms the subject of the current charge; or (iv) that he is of 'bad character'. In* **R v Malindi 1963 (4) SA 677 (FC) and 1966 (4) SA 123 (PC)**, *it was indicated that a question tends to show 'bad character' if it suggests that the accused has a disposition to commit the offence with which he is charged. The shield does not protect the accused against questions which are relevant to an issue before court.*

A judge has a discretion to exclude cross-examination even if it would be technically permissible in terms of section 197, if it would unduly prejudice the accused. The discretion had to be exercised in the light of the principles governing relevance: the cross-examination must be relevant to the issue of credibility, and it must not prejudice the accused being cross-examined in the conduct of his defence to the extent that his right to a fair trial is undermined.

Section 198 - Privilege arising out of marital state

(1) A husband or wife shall not at criminal proceedings be compelled to disclose any communication which his wife or her husband made during the marriage

(2) subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court.

A witness who is not the **de jure** spouse of the accused is not entitled to invoke the privilege relating to marital communications set out in this section – **S v Johardien 1990 (1) SA 1026 (C)**. It was held in that case that a woman who was married by Muslim rites, and whose marriage was potentially polygamous, could not invoke the privilege even though her marriage was **de facto** a monogamous one.

Section 199 - No witness compelled to answer question which the witness's husband or wife may decline

No person shall be compelled to answer any question or to give any evidence, if the question or evidence is such that under the circumstances, the husband or wife of such person, if under examination as a witness, may lawfully refuse and cannot be compelled to answer or give it.

The effect of this section is that one may refuse to answer or give evidence in respect of where the other party would claim privilege on. The scope of marital privilege as contained in section 198 (1) has been broadened by entitling a spouse to refuse to disclose a communication made by him or her to the other spouse on the ground that his or her spouse could have so refused in terms of section 198 (1).

Section 200 - Witness not excused from answer establishing civil liability on his part

A witness in criminal proceedings may not refuse to answer any question relevant to the issue by reason only that the answer establishes or may establish a civil liability on his part.

Exposure to civil liability does not entitle a witness to invoke the privilege conferred by that section. *See* **Wessels NO v Van Tonder en 'n ander 1997 (1) SA 616 (O) at 620-1**.

Section 201 - Privilege of legal practitioner

No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned.

The Appellate Division in **S v Safatsa and Others 1988 (1) SA 868 (A)** decided in favour of the view that the privilege is not merely a rule of the law of evidence but is indeed founded on an individual's fundamental right to consult freely with a legal adviser.

What is covered by the privilege—

The privilege includes everything confidentially said or communicated between legal practitioner and client by way of legal advice or for the purposes of litigation.

A mere friendly conversation is not covered (**S v Green 1962 (3) SA 899 (D)**).

A relationship of legal adviser and client must exist otherwise the communication is not privileged.

The proviso clearly stipulates that, when the client is charged with a criminal offence, relevant matters which come to the knowledge of the legal practitioner before he or she was professionally employed or consulted by that client are not covered by the privilege.

The accused can be questioned about those matters and is obliged to answer.

In addition, if a client makes a confession to an attorney without seeking that attorney's legal advice in connection therewith, the confession is not privileged information (**S v Kearney 1964 (2) SA 495 (A)**).

The communication must have been for the purpose of obtaining legal advice, otherwise it is not protected.

Whether it was a professional conversation is a question of fact, but the answer can be inferred from a circumstance such as payment to a legal adviser (**R v Fouché 1953 (1) SA 440 (W)**).

Whether the relationship of attorney and client, from which privilege flowed, in fact, existed and whether the communication was confidential are questions of fact which have to be decided on the facts.

Who can claim the privilege—

If a question is put to the legal practitioner which encroaches upon the privilege, it is the duty of the legal practitioner to claim that privilege on behalf of the client.

The legal practitioner acts as an agent for the client. If the client waives the privilege, the legal practitioner is obliged to answer.

When the accused's evidence does not correspond with what counsel for the defence has put

to the other witnesses, the accused is often asked whether his or her version was given to counsel for the defence. Such a question is in order because it is important to know whether an explanation which is now given was given earlier in circumstances in which one would expect it to have been given. In this manner the question tests the credibility of the evidence (**R v Davies 1956 (3) SA 52 (A) at 57F and 59A; S v Green 1962 (3) SA 899 (D) at 902A**).

The accused may not be asked: "What did you say to your legal representative?"

202 Privilege from disclosure on ground of public policy or public interest

Except as is in this Act provided and subject to the provisions of any other law, no witness in criminal proceedings shall be compellable or permitted to give evidence as to any fact, matter or thing or as to any communication made to or by such witness, if such witness would on the thirtieth day of May, 1961, not have been compellable or permitted to give evidence with regard to such fact, matter or thing or communication by reason that it should not, on the grounds of public policy or from regard to public interest, be disclosed, and that it is privileged from disclosure: Provided that any person may in criminal proceedings adduce evidence of any communication alleging the commission of an offence, if the making of that communication prima facie constitutes an offence, and the judge or judicial officer presiding at such proceedings may determine whether the making of such communication prima facie does or does not constitute an offence, and such determination shall, for the purpose of such proceedings, be final.

This provision provides for a privilege on the basis of "public policy" or "public interest"

As a result of the findings of the Constitiutional Court in **Shabalala and Others v AttorneyGeneral, Transvaal and Another 1995 (12) BCLR 1593 (CC), 1996 (1) SA 725 (CC)** there is no blanket privilege on the contents of the police docket.

However, this does not mean that the State is not entitled to privilege.

Three categories of public interest are contemplated in section 202:

(a) **Identity of informers**—An informer's identity and the information he or she conveys is protected from disclosure. No question may be put and no document entered as evidence which could reveal the identity of the informer or the content of the information.

In **Suliman v Hansa (2) 1971 (4) SA 69 (D)** The following four fundamental conditions set out the prerequisites for privilege:

1. The communications must originate in a confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

(b) **Other police methods**—Methods used by the police to detect crimes can be kept secret.

The Constitutional Court in **Shabalala and Others v AttorneyGeneral, Transvaal and Another 1995 (12) BCLR 1593 (CC), 1996 (1) SA 725 (CC) pars [5] and [6]** of the order regarding the defence's right of access to the prosecutor's docket, specifically indicated that the methods of investigation employed by the police would be regarded as protected information.

Note for practice:

National Director of Public Prosecutions v King (86/09) [2010] ZASCA 8*: "*litigation privilege no longer applies to documents in the police docket that are incriminating, exculpatory or prima facie likely to be helpful to the defence. This means that an accused is entitled to the content in the docket 'relevant' for the exercise or protection of that right. The entitlement is not restricted to statements of witnesses or exhibits but extends to all documents that might be 'important for an accused to properly 'adduce and challenge evidence' to ensure a fair trial'. The blanket privilege has not been replaced by a blanket right to every bit of information in the hands of the prosecution. Litigation privilege does still exist, also in criminal cases, albeit in an attenuated form as a result of these limitations. Litigation privilege is in essence concerned with what is sometimes called work product and consists of documents that are by their very nature irrelevant because they do not comprise evidence or information relevant to the prosecution or defence.

(c) State privilege – this category refers to the correspondence between State entities and between the State and international entities.

203 Witness excused from answering incriminating question

No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge.

This provision is aimed at encouraging witnesses to promote the administration of justice by providing information and giving evidence in court.

Duty of the court to warn - the Appellate Division in **S v Lwane 1966 (2) SA 433 (A)** stated that there is a duty on a judicial officer to warn a witness against self incrimination, otherwise the incriminating statement is not admissible in a subsequent criminal trial against the witness.

This section must be read together with section 204 and 205 – circumstances in which a witness may not claim the privilege in terms of section 203.

204 Incriminating evidence by witness for prosecution

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-

(i) that he is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;

(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him-

(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) the court shall cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

(4) (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

This section provides the State with a tool to encourage the co-operation of co-perpetrators or accomplices to testify on behalf of the State.

You will often hear the term "s204 witness" in criminal proceedings. This is a witness who has specific knowledge of the details of the planning and/or commission of an offence. Usually the State will not be able to prove certain facts unless the information is provided by one of the perpetrators.

The s204 witness is not automatically exempt from prosecution. The provisions require that:

1. The State inform the court that the witness will be required to answer question which will incriminate him/her in a criminal offence
2. The State informs the court of the specific offence/s which the witness might incriminate him/herself
3. The witness must answer all relevant questions frankly and honestly despite the answers causing him/her to be implicated in the specified offence/s or any offence which is a competent verdict of the specified offence/s.
4. Only if the court is satisfied that the evidence was frankly and honestly given, the court may order that the witness is discharged from prosecution on the specified offence/s.
5. If the court is not satisfied with the evidence of the witness – the court does not discharge the witness from prosecution and the evidence presented by the witness may be admissible against him/her at a trail where he/she is prosecuted.

205 Judge, regional court magistrate or magistrate may take evidence as to alleged offence

(1) A judge of a High Court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4) and section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorized thereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public

Prosecutions or the public prosecutor authorized thereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.

(2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall mutatis mutandis apply with reference to the proceedings under subsection (1).

(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.

(4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

This section is not concerned with testimony in court, but rather with the ability to gather the necessary information during the investigation of an offence.

Section 205 attempts to assist the State gather information which can assist in the investigation of an offence and possibly the institution of prosecution in respect of that offence. Someone who has information regarding an offence but does not want to give it to the police can be forced, by the application of this section, to furnish it under oath.

It provides the State with a tool to obtain information which would otherwise be protected in terms of the Protection of Personal Information Act.

To give effect to this provision the following procedure must be followed:

1. The police / investigator must prepare an affidavit which sets out the crimes which are under investigation; the information which is required; and the person/s who is in possession of the information.
2. The prosecutor, if satisfied that the information is required for the purpose of gathering evidence to prosecute the specified crime, must issue a subpoena in the name of the person specified by the investigator.
3. The subpoena must contain the following details – name of the person required for examination; crime under investigation; information which will be requested; date and place of the examination.
4. A magistrate must authorize the issue of the subpoena.
5. The person named in the subpoena or anyone authorized by the named person (in the case of juristic persons) may provide the requested information in writing prior to the date mentioned in the subpoena.

6. If the information is provided to the satisfaction of the prosecutor, the person will not be required to present him/herself before the judge/magistrate.

This section is commonly used to secure information in regard to bank account records; cellphone records; or any information kept by service providers in the ordinary course of their business. However, the section can be used to access any relevant information.

The information gathered, is not evidence unless it is presented during the trial in the ordinary manner of presenting evidence.

206 The law in cases not provided for

The law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law.

207 Saving of special provisions in other laws

No provision of this Chapter shall be construed as modifying any provision of any other law whereby in any criminal proceedings referred to in such law a person is deemed a competent witness.

208 Conviction may follow on evidence of single witness

An accused may be convicted of any offence on the single evidence of any competent witness.

This section allows the court to convict an accused on the evidence of a single witness. This means that if the court is satisfied with the evidence of a witness, a conviction may follow even though the evidence is not corroborated by any other witness or any other evidence.

The courts have however, recognized the dangers which will be present in accepting the uncorroborated evidence of a single witness and to minimize the risk, the **Cautionary Rule** was formulated.

In **R v Mokoena 1932 OPD 79** the court said that the provision of s208 should only be applied when the single witness is clear and satisfactory in every material respect, has no interest or prejudice against the accused, did not contradict him or herself, has not made a previous inconsistent statement, had proper opportunity for observation, etc.

More recently the rule was explained in **S v Sauls and Others - 1981 (3) SA 172 (A)**:

The absence of the word "credible" in s 208 of the Criminal Procedure Act 51 of 1977, which provides that "an accused may be convicted on the single evidence of any competent witness",

is of no significance; ***the single witness must still be credible****, but there are, as Wigmore on Evidence vol III para 2034 at 262 points out, "indefinite degrees in this character we call credibility".* ***There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told****. The cautionary rule referred to in* ***R v Mokoena 1932 OPD 79 at 80*** *may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded". It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.*

Many subsequent judgements have confirmed and applied this approach – including **Rugnanan v S [2020] ZASCA 166 (unreported SCA case no 259/18, 10 December 2020):** **"***The cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism. The requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated. As mentioned above, the magistrate's judgment demonstrated that the complainant's evidence was evaluated with caution. She was found to be a straightforward witness whose version remained constant notwithstanding protracted cross-examination."*

209 Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

THIS SECTION **DOES NOT** DEAL WITH THE ADMISSIBLITY OF A CONFESSION – SEE SECTION 217

This section is not applicable to the circumstances where the accused enters a plea of guilty in terms of s112 of the CPA.

The section is relevant in the circumstances where the only evidence presented is the confession of the accused made prior to the trial.

It requires one of two things to be present **in addition to a confession** before the court can convict on the basis of that confession, namely:

1. **confirmation of the confession in a material respect**;

examples of such confirmation –

R v Blyth 1940 AD 355 Mrs Blyth sent a note reading as follows to the police: "This is a confession to the fact that I murdered my husband Lindsay Harry Blyth on 2 January 1939 by arsenical poisoning".

Thereafter, arsenic was found in the body of her deceased husband.

R v Mataung 1949 (2) SA 414 (O) a confession to stock theft and proof that stock was missing were sufficient for a conviction.

S v Mjoli and Another 1981 (3) SA 1233 (A) in which the majority held that confirmation in a material respect can also be found in the statement and answers an accused gives in terms of section 115. Confirmation can even be found in informal admissions, in other words admissions which are not noted in terms of section 115(2)(b). The inference here is that other informal admissions made outside court can also materially confirm evidence.

Or

2. **proof by means of evidence other than the confession that the offence was in fact committed**

This requirement is met but evidence which proves that the crime did in fact occur and must be presented through evidence not emanating for the accused.

Admissions made by the accused is insufficient to satisfy this requirement.

NOTE: CONFIRMATION OF THE CONFESSION – means that the contents of the confession is confirmed by other evidence.
PROOF OF THE OFFENCE BY OTHER MEANS – refers to evidence not contained in the confession such as objective facts.

210 Irrelevant evidence inadmissible

No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.

Relevance is decided in the factual complex of each particular case.

In principle the relevance of a fact is determined by the probative value it has regarding the facts in dispute; and the relevance of a fact determines the admissibility of evidence regarding that fact.

But relevant evidence can also be disallowed where the evidential value thereof is overshadowed by the danger of (a) unfair prejudice caused thereby, (b) confusion of points in issue and (c) excessive delay, waste of time or unnecessary duplication of evidence.

It is possible to classify facts which create questions of relevance/admissibility into four main groups:

(i) facts of little evidential value;
(ii) facts which are not in dispute but are similar to those in dispute;
(iii) facts which only apply to the credibility of the witness
(iv) previous consistent statements.

The question of relevance and admissibility commonly arise in the following categories:

(i) facts of little evidential value;

Evidence which seeks to establish character or motive can be seen as irrelevant however in certain circumstances it can be admissible – see **R v Matthews and Others 1960 (1) SA 752 (A)**. The accused were members of a gang who were charged with the murder of a member of a competing gang. The activities of both gangs were admitted to prove how strong the motive of the accused was to murder a member of the other gang. Evidence of the motive raised the probability that the accused had deemed it necessary to murder a member of another gang in order to terrorise the public more effectively and to establish dominance over the other gang. In order to prove the motive to establish such dominance, the leading of evidence of the actions of the other gang members who were not before the court was also relevant.

(ii) facts which are not in dispute but are similar to those in dispute;

The general rule is that evidence which prove facts which are similar to facts in issue and do not prove the issues which are in dispute, are inadmissible.
However, the Doctrine of Similar Facts makes provision for certain similar fact evidence to be admissible in certain circumstances.
Similar fact evidence is allowed when it discloses such a general system or modus operandi of the perpetrator that it can be inferred logically that the same individual was responsible for both sets of facts.
In **S v Banana 2000 (2) SACR 1 (Z)** Gubbay CJ said: “Thus the test in every case must be

not whether the events sought to be proved by the prosecution are strikingly similar to the offence charged, but whether their probative contribution is such as to outweigh the prejudice to the accused".

The court assesses prejudice to the accused with reference to inter alia whether the evidence merely shows a tendency rather than having a direct link to the offence.

Rebuttal of alibi or denial—In **R v Dhlamini 1960 (1) SA 880 (N)** the charge was that the accused had stabbed a woman to death. He alleged that at the time of the offence he was at a dance party ten miles away. However, proof was admitted that he had stabbed another woman with a knife in the vicinity of the murder ten minutes before the alleged time of offence.

(iii) facts which only apply to the credibility of a witness;

While credibility is not a side issue, facts which are used merely to test credibility are secondary matters which have nothing to do with the points in issue.

Generally, a witness's reply under cross examination on a collateral matter is final in the sense that the crossexaminer may not adduce evidence to contradict such reply.

General evidence of bad character may not be adduced in terms of section 227.

(iv) previous consistent statements

As a general rule – previous consistent statements are inadmissible. Self corroboration has no evidential value. However, there are exceptions:

1. **To rebut an allegation of recent fabrication** – the previous consistent statement will only rebut the suggestion of fabrication and does not serve as proof of the content or as corroboration of the similar version on the witness stand. **S v Winnaar 1997 (2) SACR 352 (O)**
2. **The charge in sexual cases** – the Sexual Offences and Related Matters Amendment Act, 32 of 2007 provides specifically that evidence of a previous consistent statement will be admissible in a criminal case involving a sexual offence and that the court cannot draw a negative inference in circumstances where there is no such previous consistent statement.

(The specific requirements for admissibility will not be discussed in this guide)

3. **Earlier identification of a person who is pointed out in court**— the pointing out or identification of the accused before court as the perpetrator of the offence has very little and often no evidential value because it is found that the mere

presence of the accused in the accused dock is highly suggestive that s/he is the perpetrator. Therefore, the fact that the witness identified the accused at some other place without the suggestion of his/her involvement in the offence will be admissible. It is on this basis that evidence of identification parades is admitted.

211 Evidence during criminal proceedings of previous convictions

Except where otherwise expressly provided by this Act or the Child Justice Act, 2008, or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he has been so convicted.

The provisions of this section clearly state that the evidence of previous convictions of the accused is inadmissible unless it is relevant to the elements of an offence for which the accused is currently charged.

However, if the accused tenders evidence of his/her previous convictions, the evidence will be admissible.

When is evidence of previous convictions relevant:

1. Proof of previous convictions for receiving stolen property, or for an offence involving fraud or dishonesty, is admissible in order to counter timeously an allegation that the accused did not know that the goods were stolen.
2. Proof of previous convictions for the purpose of establishing similar facts will be admissible when relevant. (Note the Doctrine of Similar Fact)
3. After conviction, the proof of previous convictions are relevant for the court to determine an appropriate sentence.
4. During Bail Application, the proof of previous convictions is necessary to assist the court to evaluate and apply the provisions of S60.

Bail Applications are not a purely criminal matter.
Previous convictions are relevant during bail applications. The previous convictions impact on the schedule of the offence and the onus or burden of proof of the parties.
The accused is compelled to disclose his/her previous convictions.
Failure to disclose the previous convictions can lead to further criminal prosecution.

212 Proof of certain facts by affidavit or certificate

(1) Whenever in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place in any particular department or subdepartment of the State or of a provincial administration or in any branch or office of such department of subdepartment or in any particular court of law or in any particular bank, or the question arises in such proceedings whether any particular functionary in any such department, subdepartment, branch of office did or did not perform any particular act or did or did not take part in any particular transaction, a document purporting to be an affidavit made by a person who in that affidavit alleges—

(a) that he is in the service of the State or a provincial administration or of the bank in question, and that he is employed in the particular department or subdepartment or the particular branch or office thereof or in the particular court or bank;

(b) that—

(i) if the act, transaction or occurrence in question had taken place in such department, subdepartment, branch or office or in such court or bank;

or

(ii) if such functionary had performed such particular act or had taken part in such particular transaction, it would in the ordinary course of events have come to his, the deponent's, knowledge and a record thereof, available to him, would have been kept; and

(c) that it has not come to his knowledge—

(i) that such act, transaction or occurrence took place; or

(ii) that such functionary performed such an act or took part in such transaction, and that there is no record thereof, shall, upon its mere production at such proceedings, be prima facie proof that the act, transaction or occurrence in question did not take place, or as the case may be, that the functionary concerned did not perform the act in question or did not take part in the transaction in question.

(2) Whenever in criminal proceedings the question arises whether any person bearing a particular name did or did not furnish any particular officer in the service of the State or of a provincial administration with any particular information or document, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is the said officer and that no person bearing the said name furnished him with such information or document, shall, upon its mere production at such proceedings, be prima facie proof that the said person did not furnish the said officer with any such information or document.

(3) Whenever in criminal proceedings the question arises whether any matter has been registered under any law or whether any fact or transaction has been recorded thereunder or whether anything connected therewith has been done thereunder, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is the person upon whom the law in question confers the power or imposes the duty to register such matter or to record such fact or transaction or to do such thing connected therewith and that he has registered the matter in question or that he has recorded the fact or transaction in question or that he has done the thing connected therewith or that he has satisfied himself that the matter in question was registered or that the fact or transaction in question was recorded or that the thing connected therewith was done, shall, upon its mere production at such proceedings, be prima facie proof that such matter was registered or, as the case may be, that such fact or transaction was recorded or that the thing connected therewith was done.

(4) (a) Whenever any fact established by any examination or process requiring any skill—

(i) in biology, chemistry, physics, astronomy, geography or geology;

(ii) in mathematics, applied mathematics or mathematical statistics or in the

analysis of statistics;

(iii) in computer science or in any discipline of engineering;

(iv) in anatomy or in human behavioural sciences;

(v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or

(vi) in ballistics, in the identification of fingerprints or bodyprints or in the examination of disputed documents,

is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the Gazette, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be prima facie proof of such fact:

Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall mutatis mutandis apply with reference to such certificate.

(b) Any person who issues a certificate under paragraph (a) and who in such certificate wilfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

(5) Whenever the question as to the existence and nature of a precious metal or any precious stone is or may become relevant to the issue in criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is an appraiser of precious metals or precious stones, that he is in the service of the State, that such precious metal or such precious stone is indeed a precious metal or a precious stone, as the case may be, that it is a precious metal or a precious stone of a particular kind and appearance and that the mass or value of such precious metal or such precious stone is as specified in that affidavit, shall, upon its mere production at such proceedings, be prima facie proof that it is a precious metal or a precious stone of a particular kind and appearance and the mass or value of such precious metal or such precious stone is as so specified.

(6) In criminal proceedings in which the finding of or action taken in connection with any particular fingerprint, bodyprint, bodily sample or crime scene sample is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State and that he or she is in the performance of his or her official duties—

(a) found such fingerprint, bodyprint, bodily sample or crime scene sample at or in the place or on or in the article or in the position or circumstances stated in the affidavit; or

(b) dealt with such fingerprint, bodyprint, bodily sample or crime scene sample in the manner stated in the affidavit, shall, upon the mere production thereof at such proceedings, be prima facie proof that such fingerprint, bodyprint, bodily sample or crime scene sample, was so found or, as the case may be, was so dealt with.

(7) In criminal proceedings in which the physical condition or the identity, in or at any hospital, nursing home, ambulance or mortuary, of any deceased person or of any dead body is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges—

(a) that he is employed at or in connection with the hospital, nursing home, ambulance or mortuary in question; and

(b) that he during the performance of his official duties observed the physical characteristics or condition of the deceased person or of the dead body in question; and

(c) that while the deceased person or the dead body in question was under his care, such deceased person or such dead body had or sustained the injuries or wounds described in the affidavit, or sustained no injuries or wounds; or

(d) that he pointed out or handed over the deceased person or the dead body in question to a specified person or that he left the deceased person or the dead body in question in the care of a specified person or that the deceased person or the dead body in question was pointed out or handed over to him or left in his care by a specified person,

shall, upon the mere production thereof at such proceedings, be prima facie proof of the matter so alleged.

(8) (a) In criminal proceedings in which the collection, receipt, custody, packing, marking, delivery or despatch of any fingerprint or bodyprint, article of clothing, specimen, bodily sample, crime scene sample, tissue (as defined in section 1 of the National Health Act), or any object of whatever nature is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges —

(i) that he or she is in the service of the State or of a provincial administration, any university in the Republic or anybody designated by the Minister under subsection (4);

(ii) that he or she in the performance of his or her official duties—

(aa) received from any person, institute, state department or body specified in the affidavit, a fingerprint or bodyprint, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he or she packed or marked in the manner described in the affidavit;

(bb) delivered or dispatched to any person, institute, state department or body specified in the affidavit, a fingerprint or bodyprint, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he or she packed or marked in the manner described in the affidavit;

(cc) during a period specified in the affidavit, had a fingerprint or bodyprint, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit in his or her custody in the manner described in the affidavit, which was packed or marked in the manner described in the affidavit, shall, upon the mere production thereof at such proceedings, be prima facie proof of the matter so alleged: Provided that the person who may make such affidavit in any case relating to any article of clothing, specimen, bodily sample, crime scene sample or tissue, may issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall mutatis mutandis apply with reference to such certificate.

(b) Any person who issues a certificate under paragraph (a) and who in such

certificate wilfully states anything which is false, shall be guilty of an offence and

liable on conviction to the punishment prescribed for the offence of perjury.

(9) In criminal proceedings in which it is relevant to prove—

(a) the details of any consignment of goods delivered to the Railways Administration for conveyance to a specified consignee, a document purporting to be an affidavit made by a person who in that affidavit alleges—

(i) that he consigned the goods set out in the affidavit to a consignee specified in the affidavit;

(ii) that, on a date specified in the affidavit, he delivered such goods or caused such goods to be delivered to the Railways Administration for conveyance to such consignee, and that the consignment note referred to in such affidavit relates to such goods, shall, upon the mere production thereof at such proceedings, be prima facie proof of the matter so alleged; or

(b) that the goods referred to in paragraph (a) were received by the Railways Administration for conveyance to a specified consignee or that such goods were handled or transshipped en route by the Railways Administration, a document purporting to be an affidavit made by a person who in that affidavit alleges—

(i) that he at all relevant times was in the service of the Railways Administration in a stated capacity;

(ii) that he in the performance of his official duties received or, as the case may be, handled or transshipped the goods referred to in the consignment note referred to in paragraph (a), shall, upon the mere production thereof at such proceedings, be prima facie proof of the matter so alleged.

(10) (a) The Minister may in respect of any measuring instrument as defined in section 1 of the Trade Metrology Act, 1973 (Act 77 of 1973), by notice in the Gazette prescribe the conditions and requirements which shall be complied with before any reading by such measuring instrument may be accepted in criminal proceedings as proof of the fact which it purports to prove, and if the Minister has so prescribed such conditions and requirements and upon proof that such conditions and requirements have been complied with in respect of any

particular measuring instrument, the measuring instrument in question shall, for the purposes of proving the fact which it purports to prove, be accepted at criminal proceedings as proving the fact recorded by it, unless the contrary is proved.

(b) An affidavit in which the deponent declares that the conditions and requirements referred to in paragraph (a) have been complied with in respect of the measuring instrument in question shall, upon the mere production thereof at the criminal proceedings in question, be prima facie proof that such conditions and requirements have been complied with.

(11) (a) The Minister may with reference to any syringe intended for the drawing of blood or any receptacle intended for the storing of blood, by notice in the Gazette prescribe the conditions and requirements relating to the cleanliness and sealing or manner of sealing thereof which shall be complied with before any such syringe or receptacle may be used in connection with the analysing of the blood of any person for the purposes of criminal proceedings, and if—

(i) any such syringe or receptacle is immediately before being used for the said purpose, in a sealed condition, or contained in a holder which is sealed with a seal or in a manner prescribed by the Minister; and

(ii) any such syringe, receptacle or holder bears an endorsement that the conditions and requirements prescribed by the Minister have been complied with in respect of such syringe or receptacle, proof at criminal proceedings that the seal, as thus prescribed, of such syringe or receptacle was immediately before the use of such syringe or receptacle for the said purpose intact, shall be deemed to constitute prima facie proof that the syringe or the receptacle in question was then free from any substance or contamination which could materially affect the result of the analysis in question.

(b) An affidavit in which the deponent declares that he had satisfied himself before using the syringe or receptacle in question—

(i) that the syringe or receptacle was sealed as provided in paragraph (a)

(i) and that the seal was intact immediately before the syringe or receptacle was used for the said purpose; and

(ii) that the syringe, receptacle or, as the case may be, the holder contained the endorsement referred to in paragraph (a) (ii),

shall, upon the mere production thereof at the proceedings in question, be prima facie proof that the syringe or receptacle was so sealed, that the seal was so intact and that the syringe, receptacle or holder, as the case may be, was so endorsed.

(c) Any person who for the purposes of this subsection makes or causes to be made a false endorsement on any syringe, receptacle or holder, knowing it to be false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

(12) The court before which an affidavit or certificate is under any of the preceding provisions of this section produced as prima facie proof of the relevant contents thereof, may in its discretion cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and such interrogatories and any reply thereto purporting to be a reply from such person, shall likewise be admissible in evidence at such proceedings.

(13) No provision of this section shall affect any other law under which any certificate or other document is admissible in evidence, and the provisions of this section shall be deemed to be additional to and not in substitution of any such law.

This section is intended to allow the State to prove certain types of evidence by way of an affidavit. The subsections create certain circumstances in which such affidavits may be adduced as evidence. The subsections also provide specific requirements for the affidavits to become admissible.

The affidavits which comply with the requirement of the specific subsection will become prima facie proof of the facts contained in the affidavit. This means that unless evidence is adduced to rebut the contents of the affidavit – the contents will be accepted by the court.

An affidavit that meets the requirements of s 212 of the CPA will constitute prima facie proof of the matters stated in it.

Section 212 may be utilised by both the prosecution and the defence.

State departments, provincial administrations, courts of law, and banks

Section 212(1) of the CPA provides that the fact that an act, transaction or occurrence took place in any state department, provincial administration, court of law or bank, or that a functionary in any one of these departments performed or did not perform a particular act or transaction, may be proved by affidavit.

The affidavit will constitute prima facie proof provided the following requirements are met:

(a) the maker of the affidavit is in the service of the State and employed by one of the institutions referred to in the subsection;

(b) the act, transaction or occurrence would in the ordinary course of event have come to the deponent's knowledge and a record of it would have been kept, alternatively

(c) it has not come to the deponent's knowledge that the act, transaction or occurrence took place and there is no record of such act, etc.

Denial of information furnished

If the issue in criminal proceedings is whether a particular person furnished a specified officer of the state or provincial administration with certain information, in terms of **s 212(2**) of the CPA, a denial by the officer in question in the form of an affidavit will constitute prima facie proof that the person did not furnish the officer with any such information or document.

Official acts

In terms of **s 212(3)** of the CPA where a person is authorised by law to register or record something, proof of the registration, recording and anything connected with the registration or recording may be provided by an affidavit deposed to by the person authorised in law to perform the act of registering or recording.

Facts requiring specialised skills

Section 212(4) of the CPA, although more detailed, contains similar provisions to those contained in s 22(1) of the CPEA.

Section 212(4) provides for evidence of fact by an examination or process requiring the following skills:

(i) in biology, chemistry, physics, astronomy, geography or geology;

(ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;

(iii) in computer science or in any discipline of engineering;

(iv) in anatomy or in human behavioural sciences;

(v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or

(vi) in ballistics, in the identification of finger prints or palm-prints or in the examination of disputed documents

The document provided by the witness must:

i. Be an affidavit
ii. Allege that the deponent is in the service of the State or of a provincial administration or is in the service of or is attached to the South African Institute for Medical Research or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the Gazette, and
iii. Allege that he or she has established such fact by means of such an examination or process

The person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, may issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall mutatis mutandis apply with reference to such certificate.

Any person who issues a certificate under paragraph (a) and who in such certificate w willfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury."

Prosecutors frequently rely on this section to submit into evidence Forensic Reports, such as DNA Analysis; Chemical analysis of narcotic substances; ballistic analysis; post mortem reports; etc.

The court requires strict compliance with the provisions of the section. See **S v Kwezi 2007 (2) SAC R 612 (E)**: the court held that medical evidence had not been properly admitted in terms of s 212(4) where the affidavit did not specify that the deponent was in the service of the state. The court found that the presiding officer, in light of the unrepresented accused's objections, had erred in taking judicial notice of the fact that district surgeons are in the service of the state.

Dlamini 2004 (1) SACR 179 (NC): the deponent stated that she had conducted an examination requiring skills in genetics. Genetics is not one of the fields mentioned in subsections (i) to (iv) of section 212(4)(a) nor was there any information to justify an inference that it forms part of one of the sciences that are mentioned in those provisions. The conviction was set aside on review.

Precious metal and stones

The existence and nature of a precious metal or stone may, in terms of s 212(5) of the CPA be proved by affidavit deposed to **by an appraiser in the service of the State**.

Fingerprints, body-prints, bodily samples and crime scene samples

Prosecutors will rely on this section to tender evidence of the police official who attended a crime scene and collected evidence. (usually an official employed at the Local Criminal Records Center – LCRC)

The police official will compile an affidavit in terms of **s212(6)** which will indicate:

i. He/she is in the service of the state
ii. He/she collected specific exhibits at the specific scene
iii. The exhibits were marked with certain identifying tags or numbers
iv. The place and conditions under which the exhibits be stored.

Dead bodies

Prosecutors rely on **section 212(7)** to tender evidence of the "body chain" – the movement of the deceased body after a person is declared dead until the post mortem examination is conducted by the pathologist.

Requirements:

i. An affidavit which states that –
ii. He/she is employed or in connection with the hospital, nursing home, ambulance or mortuary;
iii. He/she has observed the conditions and characteristics of the body during the performance of her official duties;
iv. any injuries received whilst the body was in the care of the deponent must be recorded and
v. He/she must state from whom she received the body and in whose care she left the body.

Chain of custody

Section 212(8) makes provision for receipt, custody, packing, marking, delivery or dispatch of **any object.**

Prosecutors will rely on this section to tender the evidence concerning the "chain of custody" of an exhibit such as a firearm/knife; drugs; money; bullets or cartridges; etc.

The affidavit of the witness will usually refer to s212(6) – collection of the exhibit and s212(8) – the movement of the exhibit.

Requirements:

i. an affidavit

ii. deposed to by a person in the service of the State or the South African Institute of Medical Research, any university in the Republic or any body designated by the Minister under sub-s (4).

NOTE FOR PRACTICE:
Prosecutors must be careful when simply handing in medical reports. In certain circumstances, even though the affidavit / certificate may meet the requirements of the section, it may be necessary to present the oral evidence of the doctor.
Note the comments of the court in **S v MM 2012 (2) SACR 18 (SCA) at [15],** *"As appears to be an increasing feature of cases such as these the doctor's report was simply handed in by consent and the doctor was not called to give evidence. That practice is generally speaking to be deprecated. It means that there is no opportunity for the doctor to explain the frequently subtle complexities and nuances of the report; to clarify points of uncertainty and to amplify upon its implications and the reasons for any opinions expressed in the report. That may make the difference between a conviction and an acquittal or perhaps a conviction on a lesser charge. Depending on the areas where there is a lack of clarity, the lack of clarification may either benefit or prejudice an accused. Neither result is desirable. Magistrates and judges who are confronted with these reports without explanation do not have the requisite medical knowledge to flesh out their full implications. Unless therefore there can be no confusion, for example in a case where the fact of rape is admitted and the only issue is one of identification of the perpetrator, it will generally be desirable for the doctor to give evidence in support of his or her report. In this case it was undoubtedly necessary and the fact that the doctor was not called has rendered the consideration of this appeal far more complicated than it should have been***."**

Measuring instruments

Section 212(10) of the CPA makes provision for the Minister to give notice of the conditions and requirements that need to be complied with in order for measurements recorded by specified measuring instruments to constitute rebuttable proof of facts recorded by such instruments.

A question that arose in **S v Eke 2016 (1) SACR 135 (ECG)** was whether the state could prove the accuracy of a gas chromatograph, used to measure the blood alcohol levels of the accused, by way of a certificate issued in terms of s 212(4) or whether an affidavit in terms of s 212(10) was required. On this issue the court considered two conflicting decisions: **S v Ross 2013 (1) SACR 77 (WCC)** and **S v Van der Sandt 1997 (2) SACR 116 (W)**, discussed in the notes to s 210(4). It preferred the latter decision which was to the effect that a certificate could be used for this purpose.

The court concluded that the state had failed to submit a s 212(10) affidavit because it erroneously and inexplicably believed it did not have to. **The court's insistence on strict compliance with procedures was underpinned by an appreciation of the fact that s 212 significantly lightened "the burden of the state in proving facts relating to forensic questions".**

Discretion to call for oral evidence

Section 212(12) provides a discretion on presiding officers to subpoena deponents to give oral evidence or to require them to submit to interrogatories.

The scope of s 212

It is made explicit in s 212(13) of the CPA that s 212 should not be interpreted as affecting the admissibility of otherwise admissible evidence and that it must "be deemed to be additional and not in substitution" to any other law.

NOTE FOR PRACTICE:
If the affidavit/certificate complies with the above-mentioned requirements, and if the document (affidavit/certificate) is submitted to court, it **shall constitute prima facie proof** of the fact(s) thus established.
The word **shall** as contained in the section, indicate that the **court is compelled to accept** the document and that the fact(s) contained in that document becomes prima facie proof. The court has no choice or discretion regarding this type of evidence and no further requirements / qualifications is legally necessary.
Prima facie proof means that credible proof to the contrary by means of rebutting evidence is still possible. In the absence of such proof to the contrary, the prima facie proof will become conclusive proof.
Veldhuizen 1982 (3) SA 413 (A): *"The word `prima facie evidence' cannot be brushed aside or minimized. As used in this section they mean that the judicial officer will accept the evidence as prima facie proof of the issue and, in absence of other credible evidence, that prima facie proof will become conclusive proof."*
Trust Bank of Africa Ltd v Senekal 1977 (2) SA 587 (T): *"Merely to cast suspicion on the correctness of the fact or facts prima facie established and mere theories or hypothetical suggestions will not avail the defendant; the defendant's answer must be based on some substantial foundation of fact."*

Abel 1990 (2) SACR 367 (C): *"In terms of these sections the certificate is prima facie proof of its contents, provided, of course, it complies with the requirements of the sections. It follows that in the absence of other credible evidence, the prima facie proof will become conclusive proof".*
Britz 1994 (2) SACR 687 (W): *"The fact that an accused places the correctness of the certificate in issue, as did the appellant in the **Farenden** case and the appellant in the present case, is not sufficient to affect the prima facie value of the certificate. The appellant has to adduce evidence to counter the prima facie value of the certificate. That follows from decisions such as **R v Chizah 1960 (1) SA 435 (A)**...*
A document drawn up in terms of the relevant sub – section of 212 becomes prima facie proof upon its submission to court. **The admissibility of the statement is not dependent on consent from the magistrate and it is admissible evidential material irrespective of whether the accused or his legal representative admits or objects thereto provided it complies with the requirements of the section**!

NOTE FOR PRACTICE:
The mere fact that the defence indicate that they do not accept the contents of the affidavit/certificate, does not affect the value of the prima facie proof at all. They must submit substantial admissible evidential material to rebut the contents of the document. If not, the prima facie proof will become conclusive.
It often happens that legal representatives request the court to instruct the prosecutor to present viva voce evidence in lieu of the 212(4) statement. Their request is based on the argument that the **accused has the right to subject witnesses to cross examination** and if the State does not call the deponent it infringes upon the rights of the accused-so is alleged.

In **Britz** the court held in this regard as follows: *" I should point out that before the coming into operation of the present Criminal Procedure Act of 1977, affidavits of the type under discussion would only have been admissible if there was no objection. That was under s 229[sic] of the previous Act. The present Act does not render such absence of objection as a condition for the handing up of an affidavit such as that under discussion."*

See also **Tshabalala 1999 (1) SACR 412 (C)**.

Section 35(3)(i) of the Constitution of South Africa Act 106 of 1996 - does not give an accused a right to cross examination. **Challenging evidence is not synonymous to cross examination.**
See in this regard **Ndhlovu 2002 (2) SACR 325 (SCA)** where the court (with reference to the submission of hearsay evidence) makes the following ruling in paragraph [24]:
" It has correctly been observed that the admission of hearsay evidence 'by definition denies an accused the right to cross-examine', since the declarant is not in court and cannot be cross-examined. I cannot accept, however, that 'use of hearsay evidence by the State violates the accused's right to challenge evidence by cross-examination', if it is meant that the inability to cross-examine the source of a statement in itself violates the right to 'challenge' evidence. ***The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination****. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant."*
(Compare Section 166(1) of the CPA – ACCUSED IS ENTITLED TO CROSS-EXAMINE A WITNESS **CALLED BY THE STATE)**

212A Proof of certain facts by affidavit from person in foreign country

(1) Whenever in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place—

(a) in any particular department or subdepartment of a state or territory outside the Republic;

(b) in any particular department or subdepartment of an administration in such state or territory which is similar to a provincial administration in the Republic;

(c) in any branch or office of a department or subdepartment contemplated in paragraph (a) or (b);

(d) in any particular court of law in such state or territory; or

(e) in any particular institution in such state or territory which is similar to a bank in the Republic, or whenever the question arises in such proceedings whether any particular functionary in any such department, subdepartment, branch, office, court or institution did or did not perform any particular act or did or did not take part in any particular transaction, the provisions of subsections (1), (2) a n d (3) of section 212 shall mutatis mutandis apply: Provided that for the purposes of this section a document purporting to be an affidavit shall have no effect unless—

(a) it is obtained in terms of an order of a competent court or on the authority of a competent government institution of the state or territory concerned, as the case may be;

(b) it is authenticated in the manner prescribed in the rules of court for the authentication of documents executed outside the Republic; or

(c) it is authenticated by a person, and in the manner, contemplated in section 8 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963).

(2) The admissibility and evidentiary value of an affidavit contemplated in subsection (1) shall not be affected by the fact that the form of the oath, confirmation or attestation thereof differs from the form of the oath, confirmation or attestation prescribed in the Republic.

(3) A court before which an affidavit contemplated in subsection (1) is placed, may, in order to clarify obscurities in the said affidavit, at the request of a party to the proceedings order that a supplementary affidavit be submitted or that oral evidence be heard: Provided that oral evidence shall only be heard if the court is of the opinion that it is in the interests of the administration of justice and that a party to the proceedings would be materially prejudiced should oral evidence not be heard.

This section, similar to s212 provides a mechanism for the admissibility of evidence by way of affidavit, which seeks to prove that an act, transaction or occurrence did or did not take place in a:

i. department,
ii. subdepartment,
iii. provincial administration (similar to that of South Africa),
iv. court of law or
v. bank.

The difference here is that the act, transaction or occurrence must have or have not **took place in a State or territory outside the Republic of South Africa.**

The requirements for the admissibility of the affidavit as set out in s212(1), (2) & (3) will apply, with the necessary changes.

212B Proof of undisputed facts

(1) If an accused has appointed a legal adviser and, at any stage during the proceedings, it appears to a public prosecutor that a particular fact or facts which must be proved in a charge against an accused is or are not in issue or will not be placed in issue in criminal proceedings against the accused, he or she may, notwithstanding section 220, forward or hand a notice to the accused or his or her legal adviser setting out that fact or those facts and stating that such fact or facts shall be deemed to have been proved at the proceedings unless notice is given that any such fact will be placed in issue.

(2) The first mentioned notice contemplated in subsection (1) shall be sent by certified mail or handed to the accused or his or her legal adviser personally at least 14 days before the commencement of the criminal proceedings or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon by the accused or his or her legal adviser and the prosecutor.

(3) If any fact mentioned in such notice is intended to be placed in issue at the proceedings, the accused or his or her legal representative shall at least five days before the commencement or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon with the prosecutor deliver a notice in writing to that effect to the registrar or the clerk of the court, as the case may be, or orally notify the registrar or the clerk of the court to that effect in which case the registrar or the clerk of the court shall record such notice.

(4) If, after receipt of the first mentioned notice contemplated in subsection (1), any fact mentioned in that notice is not placed in issue as contemplated in subsection (3), the court may deem such fact or facts, subject to the provisions of subsections (5) and (6), to have been sufficiently proved at the proceedings concerned.

(5) If a notice was forwarded or handed over by a prosecutor as contemplated in subsection (1), the prosecutor shall notify the court at the commencement of the proceedings of such fact and of the reaction thereto, if any, and the court shall thereupon institute an investigation into such of the facts which are not disputed and enquire from the accused whether he or she confirms the information given by the prosecutor and whether he or she understands his or her rights and the implications of the procedure and where the legal adviser of the accused replies to any question by the court under this section, the accused shall be required by the court to declare whether he or she confirms such reply or not.

(6) The court may on its own initiative or at the request of the accused order oral evidence to be adduced regarding any fact contemplated in subsection (4).

The section provides the prosecution with a tool to formally eliminate issues which do not appear to be in issue.

1. The prosecution delivers in writing a notice of facts which in the circumstances of the particular case, do not appear to be in issue.
2. The notice must be delivered 14 days prior to the hearing of the matter (unless other period agreed by the parties)
3. The defense must file a notice with the clerk of court or deliver to the prosecutor a notice which specifies which facts will be placed in dispute.
4. If the defense does not file the notice which describes the disputed facts, the court will accept that the facts are undisputed.

Note: this section only applies to matters where the accused is legally represented.

213 Proof of written statement by consent

(1) In criminal proceedings a written statement by any person, other than an accused at such proceedings, shall, subject to the provisions of subsection (2), be admissible as evidence to the same extent as oral evidence to the same effect by such person.

(2) (a) The statement shall purport to be signed by the person who made it, and shall contain a declaration by such person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or which he did not believe to be true.

(b) If the person who makes the statement cannot read it, it shall be read to him before he signs it, and an endorsement shall be made thereon by the person who so read the statement to the effect that it was so read.

(c) A copy of the statement, together with a copy of any document referred to in the statement as an exhibit, or with such information as may be necessary in order to enable the party on whom it is served to inspect such document or a copy thereof, shall, before the date on which the document is to be tendered in evidence, be served on each of the other parties to the proceedings, and any such party may, at least two days before the commencement of the proceedings, object to the statement being tendered in evidence under this section.

(d) If a party objects under paragraph (c) that the statement in question be tendered in evidence, the statement shall not, but subject to the provisions of paragraph (e), be admissible as evidence under this section.

(e) If a party does not object under paragraph (c) or if the parties agree before or during the proceedings in question that the statement may be so tendered, the statement may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(f) When the documents referred to in paragraph (c) are served on an accused, the documents shall be accompanied by a written notification in which the accused is informed that the statement in question will be tendered in evidence at his trial in lieu of the State calling as a witness the person who made the statement but that such statement shall not without the consent of the accused be so tendered in evidence if he notifies the prosecutor concerned, at least two days before the commencement of the proceedings, that he objects to the statement so being tendered in evidence.

(3) The parties to criminal proceedings may, before or during such proceedings, agree that any written statement referred to in subsections (2) (a) and (b) which has not been served in terms of subsection (2) (c) be tendered in evidence at such proceedings, whereupon such statement may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(4) Notwithstanding that a written statement made by any person may be admissible as evidence under this section—

(a) a party by whom or on whose behalf a copy of the statement was served, may call such person to give oral evidence;

(b) the court may, of its own motion, and shall, upon the application of any party to the proceedings in question, cause such person to be subpoenaed to give oral evidence before the court or the court may, where the person concerned is resident outside the Republic, issue a commission in respect of such person in terms of section 171.

(5) Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this section, shall be treated as if it had been produced as an exhibit and identified in court by the person who made the statement.

(6) Any person who makes a statement which is admitted as evidence under this section and who in such statement wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury, shall be deemed to have committed the offence of perjury and shall, upon conviction, be liable to the punishment prescribed for the offence of perjury.

This section provides for evidence to be tendered to the court, without oral testimony.

It is also notable that the section referred to a “written statement” – which means that is does not have to be an affidavit.

The requirements:

i. The document must be signed by the person who made it and must declare that the facts are true to the best of his/her knowledge.
ii. Must further declare that he/she is aware that the statement will be tendered as evidence and that making a false statement, knowing it to be false may cause him/her to be liable to criminal prosecution.
iii. A copy of the written statement must be provided to the defense prior to the date on which the document is to be tendered as evidence.
iv. No time period is specified however, a reasonable period is required.
v. The defense must, at least two (2) days prior date of evidence being tendered, object to the statement being tendered as evidence.
vi. An agreement with regard to the admissibility of the document must be reached before the commencement of the proceedings.
vii. If no objection is submitted or if the parties agree to the admissibility – the document will be on mere production be admitted as evidence.
viii. The party tendering the document / statement can still call the witness to present oral evidence. In that circumstance the stamen can no longer be used in terms of s213.

214 Evidence recorded at preparatory examination admissible at trial in certain circumstances

The evidence of any witness recorded at a preparatory examination-

(a) shall be admissible in evidence on the trial of the accused following upon such preparatory examination, if it is proved to the satisfaction of the court-

(i) that the witness is dead;

(ii) that the witness is incapable of giving evidence;

(iii) that the witness is too ill to attend the trial; or

(iv) that the witness is being kept away from the trial by the means and contrivance of the accused; and

(v) that the evidence tendered is the evidence recorded before the magistrate or, as the case may be, the regional magistrate, and if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, as the case may be, the State had a full opportunity of cross-examining such witness;

(b) may, if such witness cannot, after a diligent search, be found for purposes of the trial of the accused following upon such preparatory examination, or cannot be compelled to attend such trial, in the discretion of the court, but subject to the provisions of subparagraph (v) of paragraph (a), be read as evidence at such trial, if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, as the case may be, the State had a full opportunity of cross-examining such witness.

Prepatory examination was a common procedure used to establish whether there was sufficient evidence available before a matter was set down for trial in the High Court.

Since the introduction of the Regional Courts, the procedure is very rarely used.

The mechanisms provided in this section are very similar to those available in S222 of this act and s3 of the Law of Evidence Amendment Act 45 of 1988 – ***see discussion under s216 & s222***

<u>215 Evidence recorded at former trial admissible at later trial in certain circumstances</u>

The evidence of a witness given at a former trial may, in the circumstances referred to in section 214, mutatis mutandis be admitted in evidence at any later trial of the same person upon the same charge.

It must immediately be noted that the provisions of the section do not make the record of a former trial automatically admissible. The proviso "in certain circumstances" ensures that there must be satisfactory reasons provided for the previous record to be admitted in the latter proceedings.

Further, the requirements for admissibility set out in s214 must be met before the evidence is deemed admissible.

The following requirements must be satisfied:

i. The court must be satisfied that the unavailable witness is dead, incapable of giving evidence, too ill to attend the trial or is being kept away from the trial by the accused.
ii. The evidence must have been recorded in either a magistrates' or regional court and the accused or state (as the case may be) must have had the opportunity of cross-examining the witness.
iii. The court has a discretion in terms of s 214(b) to admit evidence from preparatory examination (or former trial) if the witness cannot be found after a diligent search or cannot be compelled to attend the trial, provided once again that the evidence has been recorded in the magistrates' or regional court and the accused or state had an opportunity to cross-examine the witness.

The original record of judicial proceedings may be proved in terms of s 235 by a certified copy which "**shall be prima facie proof that any matter purporting to be recorded thereon was correctly recorded**".

216 .....

[S. 216 repealed by s. 9 of Act 45 of 1988 (wef 3 October 1988).]

Section 216, which specifically dealt with hearsay evidence, was repealed by section 9 of the Law of Evidence Amendment Act 45 of 1988. The former section in principle applied the admissibility of hearsay evidence in accordance with the English common law as at 30 May 1961.

***Section 3 of Act 45 of 1988** reads as follows:*

"3 Hearsay evidence.—(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to—

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings:

Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section—

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution".

Definition of hearsay

For the purposes of s 3, ***'hearsay evidence' is defined as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'***.

Admissibility

Section 3(1) provides that, subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence unless the requirements set out in para (a), (b) or (c) are satisfied.

Section 3(2) provides that '[t]he provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence'.

The purpose of this provision is to preserve intact the other exclusionary rules such as those relating to opinion, character and relevance.

Note:

It is important to distinguish between admissibility and weight. In **S v Rautenbach (unreported, GJ case no SS 40/2006, 24 December 2020) at [25]–[26]**, Spilg J observed,

'Weighing evidence does not determine admissibility whereas determining the reliability of a hearsay statement acts as one of the gatekeepers to its reception into the pool of evidence which a court is obliged to consider. . .. To conflate the two would result in the exclusion of hearsay statements which have probative value that may, for instance, explain conduct or put events that unfold into perspective'.

ADMISSIBLE BY CONSENT - Section 3(1)(a) of Act 45 of 1988

Hearsay evidence will be admissible if 'each party against whom the evidence is to be **adduced agrees to the admission t**hereof as evidence at such proceedings'.

Consent can be expressly given or inferred:

i. The failure to object to the admission of hearsay evidence may be regarded as consent.
ii. Consent will also be inferred where a party deliberately elicits hearsay evidence from her opponent in cross-examination.
iii. However, the courts will be slow to infer informed consent where a party is unrepresented

In **S v Flobela (unreported, WCC case no 17258, 12 March 2018)** where the court made it clear that the accused must make a fully informed decision before it can be accepted that he/she agreed to have the hearsay evidence presented into evidence. The court said especially the unrepresented accused must be informed of the nature and the implications of such evidence being admitted. In fact, said Henney J, the court should go even further. It should make an assessment of the facts the accused places in issue; consider the hearsay evidence the State wishes to present against the accused; and consider further whether that evidence would serve to prove those facts which the accused places in issue and which the State bears the onus of proving. The court should then 'explain to the accused . . . the nature of the hearsay evidence, the purpose for which the prosecutor wants to tender such evidence and the prejudice and consequences that might flow from the admission of such evidence'. It must then 'inform the accused that there is no obligation upon him or her to agree or to admit such evidence, because the onus rests on the State to prove such evidence beyond reasonable doubt'.

Care must be exercised when relying on s 3(1)(a) to receive hearsay against an accused in sentence proceedings. In **S v N & another (unreported, WCC case no SHE 59/14, 9 January 2015)** the trial court, it was held, had wrongly applied that section. The magistrate had not asked the accused's legal representative whether the accused were willing to admit the adverse versions of the facts contained in the probation officer's reports, and there was nothing in what the defence attorney said in his address in mitigation to infer that there was agreement that the hearsay evidence adverse to the accused and inconsistent with their plea

statements might be admitted against them. There should, the court warned, be an 'unequivocal admission of the hearsay facts'.

The Provisional Admission of Hearsay - Section 3(1)(b)

Hearsay evidence may be provisionally admitted where the court is informed that the person upon whose credibility the probative value of the evidence depends is going to testify at some future time in the proceedings.

This section is usually applicable in the circumstance where, a witness while giving evidence will refer to information received by another person – the prosecutor will then inform the court that the person from whom the information was received is a witness which the State intends to call and the State will request in terms of s3(1)(b) that the hearsay evidence be provisionally allowed.

Note:

Section 3(3) provides that if the relevant person does not testify, the hearsay evidence will not be taken into account unless it is admitted by consent in terms of s 3(1)(a) of the Act or is admitted by the court in the interests of justice as provided for in s 3(1)(c) of the Act.

In **S v Ndhlovu and Others 2002 (2) SACR 325 (SCA)** the Supreme Court of Appeal rejected the literal interpretation adopted by Goldstein J and referred to s 3(3) to ascertain the purpose of s 3(1)(b). Section 3(3) permits the provisional admission of hearsay "if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings". Cameron JA identified the rationale of the subsection as follows: *"Before the Act, a witness w hose narrative was conjoined with that of a later witness could not refer at all to the latter's hearsay statements. This could render the delivery of evidence fragmentary and even incoherent. Any allusion to hearsay would be met with justified objection, and the court would have to wait for the later witness to be called for coherence to emerge. In these circumstances the provision permits the first witness to testify fully and without objection, provided the court is informed that the declarant will in due course be called. If the declarant is not called the hearsay is 'left out of account' unless the opposing party agrees to its admission or the interests of justice require its admission under s 3(1)(c)."*

Discretion of the court – Section 3(1)(c)

Section 3(1)(c), which confers a judicial discretion on presiding officers to admit hearsay evidence if the admission of the evidence would be in the interests of justice.

In exercising this discretion, the court must consider **six specified factors** as well as **"any other factor** which should in the opinion of the court be taken into account".

1. The nature of the proceedings: s 3(1)(c)(i)

The nature of the proceedings considers whether it is a criminal or civil matter; whether it is an application or a trial. Criminal proceedings usually have severe consequences for the accused and the State – the right to a fair trial is paramount. This factor must be considered with those consequences in mind.

It has been suggested that hearsay will be more readily admitted in application proceedings than at trial. Since bail proceedings are regarded as neither civil nor criminal proceedings, the rules of evidence are not strictly adhered to and consequently hearsay evidence is generally admissible at bail proceedings although the hearsay nature of the evidence will affect its weight.

It is important to note that the mere fact that the court is dealing with a criminal matter, will not render the evidence inadmissible – this is only one of the factors which the court must consider.

S v Shaik & others 2007 (1) SA 240 (SCA), the court stated*: 'sight should not be lost of the true test for the evidence to be admitted, and that is whether the interest of justice demands its reception'.*

S v Van Willing & another [2015] ZASCA 52 (unreported, SCA case no 109/2014, 27 March 2015)*, where the court followed what had been said in Shaik and admitted hearsay under s 3(1)(c) 'notwithstanding the fact that its admission was sought in criminal proceedings and such evidence was of importance to the State's case' because of its high probative value, reliability and the fact that the risk of causing prejudice to the appellants by its admission was slim.*

Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security 2012 (2) SA 137 (SCA)*: 'The section requires that the court should have regard to the collective and interrelated effect of all the considerations in paras (i)–(iv) of the section and any other factor that should, in the opinion of the court, be taken into account. The section thus introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require.'*

Note:

Section 2(2) of the Prevention of Organised Crime Act 121 of 1998 provides as follows with regard to prosecutions for racketeering offences as identified in s 2(1) of the Act: "The court may hear evidence, including evidence with regard to hearsay . . . notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair."

2. The nature of the evidence: s 3(1)(c)(ii)

This factor seems to investigate relevance and reliability. The court may also consider probative value.

It must be borne in mind that the factors listed in s 3(1)(c) cannot be viewed in isolation and will be weighed collectively in determining whether it is in the interests of justice to admit the evidence.

Re sincerity: whether the evidence is assertive or non-assertive; whether it was against the interest of the absent actor or declarant; whether it was voluntarily or spontaneously made;

whether there is any indication that someone else may have prompted the declarant to speak or communicate.

In **S v Makhaye 2007 (1) SACR 369 (N)**: the contested evidence was a statement made by the deceased shortly after she had been stabbed. The manager of a hotel testified that he had been called by a cleaner who had told him that a woman had been stabbed and, on investigating, found the woman who told him that she had problems with her boyfriend who had already left the room. This evidence was received, since there was nothing to suggest that the deceased had any motive to lie about the identity of her attacker or that she could have been mistaken as to his identity.

In **S v Van Willing & another [2015] ZASCA 52 (unreported, SCA case no 109/2014, 27 March 2015)** the reliability of a statement by the deceased in which he identified his two attackers was enhanced by reliable corroborating identification evidence by an eyewitness who saw the two appellants outside the house in question talking to the deceased immediately before the shots rang out.

In **S v Sigcawu 2022 (1) SACR 77 (WCC)** the court admitted the dying declaration of the victim of a shooting in a murder case. The evidence was received in terms of s 3(1)(a), but the court went on to consider too the applicability of s 3(1)(c) and concluded that the evidence would probably have been admitted under that section as it was in the interests of justice to do so. The victim was obviously 'a witness to his own killing' and there was 'no cogent reason why the deceased would specifically implicate the appellant as his assailant and state this to three people'. The three witnesses were, moreover, reliable and wholly independent of each other; the utterances of the deceased were 'made spontaneously and unsolicited'; and the evidence was strengthened by strong surrounding evidence.

In **Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security 2012 (2) SA 137 (SCA)** it was argued that the statements of the absent declarants had no probative value as they were joint wrongdoers in an alleged casino robbery with high motivation to blame others and deflect blame from themselves. It was held that this was valid up to a point but did not render the statements devoid of any probative value. While the declarants denied their own complicity, why would they falsely implicate three policemen? Further, in respect of two who were admitted robbers, how could they minimise their role in the robbery by alleging that the police had taken away the spoils? There were, moreover, significant indicia that supported the reliability of their statements: there was no real benefit for the declarants in antagonising the three policemen implicated in their statements, all of which were 'known not to be averse to violence'; the three policemen were shown to have lived 'way beyond their means', thus suggesting they enriched themselves from the proceeds of the huge robbery of the casino that formed the focus of proceedings; the policemen had been prepared to threaten the investigating officer, who was a very senior police officer, with harm and even death if he continued with his investigation; and the statements were found (in the respondent's own department) to be of enough weight and force to form the basis of an application under POCA and of criminal charges against the three policemen.

Re memory: the extent of the reliance placed on the actor's/declarant's memory; the importance of the matter to the maker of the act or statement; whether the act or statement concerned the maker's own affairs or the affairs of another; the length of time that elapsed between the act or statement of the maker and the event it ostensibly describes; whether the

evidence is first- or second-hand hearsay; and the degree of detail which the evidence contains.

In **S v Montgomery (unreported, WLD case no A814/05, 25 May 2006)**, the communication had been made fairly recently, the information was not unduly complicated, it was highly dramatic and unusual and not likely to be forgotten, and the witness was himself involved in some of the events. All these factors were held to enhance the reliability of the hearsay evidence. The evidence accorded, moreover, with all the circumstantial evidence adduced by the State.

Re perception: whether the maker had a proper opportunity to perceive the facts which his act or statement is offered to show; whether the facts were within his personal knowledge; whether the evidence is first- or second-hand hearsay; and whether there is any reason to doubt the maker's ability to perceive properly the facts in issue (such as poor eyesight or hearing).

The Supreme Court of Appeal warned, in **Mamushe v S 2007 (4) All SA 972 (SCA)**, of the dangers of honest mistakes when it came to identification (see, too, **S v Mthetwa 1972 (3) SA 766 (A) at 768** and **S v Charzen 2006 (2) SACR 143 (SCA) at [11])**. It expressed the view that 'hearsay evidence of identification can only be admitted if the possibility of mistake can be safely excluded in some other way, e.g. with reference to objectively established facts'. The court refused to admit the evidence in that case under s 3(1)(c) because there was, in its view, no way to test the accuracy of the declarant's observations and because her testimony in court indicated that it would, as a result of physical obstructions impeding her view, have been virtually impossible for her to have made those observations from where she stood in her garden.

Re narrative capacity: the manner in which the absent actor or declarant conveyed the material information to the witness (writing is obviously clearer than oral communication which, in turn, may be less equivocal than non-verbal conduct); whether there is anything to suggest that the maker's act or statement could have been motivated by a belief or fact other than the one it is sought to establish; the simplicity or complexity of the act or statement; whether the evidence is first- or second-hand hearsay; and the court's impressions of the ability of the witness to convey accurately the act or statement of the maker in the light of the peculiar susceptibilities of hearsay to erroneous transmission.

In **Mnyama v Gxalaba & another 1990 (1) SA 650 (C) 654** Conradie J alluded to the dangers involved in adequately recalling and reproducing oral statements: 'The smallest change of inflection or nuance could change their meaning and words uttered in casual conversation are particularly vulnerable to these defects. "Talk is cheap" is an old adage which, I think, is as apt to hearsay evidence as it is to unkept promises.' The danger of misreporting oral statements is ordinarily high because a witness's recounting skills may be inadequate to convey the true import of what the declarant was saying or because the nuances may have been understood either at the time the statement was made or later. These dangers are, however, even greater when the evidence is on affidavit, since one is then 'really looking at the draftsman's interpretation of the interpretation which the witness put upon the words of the person whose speech she is reporting'.

3. The purpose for which the evidence is tendered: s 3(1)(c)(iii)

The State may seek to tender hearsay evidence to establish any number of issues. The court will consider whether the hearsay evidence is tendered to prove an element of the offence or to confirm evidence already tendered through some other means or as support for an inference which the State seeks to that the court should draw; etc. There is no closed list. The purposes are best described in the following cases:

In **Mamushe v S [2007] 4 All SA 972 (SCA)** the Supreme Court of Appeal warned against receiving hearsay evidence in a criminal trial on so crucial a matter as identification without confirmatory evidence on that issue in the form of objectively established facts (see para [18]).

In **S v Makhakha (unreported, WCC case no SS41/2012, 11 June 2013)** such facts were found to exist. The court received the report of an anonymous person, probably the person who rescued the victim of a sexual attack, who elected to remain anonymous, in which he identified the accused as the assailant. The court held that the 'mosaic of the hearsay evidence . . . completed the State's evidence and could in the circumstances not be ignored'. The interests of justice demanded its admission: it provided independent corroboration of the complainant's version; it connected with the circumstantial evidence in that it provided the initial link which led to the arrest of the accused; and it had high probative value. It was reliable in that the contents of the report turned out to be true in respect of the accused's name, identity and clothes worn by him at the time.

In **S v Van Willing & another [2015] ZASCA 52 (unreported, SCA case no 109/2014, 27 March 2015*)*** the fact that the evidence was tendered to corroborate the evidence of the identifying witness contributed to its admissibility.

In **S v Nene (unreported, GJ appeal case no 87/2020, 8 June 2021)**, where the hearsay was received in circumstances where its purpose was to corroborate a first report in a rape case and where it 'carrie[d] the hallmark of truthfulness and reliability in that it accorded in all the material respects with all the other evidence led by the State'.

In **Hlongwane's 1989 (3) SA 318 (D)**, the fact that the hearsay evidence was tendered to establish a fundamental issue as opposed to a subordinate issue or side-issue was considered to be a factor militating against its admissibility.

In **S v Rautenbach 2014 (1) SAC R 1 (GSJ)** the court held hearsay would be more readily admitted where its purpose was to exonerate the accused.

4. The probative value of the evidence: s 3(1)(c)(iv)

The probative value of the hearsay evidence must be established in order to determine admissibility. In ascertaining whether evidence is sufficiently relevant a court will weigh the probative value of the evidence against the potential prejudice to the party against whom it is admitted.

Whether evidence is sufficiently probative to be worth receiving in view of its prejudicial features. Hearsay, of course has several prejudicial features. These features are, however, peculiar to that kind of evidence, and the law of evidence has seen fit to accommodate them within a separate framework. Since the enactment of s 3, Subparas (iv) and (vi) of s 3(1)(c) enjoin a court to take into account both the probative value and the prejudicial effect of an item

of hearsay evidence in determining its admissibility. This is a realistic acknowledgement of the fact that although the rules regarding relevance and hearsay may be severed for the purpose of analysis, they are co-determinants of the same practical inquiry—that of admissibility

In **S v Ndhlovu and Others 2002 (2) SACR 325 (SCA)** the court usefully spelt out the contents of this leg of the inquiry as follows: "'Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?' but will it do so reliably?"

In **C v C & others [2021] ZASCA 12 (unreported, SCA case no 205/2019, 3 February 2021)**, the court observed that these two factors, which often weigh crucially in an analysis involving s 3(1)(c), 'are usually considered together'. An item of evidence may, for instance, be worth receiving in view of its non-hearsay prejudicial features but not when these features are taken together with the dangers of hearsay. Conversely a court may be satisfied that the hearsay dangers are not sufficient alone to warrant the exclusion of an item of evidence yet conclude that the aggregate of these and the non-hearsay disadvantages is sufficient to outweigh the probative value of the evidence.

The court in **S v Rautenbach 2021 (2) SACR 18 (GJ)** considered the nature of the relationship between reliability, relevance and weigh. Spilg J warned, in particular, against isolating pieces of evidence to determine their probative value or relevance since they 'may turn out to be rationally connected to a broader set of dynamics with which the case is concerned and against which a court is required to test the soundness of inferential reasoning during the fact-finding process'. He warned too that the admissibility of a hearsay statement was distinct from determining its weight. (emphasis added)

5. The reason why the evidence is not given by the person upon whose credibility the probative value depends: s 3(1)(c)(v)

The inherently prejudicial nature of hearsay evidence requires a party to establish the necessity of leading such evidence.

The inquiry focuses on the need to receive the evidence—with all its dangers and prejudicial qualities—in view of its probative value and any acceptable explanation for the absence of the out-of-court actor or declarant.

A court would be free to consider reasons for his non-availability, reasons such as those specified in ***s 34(1)(b) of the Civil Proceedings Evidence Act 25 of 1965 (which applies to criminal proceedings by virtue of s 222)***: the fact that such a person is deceased; is 'unfit by reason of his bodily or mental condition to attend as a witness', or is 'outside the Republic', or that 'it is not reasonably practicable to secure his attendance' or that 'all reasonable efforts to find him have been made without success'.

The reception of the hearsay evidence in **Hlongwane's case (supra)** was due largely to the fact that the persons on whose credibility the probative value of the evidence depended were justifiably afraid that violent reprisals would ensue in the event of their testifying.

In **S v Ghumman (unreported, WCC case no A439/2013, 26 June 2013)**, the declarant denied that he had made the previous statements and reneged on his written statements, and was not called because the prosecutor 'had no faith in the witness'.

In **S v Saat 2004 (1) SACR 87 (W)**, the court accepted that the presence of the eyewitnesses, who were Mozambican policemen, could not be secured in South Africa and that reasonable attempts to bring them into the country, including efforts made by the South African branch of Interpol, had been unsuccessful.

In **C v C & others [2021] ZASCA 12 (unreported, SCA case no 205/2019, 3 February 2021)**, the supreme court of appeal accepted that the fact that the witness is incapacitated or fears reprisal if she testifies may, in conjunction with other factors, weigh in favour of admitting the evidence. In that case, however, the excuse that the witness was 'too anxious to testify' against her husband, whom she had accused of being responsible for a brutal assault on her, failed in the circumstances: it was, 'obviously used to bolster the speculative inference that [she] honestly believed that [he] was responsible for the attack on her'.

The declarant in **S v Shaik & others 2007 (1) SA 240 (SCA)** refused to come to South Africa to testify. It was clear, further, that he would deny that the fax in question (of which he was the author) correctly reflected his understanding of the events it described. It was clear, the court found, that he was a dishonest person—a fact that did not necessarily mean that the fax was false—and the State could not have been expected to call him as a witness or to apply for his evidence to have been taken on commission—an avenue that would have been open to the appellants had they believed that his evidence might advance their case.

It should be stressed that even the death of the declarant is not, by itself, a sufficient ground for receiving an item of hearsay evidence. A court is required, in addition, to consider the other factors listed in para (c) and to satisfy itself that it is in the interests of justice that the evidence be admitted.

6. Prejudice to opponents: s 3(1)(c)(vi)

This factor is crucial to any approach that perceives the hearsay rule as being in any way a product of the adversarial mode of trial procedure. All evidence, of course, is potentially dangerous, since any witness may lie or be mistaken. To guard against these dangers, the adversary trial has developed certain techniques for detecting honest error and for exposing and discouraging dishonest error. What distinguishes hearsay from other evidence is not so much the extent of its inherent dangers as the extent to which these dangers may be detected and evaluated. The adversarial techniques designed for this purpose can only properly be employed if directed at the person upon whose credibility the probative value of the evidence depends. The hearsay actor or declarant thus escapes the full force of their effective deployment. He does not testify in open court subject to the careful scrutiny of judge, triers of fact, adversary, counsel and spectators; he does not take the oath or its equivalent; he is not required to build up to the germane part of his testimony by establishing first a set of facts from which one may infer both a capacity and an opportunity for accurate perception; he does not speak in response to questions which shape the body of his ideas and set them in an appropriate and helpful context; and he is not subjected to cross-examination at the hands of the adversary or his legal representation. To view this from a different perspective, the adversary is denied the opportunity of subjecting this person to these procedures and is thereby prejudiced. And this prejudice is exacerbated where the subject matter of the hearsay evidence is complex, such as an opinion that requires the assessment of experts who are specialists in the field.

In **C v C & others [2021] ZASCA 12 (unreported, SCA case no 205/2019, 3 February 2021)**, the court found that the plaintiff, having 'had to endure the false allegation that he had sexually assaulted his erstwhile wife in the most brutal manner, . . . was denied the opportunity to cross-examine her state of mind when these events were alleged to have unfolded'. She would, said Cachalia JA, have had to answer many questions had he in fact had such an opportunity. These included: a material time discrepancy of some eight hours in her two reports of the alleged assault; how she could have made a mistaken identification of her attacker, whom she had observed closely during the attack; why she had averred that her husband had sexually abused her during the marriage, contrary to evidence she had given in domestic violence proceedings; and why she had not mentioned the attack to a medical consultant during a consultation two weeks after the alleged incident when she had made similar false allegations regarding previous abuse. The fact that the plaintiff had 'dealt with the evidence' by responding to the allegations against him—a fact that influenced the High Court in its decision to admit her hearsay statement in terms of s 3(1)(c)—was correctly dismissed by Cachalia JA since it was 'no answer to the prejudice he suffered by not being able to test [her] version' (at [58]). This was especially true because her evidence was not corroborated in any material respect by the testimony of the police officers who had investigated the matter.

It will depend on the degree of the prejudice caused to the accused, even in a serious criminal case such as rape.

In **S v Nene (unreported, GJ appeal case no 87/2020, 8 June 2021)**, for instance, the hearsay evidence of the absent declarant, who was the complainant's sister to whom the complainant had made a first report of the alleged rape, was held to be admissible. The degree of prejudice had to be considered to see if an injustice would be done to the other party. This was a matter of fact to be determined in the circumstances of each case. In Nene the prejudice was 'minimal at best' because, first, the evidence only corroborated the fact that the complainant had reported the rape to her sister on the day it allegedly occurred and, second, there was a 'warrant of reliability to be found in the probabilities, particularly the fact that the statement accord[ed] with all of the other evidence led by the State'.

In **S v Mabilu & others (unreported, LP case no CC66/2018, 31 March 2022)**, the question was the identity of the person who had incited a mob to burn the houses of the complainants. A State witness testified that he had been told by a boy who witnessed the events that the mob had been led by a person other than the accused. This evidence was obviously hearsay, but the court admitted it because, first, it would have led to a 'travesty of justice' to exclude it, in that the nature of the evidence was 'such that if ignored it might lead to [the] wrong people being convicted'; and, second, the State (whose witness had disclosed the hearsay communication) would not suffer any prejudice if the evidence was received 'since it emanate[d] from the State's version, and they had the opportunity to investigate its veracity but had failed to do so'. It was in the interests of justice to receive the hearsay evidence.

In a criminal case – the rights of the accused in terms of section 35(3) of the Constitution must be considered. The trial must be fair – **National Director of Public Prosecutions v King (86/09) [2010] ZASCA 8**: "Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the state. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution."

In South Africa the courts would have to create a coherent theory out of the following ingredients: s 35(3)(i), the limitation section (s 36(1)) and the (fortunately) flexible provisions of s 3(1) of the Law of Evidence Amendment Act of 1988. And in **S v Ndhlovu & others 2002 (2) SACR 325 (SCA)** the Supreme Court of Appeal has responded to these challenges by holding that s 3 does no violence to s 35(3)(i) since the right to 'challenge evidence' does not, where the interests of justice require the admission of an item of hearsay evidence, encompass the right to cross-examine the original declarant. The court in that case rejected the argument that the strengthening of the State case by the hearsay evidence could be considered as constituting 'prejudice' for the purpose of s 3(1)(c)(vi): as Cameron JA put it, a 'just verdict, based on evidence admitted because the interests of justice require it, cannot constitute "prejudice"'. There was, however, some prejudice where the original declarant testified but disavowed his previous statement, since the benefits of cross-examination are largely negated.

7. Any other factor which in the opinion of the court should be taken into account: s 3(1)(c)(vii)

Although the common-law exceptions to the hearsay rule are obsolete, they are not irrelevant. The common-law exceptions are factors that a court may take into account in exercising its discretion to admit the evidence in the interests of justice.

There is no list of factors which the court may take into consideration. Any factor that is relevant to the just administration of justice may be considered.

217 Admissibility of confession by accused

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided-

(a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and

(b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question-

(i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and

(ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under proviso (b) to subsection (1).

(3) Any confession which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him-

(a) if he adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and

(b) if such evidence is, in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person.

It is important to distinguish between a confession and an admission – the requirements for admissibility are different.

Therefore, a prosecutor must first identify whether the statement is a confession or and admission and then determine whether S217 or S219A will be applicable.

What is a confession?

No statutory definition of a confession is provided. It is therefore necessary to look at the common law. In **R v Becker 1929 AD at 171** De Villiers ACJ concluded that a **confession could only mean 'an unequivocal acknowledgement of guilt**, the equivalent of a plea of guilty before a court of law'. It is therefore **an extra-curial admission of all the elements of the offence charged**.

The unequivocal admission of all the elements of the offence must not contain a description of any possible defence.

In **S v Mudau [2017] ZASCA 34 (unreported, SCA case no 1148/2016, 29 March 2017)** it was held that the statement of the first appellant had been wrongly classified as a confession. He claimed that he had acted under the coercion of the second appellant, with the result that he was contesting the element of wrongfulness, so that the statement did not constitute an unequivocal admission of every element of the offence.

In **S v Molimi 2008 (2) SACR 76 (CC)** – the statement of the accused admitted that he was involved and played a role in the planning of the robbery. However, he stated that he did not participate in the execution of the robbery.

The state relied on the Doctrine of common purpose.

This statement was regarded as an admission that fell short of constituting a confession. The Constitutional Court reasoned that the statement showed 'that [the] accused . . . did not play any active part in the robbery' and that it was, further, 'still open to [the] accused . . . to raise a defence of dissociation from the common design to rob'. What was critical, in her assessment, was that the accused asserted that he left the scene after an assurance by one of the others that everything was still fine, and before the robbery took place. The statement, coupled with the accused's sudden departure, could not be said to 'amount to an unequivocal acknowledgement that accused 3 participated in the robbery under a common purpose with those who actually committed the robbery'.

Requirements for admissibility

S217(1) prescribes the requirements for the admissibility of a confess:

1. it must be shown that the confession was **made by the accused**
2. **freely and voluntarily**,
3. while he was in his **sober senses**, and
4. **without** having been **unduly influenced** thereto
5. Must be made to a magistrate or justice (justice of the peace)
6. Apart from s 217(1), however, it has become increasingly apparent that the question of the admissibility of admissions and confessions has significant constitutional implications, the most notable being the duty to inform the accused of various important constitutional (and, possibly, other) rights.

This means that two separate but related inquiries will be required to establish whether the confession will be admissible:

a. The requirements set out in S217 and
b. The requirement that the accused receives a fair trial.

S v Gcam-Gcam 2015 (2) SACR 501 (SCA), where this proposition was expressly approved by the Supreme Court of Appeal.

In **S v Magwaza 2016 (1) SACR 53 (SCA)** the importance of considering the constitutional requirements in addition to the provisions of s 217 is brought into sharp relief by what was said by the Supreme Court of Appeal, where the trial court and the full court focussed solely on the voluntariness of the pointing out and confession. Both were criticised for not touching 'even tangentially, on the Constitution's exclusionary provision—s 35(5)' when there was certainly reason to do so.

In **S v Bantom & others (unreported, ECP case no CC39/17, 16 August 2019)**, where the court ruled inadmissible a confession made by a juvenile suspect in these circumstances: the juvenile accused did not have a parent or guardian present; he expressly sought legal representation, but his request was ignored; he made the statement after the detectives had told him he could get 25 years' imprisonment if he did not tell the truth; and he was making the statement because he was 'expecting to be released from police custody'. The statement would fall foul of the requirements of s 35(3)(f) and (g) of the Constitution (the right to legal representation) as well as s 35(3)(h) (the right to silence), and its reception would render the trial unfair or would otherwise be detrimental to the administration of justice as contemplated by s 35(5). But it is clear that the provisions of s 217 of the Criminal Procedure Act relating to voluntariness could also have been invoked with the same result.

Constitutional implications: The requirement that the accused be warned of and allowed to exercise certain rights

There are several provisions of the Constitution that relate in one way or another to the question of the admissibility of an admission or a confession in criminal proceedings.

Section 35(1)(c) provides that every person who is arrested for allegedly committing an offence has the right 'not to be compelled to make any confession or admission that could be used against that person'.

Section 35(1)(a) and (b) Such a person is also given the right to remain silent as well as to be informed promptly of that right and of the consequences of not remaining silent.

Section 35(4) this in a language that the person understands.

Section 35(2) the right that detained persons have 'to choose, and to consult with, a legal practitioner, and to be informed of this right promptly', again in a language that he or she understands.

Section 35(3) the right that every accused person has to a fair trial, which includes (but is not limited to) the right to be presumed innocent (s 35(3)(h)) and the right not to be compelled to give self-incriminating evidence (s 35(3)(j)).

It should be noted that the Supreme Court of Appeal has held, in **S v Mabuza & others 2009 (2) SACR 435 (SCA)**, that while the failure to inform an accused person of his rights might render a trial unfair, the failure to record such a warning cannot, by itself, render the trial unfair.

In **S v Ntuli 1996 (1) SA 1207 (CC)**, which required criminal trials to be conducted according to the notions of basic fairness and justice. The court went on to say that it was not every breach of the provisions of the interim Constitution that led automatically to the trial being unfair, since fairness was, as the Constitutional Court emphasised in **Key v Attorney-General, Cape Provincial Division & another 1996 (2) SACR 113 (CC), 1996 (4) SA 187 (CC)**, an issue that had to be determined on the facts of each case.

The Constitutional Court in **S v Zuma and Others 1995 (1) SAC R 568 (CC)** found that the presumption in s 217(1)(b)(ii) placed on the accused the burden of proving that the confession was not made freely and voluntarily and required him to discharge the onus on a balance of probabilities. The court held that the common-law rule placing the burden of proof on the state to prove that a confession was made voluntarily was integral and essential to: the right to remain silent after arrest; the right not be compelled to make a confession; and the right not to be a compellable witness against oneself. The court held that by reversing the burden of proof all these rights would be seriously compromised and undermined. The Constitutional Court found that the right to a fair trial conferred by s 25(3) of the Interim Constitution was broader than the list of specific rights listed in that section. It held that the right to a fair trial embraces a concept of substantive fairness and consequently the common-law rule on the burden of proof was inherent in the rights specifically mentioned in s 25(2) and 25(3). The court concluded that s 217(1)(b)(ii) violated the provisions of the Interim Constitution and was invalid.

218 Admissibility of facts discovered by means of inadmissible confession

(1) Evidence may be admitted at criminal proceedings of any fact otherwise in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.

(2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

Duty of the prosecutor to warn the court—It is the duty of the prosecutor who wants to present an admission of the accused, and who has information that there is a possibility that such admission forms part of an inadmissible confession, to investigate the surrounding circumstances and to determine whether the admission may be proved. If the admission is doubtful, the presiding officer must be warned. When an admission is proved without further ado, the court must accept that the admission is not connected to an inadmissible confession. The prosecutor must not leave it to the court to open the investigation to determine whether the admission forms part of an inadmissible confession. Nevertheless, it remains the overriding duty of the presiding officer to ensure that an admission is properly admissible before it is accepted as part of the evidentiary material (**S v Nkosi 1980 (3) SA 829 (A)**).

Subsection (1) is concerned with the proof of facts which are discovered or determined as a result of inadmissible information which comes from the accused – in other words, what was found or discovered.

If as a result of the accused's inadmissible or even forced confession, a murder weapon or bloodstained clothing is found (which could possibly be connected with the accused by means of other evidence), evidence that such objects were found is admissible **(R v Samhando 1943 AD 608).** Irrespective of how it was obtained, the information itself is not excluded. In **Samhando** the court also, because of the so called "theory of confirmation by subsequently discovered facts", held that, if something is discovered as a result of the inadmissible confession, it can then also be proved that the discovery was made because of information the accused provided.

Section 218(2) - In terms of this subsection evidence that the accused pointed out anything may be admitted as well as evidence that any fact or thing was discovered in consequence of information given by the accused, even though the pointing out or information forms part of an inadmissible confession or statement.

A pointing out has been defined as "**an overt act whereby the accused indicates physically to the inquisitor the presence or location of some thing or some place actually visible to the inquisitor**". Evidence of a pointing out will be admissible even if no concrete facts are discovered as a result of the pointing out. It is only necessary to show that the accused knew of a fact relevant to his guilt.

In **R v Tebetha 1959 (2) SA 337 (A)** the accused was arrested and interrogated in connection with a robbery. The police, prior to arresting the accused, had already found the van and empty tins used to carry money. The court held that the fact that the accused later pointed out the place where the van and tins had been found was admissible in evidence notwithstanding that the pointing out was conducted as a consequence of an inadmissible statement.

This subsection does not permit statements accompanying the pointing out to be admitted into evidence and the courts have held a confession in the guise of a pointing out will not be admissible.

Requirements for admissibility

In **Sheehama** the court noted that the reliability argument was dependent on an element of discovery and was therefore not applicable where the pointing out simply confirmed already known facts.

This approach has led the courts to express disapproval of police practices that might compromise the discovery element in a pointing out. The courts have found the following practices to be undesirable:

1. a member of the investigating unit being involved in the pointing out;
2. the involvement of any person in conducting the pointing out who has prior knowledge of the relevant places or objects;
3. using an interpreter, during the course of the pointing out, who is attached to the investigating unit.

However, such practices will not automatically render the evidence of the pointing out inadmissible.

In each case the court will determine whether the accused acted **freely and voluntarily while in sound and sober senses**.

219 Confession not admissible against another

No confession made by any person shall be admissible as evidence against another person.

The section is clear – a confession is only admissible against the accused making that confession.

Previously, admissions were not included in this section, and in terms of s3(1)(c) of the Law of Evidence Act, the State could apply that the contents of the admissions made by one accused be used against another accused.

However, in **Litako and Others v S 2015 (3) SA 287 (SCA) (16 April 2014)** the State's case rested upon eyewitness evidence, ballistics evidence and the extra-curial statement of the first appellant. The eyewitness and ballistics evidence in and of themselves were inadequate to found a conviction on any of the charges preferred against the appellants. The State's case therefore hinged on the extra-curial statement of the first appellant.

The trial court referred to the judgment of the SCA in **S v Ndhlovu & others 2002 (2) SACR 325 (SCA)** and the judgment of the Constitutional Court in **S v Molimi [2008] ZACC 2; 2008 (2) SACR 76 (CC)** as authority for admitting the statement by the first appellant as evidence against the others in terms of the provisions of s 3(1)(c) the Act.

The SCA stated: "*The prohibition against the confession of one accused being used against another is captured in s 219 of the Criminal Procedure Act 51 of 1977 (the CPA). Admissions are regulated by s 219A of the CPA. It provides that evidence of an admission made extra-curially by any person in relation to the commission of an offence shall, if such admission*

does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings in relation to that offence. It does not contemplate such an admission being tendered as evidence against anyone else."

The SCA stated further: "*As best as we can discern, the first reported case in which the State appears to have invoked the Act in application to the admissions of one accused being tendered against his co-accused was* ***S v Ndhlovu 2001 (1) SACR 85 (W)*** *(per Goldstein J) (****Ndhlovu*** *in the high court). On appeal to this court, Cameron JA identified 'the main question in the appeal' as 'whether an accused's out-of-court statements incriminating a co-accused, if disavowed at the trial, can nevertheless be used in evidence against the latter'. That question, as a perusal of the judgment reveals, was answered, with reference to the Act, in the affirmative. It thus represented a seismic shift in our law.*"

The SCA found that: "*In my view,* ***Ndhlovu (supra)*** *too readily dismissed concerns expressed in* ***S v Ramavhale 1996 (1) SACR 639 (A)****, which cautioned (at 649C-D) that a court should hesitate long in admitting hearsay evidence that plays a decisive or even a significant part in convicting an accused person.* ***Ndhlovu (supra)*** *makes no attempt to reconcile the incongruity between the bar created by section 219 of the Criminal Procedure Act 51 of 1977 and its application of section 3 of the Law of Evidence Amendment Act 45 of 1988. Moreover, in dealing with the constituent parts of section 3,* ***Ndhlovu*** *offers no guidance as to how the receipt of the extra-curial admissions which it allows under that section, should be approached given the rationale at common-law for their exclusion or what role, if any, the various common-law safeguards should play. In effect it is as if a pen has been struck through those well recognised common-law safeguards and they have been summarily jettisoned."*

The SCA reaffirmed the view that hearsay evidence in terms of s3 of the Law of Evidence amendment act, is admissible where having due regard to the subsections of the constitution, it is in the interests of justice to admit such evidence but stated clearly that the evidence of a confession or admission made by one accused can not be admissible against the co-accused/s.

219A Admissibility of admission by accused

(1) Evidence of any admission made extrajudicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained—

(a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and

(b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).

The requirements for admissibility

1. At common law an extra-judicial statement made by an accused may not be admitted into evidence unless it is proved to have been made **freely and voluntarily**.

The term "freely and voluntarily" means that the statement must have been made by the accused without promise, threat, coercion or undue influence.

2. The admission can be made to any person. The State will need to prove that the statement was given freely and voluntarily.
3. However, if it is made to a magistrate, and reduced to writing, it is admissible on mere production thereof.
4. If an interpreter is used for communication between the accused and the magistrate, then a certificate from the interpreter must be provided to prove that the contents of the communication was true and correctly conveyed to the best ability of the interpreter.
5. S1(b) provides that, if the statement is made to the magistrate, it will be presumed that the statement was given freely and voluntarily – and the accused will need to prove that it was not given freely and voluntarily.

In **S v Zuma and Others (supra)** the Constitutional Court found a similar presumption contained in s 217(1)(b)(ii) of the CPA, pertaining to confessions, to be unconstitutional in that by placing the burden of proving the absence of voluntariness on the accused it violated the presumption of innocence.

The provisions of s219A (1)(b) has not been evaluated by the constitutional court, but the consensus among scholars and authors is that it is doubtful that the presumption will pass constitutional muster and will likely be ruled unconstitutional.

In addition to the above requirements, the rights enshrined in Section 35 of the Constitution must also be considered to determine whether the accused would receive a fair trial in the circumstances, if the statement is admitted into evidence. (See discussion under s217 above.)

note: The National Instructions for admissions made by children: Paragraph 22 of 'National Instruction 2 of 2010: Children in Conflict with the Law' (published under GN 759 in GG 33508 of 2 September 2010 and issued by the Minister of Police in terms of s 97(5) of the Child Justice Act 75 of 2008) – not discussed in this guide.

220 Admissions

An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.

Purpose of the section

This section originally intended to relieve the State of the necessity of proving allegations admitted by the accused. It now covers admissions made by the prosecution as well, so it may be seen more generally as a provision that allows for the proof of facts that are not in dispute.

Any fact that is admitted in terms of s220, relieves the other party of the burden of presenting evidence to prove such fact.

Who may make a formal admission

Admissions are usually made by the legal representative on behalf of the accused. The court will confirm from the accused whether such admissions are in accordance with the instructions given to the legal representative.

The prosecutor on behalf of the state is also entitled to make admissions in terms of this section.

What may be admitted

Only facts alleged by the State may be admitted by the accused in terms of s 220. The section concerns the acceptance of facts alleged by the opposite side and not by the accused himself.

It was held in **S v Mazina [2017] ZASCA 22 (unreported, SCA case no 494/2016, 24 March 2017)** that '[a] formal admission can only be made in respect of unfavourable facts and must be an admission, properly so called'. The fact that the appellant had said, in his statement made under s 115, that he stabbed the deceased in self-defence because he feared for his life could not, then, be used to create reasonable doubt as to his guilt. Where, however, the State elects to accept an admission such an admission constitutes sufficient proof of every fact that it covers. If explanations or statements appear with the admitted fact the court may take notice of them subject to further evidence that may be adduced, but it is only the 'pure fact' that was put in issue and admitted that is regarded as furnishing sufficient proof.

NOTE FOR PRACTICE:
Be careful when accepting s220 admissions.
If the accused admits a certain fact but gives an explanation or a mitigation for the that conduct – you will be bound by the contents of the admission which was accepted.
S220 admissions must describe admissions of the facts in issue – you are cautioned – DO NOT ACCEPT S220 ADMISSIONS WHICH CONTAIN EXPLAINATIONS AND MITIGATIONS

An accused may only admit facts, **not evidence of those facts**.

Care should therefore be taken in regard to the form in which the admissions are made. If the accused consents to the reception of the evidence it becomes admissible in terms of s 141(3)(b). It does not, however, constitute 'sufficient proof' of the facts alleged unless the accused formally admits those facts in terms of s 220.

Effect of formal admissions in other proceedings

A formal admission only binds a party in the proceedings at which it is made. It may, however, be proved against him at other proceedings in the same way that any informal admission may be proved. It would, at those proceedings, not constitute 'sufficient proof' of the facts to which it relates; it could thus be explained away by the accused and its weight and cogency would fall to be assessed in the same way as any other evidence adduced at those proceedings.

Effect vis-à-vis a co-accused

An admission which one accused makes in terms of s 220 cannot relieve the State of its burden of proving such fact with regard to the complicity or guilt of a co-accused who has placed this fact in issue: **S v Long 1988 (1) SA 216 (NC)**

The effect of formal admissions is drastic in that they dispense with the need for proof and result in the shortening of the criminal trial. Because of the drastic effect of this section, the courts have been at pains to insist on various measures to protect the accused.

In **S v Mavundla 1976 (4) SA 731 (N)** the court set out the duty of a judicial officer in respect of an unrepresented accused as follows: he must satisfy himself that the accused's decision to make the admission has been taken with full understanding of its meaning and effect, that he is not under a misapprehension that he is obliged or expected to supply the State or the court with it, and that it appears to be truly voluntary in all other respects. This duty, the learned judge added, is especially important when the fact that the accused proposes to admit is beyond the range of his personal knowledge, such as the cause of death of a person who died of multiple injuries. It is also the duty of the judicial officer to ensure that an undefended accused cannot be misled to his prejudice by the prosecutor's failure to make any comment on admissions made by the accused to the extent that they are to his advantage in the further handling of his defence.

The courts further require that the admission be made in a formal manner and that it be fully and accurately recorded (see **S v W 1963 (3) SA 516 (A)**; **S v D 1967 (2) SA 537 (N)**).

221 Admissibility of certain trade or business records

(1) In criminal proceedings in which direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, upon production of the document, be admissible as evidence of that fact if—

(a) the document is or forms part of a record relating to any trade or business and has been compiled in the course of that trade or business, from information supplied, directly or indirectly, by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply; and

(b) the person who supplied the information recorded in the statement in question is dead or is outside the Republic or is unfit by reason of his physical or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected, having regard to the time which has elapsed since he supplied the information as well as all the circumstances, to have any recollection of the matters dealt with in the information he supplied.

(2) For the purpose of deciding whether or not a statement is admissible as evidence under this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner.

(3) In estimating the weight to be attached to a statement admissible as evidence under this section, regard shall be had to all the circumstances from which any inference may reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement, did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(4) No provision of this section shall prejudice the admissibility of any evidence which would be admissible apart from the provisions of this section.

(5) In this section—

***"business"** includes any public transport, public utility or similar undertaking carried on by a local authority, and the activities of the Post Office and the Railway Administration;*

***"document"** includes any device by means of which information is recorded or stored; and*

***"statement"** includes any representation of fact, whether made in words or otherwise.*

Section 221 allows a statement contained in a document to be received as evidence of the fact it tends to establish upon the mere production of the document, provided:

(a) the document is or forms part of a record relating to any trade or business and has been compiled in the course of that trade or business from information supplied directly or indirectly by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with; and

(b) the person who supplied the information is unable, for one of the reasons mentioned in s 221(1)(b), to testify to that fact.

(There is a substantial overlap between this section and s 222 (which incorporates Part VI of the Civil Proceedings Evidence Act 25 of 1965).

Requirements for admissibility

1. Direct oral evidence admissible

The statement in the document will not be admissible as evidence of the fact that it tends to establish if direct oral evidence of that fact would not be admissible. Thus if direct oral evidence of that fact is legally irrelevant (see s 210) or is hit by any of the exclusionary rules the documentary evidence will be excluded.

2. 'Statement'

A 'statement' is defined in sub-s (5) to include 'any representation of fact, whether made in words or otherwise'. This would seem to include opinion and implied assertions.

3. 'Document'

A 'document' is defined in sub-s (5) as including 'any device by means of which information is recorded or stored'. As Van Wyk points out, however (in 1977 SACC 213 at 221), the meaning of the term 'document' is further restricted by s 221(1)(a) which stipulates that the document must be or form part of a record relating to any trade or business. A 'record' is not defined in

the Act and it may lead to problems of interpretation. The document need not, however, form part of a continuous record as required by s 222.

4. A 'trade or business'

A 'business' is defined as including 'any public transport, public utility or similar undertaking carried on by a local authority, and the activities of the Post Office and the Railways Administration' (s 221(5)). It is submitted that the terms 'trade' and 'business' will probably be given a wide interpretation and will include, for instance, a bank. It is essential, however, that the document be compiled in the course of the trade or business.

5. 'Personal knowledge'

Section 221 does not require that the maker have personal knowledge of the facts described in the document. It suffices for the purpose of this section that the document was compiled from information supplied directly or indirectly by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information supplied.

6. Supplier of information unable to testify to the fact in issue

It is further required that the person who supplied the information recorded in the statement either

(i) is dead; or
(ii) is outside the Republic; or
(iii) is unfit by reason of his physical or mental condition to attend as a witness; or
(iv) cannot with reasonable diligence be identified or found; or
(v) cannot reasonably be expected, having regard to the time which has elapsed since he supplied the information as well as all the circumstances, to have any recollection of the matters dealt with in the information he supplied.

222 Application to criminal proceedings of certain provisions of Civil Proceedings Evidence Act, 1965, relating to documentary evidence

The provisions of sections 33 to 38 inclusive, of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965), shall mutatis mutandis apply with reference to criminal proceedings.

223 Admissibility of dying declaration

[S. 223 repealed by s. 9 of Act No. 45 of 1988.]

This section, which dealt with the admissibility of dying declarations, was repealed by section 9 of the Law of Evidence Amendment Act 45 of 1988.

224 Judicial notice of laws and other published matter

Judicial notice shall in criminal proceedings be taken of—

(a) any law or any matter published in a publication which purports to be the Gazette or the Official Gazette of any province;

(b) any law which purports to be published under the superintendence or authority of the Government Printer.

Judicial notice may be taken of public Acts of Parliament, the courts do not at common law take judicial notice of delegated legislation.

Section 224, however, requires judicial notice to be taken of any law or other matter published in the Gazette or Provincial Gazette. No judicial notice is, however, taken of the validity of such delegated legislation, which may be contested on grounds of unreasonableness or vagueness or on the ground that it was ultra vires. Nor is notice taken of subordinate legislation that is published elsewhere than in an official Gazette.

A court is entitled to take judicial cognisance of the contents of these Gazettes without their formal production in evidence (see **S v Hoosen 1963 (2) SA 340 (N)**; **S v Di Stefano 1977 (1) SA 770 (C)**).

Paragraph (b) makes it clear that judicial notice may be taken of legislation published by someone other than the Government Printer.

225 Evidence of prints, bodily samples or bodily appearance of accused

(1) Whenever it is relevant at criminal proceedings to ascertain whether—

(a) any fingerprint, bodyprint or bodily sample, as defined under Chapter 3, or the information derived from such prints or samples, of an accused at such proceedings corresponds to any other fingerprint, bodyprint, bodily sample, crime scene sample or the information derived from such samples; or

(b) the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the fingerprints or bodyprints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test of the accused, shall be admissible at such proceedings.

(2) Such evidence shall not be inadmissible by reason only thereof that the fingerprint, bodyprint, or bodily sample as defined in Chapter 3, in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of sections 36A, 36B, 36C, 36D, 36E or 37, or that it was taken or ascertained against the wish or the will of the accused concerned.

Subsection (1) provides for the admissibility of evidence of fingerprints or body-prints of the accused or 'bodily sample' as defined in Chapter 3 of the Act whenever the correspondence between such evidence and other evidence is relevant, and for the admissibility of evidence of bodily marks, characteristics, distinguishing features or the condition or physical appearance of the accused whenever the existence of such marks, features, etc is relevant.

Subsection (2) provides that such evidence will not be inadmissible solely because it was procured contrary to the provisions of s 36A, 36B, 36C, 36D, 36E, or 37, or against the wish or will of the accused.

The relevance of the evidence

Such evidence may only be received when it is relevant to consider whether the prints of the accused or the sample in question corresponded with any other prints or sample, or whether the body of the accused showed any marks, characteristics, features, etc.

Section 225(2)

At common law no man may be compelled to supply evidence that incriminates him, either before or during the trial: **R v Camane & others 1925 AD 570**. Innes CJ (575) cited with approval the view of Wigmore that it is not merely compulsion but 'testimonial compulsion' that forms the kernel of this rule. Thus a man may be compelled to furnish what Wigmore calls 'autoptic' evidence, where he is really passive and is required to show his complexion, stature, marks or features. He cannot, however, be asked to go further and to give evidence against himself, whether by words, writing or conduct.

It was held in **S v Skhosana 2016 (2) SACR 456 (GJ)** that a photograph taken of the appellant and his co-accused by a security officer on his cell phone after the alleged commission of an offence was admissible even though the applicant's rights in terms of s 35 of the Constitution had not been explained to him prior to the taking of the photograph. The court relied on s 37(1)(d) of the Act, which provides that any police officer may 'take a photographic image or may cause a photographic image to be taken' of any arrested person, and did not regard the fact that the photograph was taken by a security officer, and not a police officer, as significant.

Does the taking of an accused's fingerprints or other bodily prints against his wish or will do violence to the Constitution?

The courts have found that this section does not offend against the rights guaranteed in the constitution.

In **S v Huma & another (2) 1995 (2) SACR 411 (W)** - the court considered whether constitutional rights had been infringed: his right to dignity contained in ss 10 and 11 (see, now, ss 10 and 12 of the 1996 Constitution) and his right to remain silent and not to be a compellable witness against himself contained in s 25(3)(c) and (d) (see, now, s 35(3)(h) and (j) of the 1996 Constitution).

The court held: As for dignity, the taking of fingerprints did not constitute inhuman or degrading treatment but that, even if it did, it constituted a reasonable and necessary limitation of the right since it was necessary to enable the administration of justice to run its proper course. As far as self-incrimination was concerned, he concluded that s 25(3)(d) of the Constitution was 'merely a codification of the common-law principle against self-incrimination and [did] not take the common-law principle any further'. It was clear that the principle '*nemo tenetur se ipsum accusare'* related, at common law, 'only to oral or documentary testimonials by an accused person'.

The court referred to the decision of the United States Supreme Court in **Schmerber v State of California 384 US 757 (1966)**, where it was held (albeit by a majority of only one) that the taking of a blood sample from a motorist against his will in order to determine whether he was

under the influence of liquor did not violate his protection under the Fifth Amendment to the United States Constitution (which was similar to that contained in s 25(3)(d) of the interim Constitution). Brennan J held in that case that the privilege was 'a bar against compelling "communications" or "testimony", but that compulsion which [made] a suspect or accused the source of "real or physical evidence" [did] not violate it'.

The court agreed with this proposition and held that the position with regard to fingerprints was an 'a fortiori case' compared to that of taking blood samples.

A similar conclusion was reached in **S v Maphumulo 1996 (2) SACR 84 (N)**, where the court held that the taking of an accused's fingerprints under compulsion did not violate his rights as contained in ss 10, 25(2)(c) or 25(3)(d) of the interim Constitution.

The approach of the courts in respect of fingerprints has been followed, too, in the context of voice samples: see **Levack & others v Regional Magistrate, Wynberg & another 2003 (1) SACR 187 (SCA**). Such evidence, too, is autoptic, and the compulsion of an accused to furnish a voice sample does not, of itself, constitute a violation of the right against self-incrimination or the right to a fair trial.

Many questions regarding handwriting samples remain to be resolved. Does the taking of such samples involuntarily or in circumstances where no legal representation was afforded an accused person or his rights to silence or to legal representation were not explained to him, mean that the evidence was improperly obtained within the meaning of s 35(5) of the Constitution? If so, would the admission of the evidence render the trial unfair or be detrimental to the administration of justice? Can such evidence be viewed as 'autoptic', 'testimonial' or 'communicative'? It is not autoptic in the sense that Wigmore used that term, since the person is not passive in the same way that a person who has fingerprints taken is; as we submitted above, handwriting requires a co-operative, volitional act and a sample cannot be acquired through observation or, even, the use of superior force in the case of a reluctant accused. Is it, then, either 'testimonial' or 'communicative'?

Everything, it seems, depends on the circumstances. If an accused who is forced to render a handwriting sample realises that he will, by so doing, communicate to the authorities the notion that he is the author of the sample that incriminates him, then it will be an assertive self-incriminatory act expressing his subjective intention to communicate, albeit involuntarily, a thought to another. It differs from admissions and confessions in that it is objectively verifiable by expert evidence and is not overtly 'testimonial' in the sense that an admission or a confession is. But whether this is enough to save such evidence from inadmissibility remains to be seen.

In South Africa, many issues relating to the taking of bodily samples and the creation of a National Forensic DNA Database are now regulated by statute. **The Criminal Law (Forensic Procedures) Amendment Act 6 of 2010** did not introduce any procedure specifically related to DNA, since it was decided that DNA procedures would be dealt with in separate legislation which would, as with Act 6 of 2010, amend the Criminal Procedure Act. The result was the **Criminal Law (Forensic Procedures) Amendment Act 37 of 2013** which, except for s 2, came into effect on 31 January 2015. This Act contains detailed provisions governing many aspects of DNA evidence.

226 Evidence of no sexual intercourse between spouses admissible

For the purposes of rebutting the presumption that a child to whom a married woman has given birth is the offspring of her husband, such woman or her husband or both of them may in criminal proceedings give evidence that they had no sexual intercourse with one another during the period when the child was conceived.

227 Evidence of character

Evidence of character and previous sexual experience (1) Evidence as to the character of an accused or as to the character of any person against or in connection with whom a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961.

(2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless—

(a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or

(b) such evidence has been introduced by the prosecution.

(3) Before an application for leave contemplated in subsection (2) (a) is heard, the court may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings.

(4) The court shall, subject to subsection (6), grant the application referred to in subsection (2) (a) only if satisfied that such evidence or questioning is relevant to the proceedings pending before the court.

(5) In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning—

(a) is in the interests of justice, with due regard to the accused's right to a fair trial;

(b) is in the interests of society in encouraging the reporting of sexual offences;

(c) relates to a specific instance of sexual activity relevant to a fact in issue;

(d) is likely to rebut evidence previously adduced by the prosecution;

(e) is fundamental to the accused's defence;

(f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or

(g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue;

(6) The court shall not grant an application referred to in subsection (2) (a) if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant—

(a) is more likely to have consented to the offence being tried; or

(b) is less worthy of belief.

(7) The court shall provide reasons for granting or refusing an application in terms of subsection (2) (a), which reasons shall be entered in the record of the proceedings.

The general rule is that the accused may adduce evidence of his own good character, but the prosecution is prohibited from adducing evidence of his bad character, subject to specified exceptions.

The reason for permitting evidence of the accused's good character is to be found in the dictum of Willes J in **R v Rowton**, in which the court held that "such evidence is admissible because it renders it less probable that what the prosecution has averred is true. It is strictly relevant to the issue." Evidence of the accused's bad character is excluded in English law because it might "have a disproportionately prejudicial effect upon the jury" and because it is generally considered to be irrelevant.

There are a number of ways in which an accused may try and establish her good character: by the accused giving evidence herself, by calling witnesses to testify on her behalf, or by cross-examining prosecution witnesses. However, once the accused herself, or through calling witnesses, adduces evidence as to her good character the prosecution can respond by introducing evidence of bad character.

The accused may also render herself liable to cross-examination as to bad character in terms of s 197 of the CPA.

Evidence of the accused's bad character

Once the accused has adduced evidence as to her own good character the prosecution may respond in three different ways: (i) adducing evidence of bad reputation; (ii) cross-examining character witnesses; and (iii) cross-examining the accused. 13

If the accused attacks the character of prosecution witnesses but does not adduce evidence as to her own good character, the prosecution may not adduce evidence of the accused's bad character.

In these circumstances the prosecution will be limited to cross-examining the accused as to character in terms of s 197(a) of the CPA.

Section 197

Section 197 protects the accused against cross-examination that is directed at showing bad character or his previous criminal record. However, the accused will lose this protection (or "shield") by: adducing evidence as to his own good character; attacking the character of a prosecution witness; or by testifying "against any other person charged with the same offence or an offence in respect of the same facts".

Character of the complainant

In all criminal cases where the complainant testifies he or she may be cross-examined, and the cross-examiner may ask questions that are pertinent to exposing the witness's credibility or lack thereof.

However, the point of departure is that the character or disposition of the complainant is not relevant to credibility. Consequently, evidence which is *solely* directed at establishing that the complainant has a bad character is prohibited, as is evidence of good character.

Sexual Offences

There is a common-law rule that in a case involving a charge of rape or indecent assault the accused may adduce evidence as to the complainant's bad reputation for lack of chastity.

In terms of the common law the defence may question the complainant as to her previous sexual relations with the accused. The accused is prohibited from leading evidence of the complainant's sexual relations with other men. However, the complainant may be questioned on this aspect of her private life in cross-examination as it is considered relevant to credibility. Evidence to contradict any denials may be led only if such evidence is relevant to consent.

The common-law provisions have been criticised on a number of grounds:

(a) whilst cross-examination concerning prior sexual history traumatises and humiliates the victim, the evidence it elicits is irrelevant and at most establishes a general propensity to have sexual intercourse;
(b) evidence of this nature is held to be inadmissible in other cases and there are no grounds for admitting it where the case is of a sexual nature;
(c) the possibility of such cross-examination deters victims from reporting the offence.

The legislation was therefore amended to respond to these criticisms by amending s 227 in 2007.

Section 227(1) of the Criminal Procedure Act retains the common law but is now gender neutral and subject to sub-s (2).

Section 227(2) prior sexual history evidence "other than evidence relating to sexual experience or conduct in respect of the offence which is being tried" may not be led or raised in cross-examination except with the leave of the court or unless prior sexual history evidence has been introduced by the prosecution.

The exception that is created by the introduction of prior sexual history by the prosecution is consistent with the approach taken by the court in **S v Zuma 2006 (2) SACR 191 (W)**.

In **Zuma**, it was the State that made application to ask the complainant (its own witness), how long before the incident in question she had last had intercourse. Permission was granted, and the complainant replied by giving a specific date. Thereafter the defence made application in terms of the then-existing s 227, to both cross-examine and lead evidence on her prior sexual history. The court granted the application.

It should be noted that in **Zuma** the permission granted to the defence was also based on relevance in the sense that what was sought to be introduced was fundamental to the accused's defence: "*In my judgment the purpose of the cross-examination and the evidence the defence wanted to lead concerning the complainant's behaviour in the past was not to show that she misbehaved with other men. In fact, it was aimed at showing misconduct in the sense of falsely accusing men in the past. The cross-examination and evidence are relevant to the issue of consent in the present matter, the question of motive and indeed credibility as well. It was not aimed at showing that the complainant was a woman of questionable morals. It was aimed at the investigation of the real issues in this matter and was fundamental to the accused's defence*."

The wording of s 227(2) makes it clear that as far as “the offence which is being tried” is concerned, no application is necessary. But the fact that no prior application is required does not relieve the court of its common-law and statutory duty to ensure that evidence and questioning do not go beyond what is relevant

Section 227(4) – leave to lead evidence of prior sexual history will only be granted if the court is satisfied that such evidence is relevant.

Section 227(5), specifies the factors that the court must take into account when deciding whether to grant leave to lead evidence of prior sexual history.

Section 227(6) directs the court to refuse leave if the purpose of adducing the evidence or questioning the complainant is to support an inference that the complainant is more likely to have consented or is untruthful.

Section 227(7) requires a court to provide reasons for refusing or allowing an application to lead prior sexual history evidence.

228 Evidence of disputed writing

Comparison at criminal proceedings of a disputed writing with any writing proved to be genuine, may be made by a witness, and such writings and the evidence of any witness with respect thereto, may be submitted as proof of the genuineness or otherwise of the writing in dispute.

Section 228 provides that comparison of a disputed writing with any writing proved to be genuine may be made by witnesses, and such writings and the evidence of any witness with respect thereto may be submitted as evidence of the genuineness or otherwise of the writing in dispute.

On the basis of the provision as well as common-law principles, a lay witness is permitted to identify handwriting.

An expert may also express an opinion on handwriting.

The fact that an accused who has furnished samples of his handwriting to the police could have made some intentional distortions affects the weight and not the admissibility of the opinion.

Opinion evidence of handwriting must be approached with caution. A court is also entitled to make its own comparison, but should do so with caution.

229 Evidence of times of sunrise and sunset

(1) The Minister may from time to time by notice in the Gazette approve of tables prepared at any official observatory in the Republic of the times of sunrise and sunset on particular days at particular places in the Republic or any portion thereof, and appearing in any publication specified in the notice, and thereupon such tables shall, until the notice is withdrawn, on the mere production thereof in criminal proceedings be admissible as proof of such times.

(2) Tables in force immediately prior to the commencement of this Act by virtue of the provisions of section 26 of the General Law Amendment Act, 1952 (Act 32 of 1952), shall be deemed to be tables approved under subsection (1) of this section.

230 Evidence and sufficiency of evidence of appointment to public office

Any evidence which, on the thirtieth day of May, 1961—

(a) would have been admissible as proof of the appointment of any person to any public office or the authority of any person to act as a public officer, shall be admissible in evidence in criminal proceedings;

(b) would have been deemed sufficient proof of the appointment of any person to any public office or of the authority of any person to act as a public officer, shall in criminal proceedings be deemed to be sufficient proof of such appointment or authority.

231 Evidence of signature of public officer

Any document—

(a) which purports to bear the signature of any person holding a public office; and

(b) which bears a seal or stamp purporting to be a seal or stamp of the department, office or institution to which such person is attached, shall, upon the mere production thereof at criminal proceedings, be prima facie proof that such person signed such document.

232 Article may be proved in evidence by means of photograph thereof

(1) Any court may in respect of any article, other than a document, which any party to criminal proceedings may wish to produce to the court as admissible evidence at such proceedings, permit such party to produce as evidence, in lieu of such article, any photograph thereof, notwithstanding that such article is available and can be produced in evidence.

(2) The court may, notwithstanding the admission under subsection (1) of the photograph of any article, on good cause require the production of the article in question.

This section allows for the production in evidence of a photograph of an article without requiring the production of the article itself, even if the article is available and can be so produced.

The section is particularly useful in respect of heavy objects which cannot easily be produced, but it should be noted that the court may on good cause always require the article to be produced.

The courts had previously allowed the production of such photographs as real evidence provided there was some evidence to identify the photograph as a true likeness of the article it purported to represent.

Evidence of identification may be given by someone other than the photographer.

Real Evidence

Although they fall outside the ambit of this section, the courts have received as real evidence photographs of material other than 'articles', such as places and persons, the latter frequently

in order to facilitate identification by witnesses (see **R v Jackson 1955 (4) SA 85 (SR)**; **S v Skhosana 2016 (2) SACR 456 (GJ)**).

In **S v Fuhri 1994 (2) SACR 829 (A)** the Appellate Division held that a photograph taken of a moving vehicle by a 'speed camera' was admissible even in the absence of a witness to verify that it was a true image of what had passed in front of the lens of the camera, since the reliability of the camera and its ability to measure and record speed were not in issue and it was common cause that the camera had been correctly set up and operated.

Photographs in electronic form such as are found on modern cellular phones and similar devices present particular problems, and it may be inappropriate to regard them as real evidence: See **S v Brown 2016 (1) SACR 206 (WCC)**. Because the modern cellular phone is, in reality, a mini computer, the question is considered in the context of computer-generated images.

See, however, **S v Skhosana 2016 (2) SACR 456 (GJ),** where a cell phone photograph and video footage were regarded as real evidence. Dosio AJ applied what was said by Milne JP in **S v Ramgobin & others 1986 (4) SA 117 (N)** and set out these requirements for the admissibility of a cell phone photograph:

i. it must be relevant; it must be verified as a true image of what was captured;
ii. it must be clear and not edited;
iii. it must be presented to the court to be viewed; and
iv. the device must be reliable.

The fact that a photograph constitutes real evidence does not mean that it will always be admissible. If it is tendered for a purpose that offends against the hearsay rule, for instance, some exception to the rule has to be found before it may be received.

The fact that the photograph is of poor quality will only affect the weight to be attached to the evidence, not its admissibility.

Audio and video tapes

There is some inconsistency in the manner in which the courts have dealt with video recordings.

In **S v Ramgobin & others 1986 (4) SA 117 (N)**, Milne JP found himself 'unable to see any difference, in principle, between the admissibility of an audio tape recording and a video tape recording'. For such tapes to be admissible against an accused person in criminal proceedings he found the State had to prove the following beyond reasonable doubt:

(a) that they were original;

(b) that they had not been interfered with;

(c) that they related to the occasion to which it was alleged they related;

(d) that they were faithful;

(e) that they proved the identity of the speakers; and

(f) that they were sufficiently intelligible to be placed before the trier or triers of fact.

In regard to the need for proof of accuracy, he added, there must be a witness to the event purportedly recorded who is able to testify that it accurately portrays that event. It need not be the person who made the recording but may be anyone who witnessed the event.

Ramgobin was followed in **S v Sibiya & others (unreported, KZP case no CCD11/2019, 18 August 2020) at [26]**, where the six requirements laid down by Milne JP were held to be satisfied beyond a reasonable doubt.

In **S v Mdlongwa 2010 (2) SACR 419 (SCA)**: There had been a bank robbery and one of the questions concerned the admissibility of certain video footage in which the appellant and his co-accused had been captured. The evidence was challenged on the ground that the video footage was not 'original'. The court, however, accepted that each branch of the bank had its *own* hard drive, and that the video footage in this case had been downloaded from the hard drive of this particular branch. There could be 'no question that the video footage was original and therefore constituted real evidence'. **He cited with approval what had been said in *Mpumlo*, that a video film, like a tape recording, was real evidence, as distinct from documentary evidence, and that, provided it was relevant, it could be produced as admissible evidence, subject to any dispute that might arise either as to its authenticity or interpretation.**

But he cited, too, and without disapproval, what had been said in **Ramgobin**: that, for video tape recordings to be admissible it must be *proved* that the exhibits are original recordings and that there exists no reasonable possibility of some interference with the recordings. In view of the circumstances surrounding the security of the footage, he concluded that he had 'no reason to reject the authenticity and the originality of the video footage downloaded by [X] from the surveillance cameras installed at the bank'.

One case where the video evidence clearly had been improperly dealt with *was* **S v Kotze (unreported, FB appeal no A19/2014, 11 September 2014)**. In that case the magistrate viewed the video footage outside the courtroom; viewed it alone; made certain observations without inviting comments or conveying them to the parties (including the unrepresented accused) in order to give them the opportunity to challenge or agree with the observations; set out the observations only in the judgment; allowed them to form the basis of the judgment; and failed to assist the accused throughout the process. The magistrate identified the evidence as real evidence, and recognised a duty to record observations in regard to the video footage. The observations were not, however, reflected in the record itself before judgment. There was a failure to observe the procedure described in ***Kruger v Ludick* 1947 (3) SA 23 (A)**: that such observations only became evidence if, after an invitation for comment by both sides, there was no objection from them. There was prejudice to the appellant sufficient to warrant the setting aside of his conviction.

Images on computer

One of the questions that fell to be decided in **S v Brown 2016 (1) SACR 206 (WCC)** was whether photographic images, downloaded from a cellular telephone, were to be treated as real or as documentary evidence. Bozalek J approved the views that electronic evidence such as graphics, audio and video material 'now resemble documents more than the knife and bullet

that are the traditional examples of real evidence'. They were, in data form, 'susceptible to error and falsification' and their evidential value depended 'on witnesses who can both interpret them and establish their relevance'. He concluded, then, that given the 'potential mutability and transient nature of images . . . generated, stored and transmitted by an electronic device', it was more appropriate to deal with them as documentary rather than real evidence. It was, accordingly, necessary for the State to show both the originality and the authenticity of the images.

Authenticity had not been contested, but it was necessary to consider the effect of ***s 14 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA)***, which provides that a data message satisfies the requirements of 'original form' if it meets the conditions set out in that section. These are that *(a)* the integrity of the information, from the time it was first generated in its final form as a data message, has passed *assessment* in terms of s 14(2); and *(b)* the information is capable of being displayed or produced to the person to whom it is to be presented. As to *(a)*, s 14(2) gives pointers as to how 'integrity' must be assessed. All relevant circumstances must be considered, but mention is made of 'whether the information has remained complete and unaltered' and 'the purpose for which the information was generated'.

In concluding that the requirement of 'original form' *had* been satisfied, the court took into account these considerations: there had been no suggestion of tampering on the part of the police officer who had downloaded the images; the software programme he used excluded any possibility of tampering; the images had been transferred from phone to court exhibit in no more than just a minute or two; the phone had been in lay hands, after being found on the crime scene, for no more than four hours, making it improbable that any tampering had occurred then; and, significantly, the data had been transmitted to the phone two days before the shooting, when the phone was in the possession of its original possessor. In any event, said the learned judge, ***s 15(1)(b) of ECTA*** provided exemption from the requirements of 'original form' if a data message was 'the best evidence that the person adducing it could reasonably be expected to obtain', a requirement satisfied on the facts in **Brown's** case.

233 Proof of public documents

(1) Whenever any book or other document is of such a public nature as to be admissible in evidence upon its mere production from proper custody, any copy thereof or extract therefrom shall be admissible in evidence at criminal proceedings if it is proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.

(2) Such officer shall furnish such certified copy or extract to any person applying therefor, upon payment of an amount in accordance with the tariff of fees prescribed by or under any law or, if no such tariff has been so prescribed, an amount in accordance with such tariff of fees as the Minister, in consultation with the Minister of Finance, may from time to time determine.

This section dispenses with the need to prove the authenticity of a copy of a public document provided such copy is 'examined' or 'signed and certified' in the manner prescribed in the section. The copy, however, will only be received if the original document is admissible.

Requirements:

(a) **It must have been made by a public officer**.

(b) **It must have been made in the execution of a public duty.**

(c) **It must have been made for public use.**

(d) **The public must have a right of access to it.**

As regards the admissibility of such documents, s 3 of the Law of Evidence Amendment Act liberates the courts from the tyranny of labels and mechanical rules. The fact that a document is a 'public document' does not necessarily ensure its reception, although compliance with the above four requirements might go some way to satisfying a court that the interests of justice would be promoted by admitting it (see s 3(1)(c)). Conversely, the fact that it does not comply with these requirements and is not a 'public document' will not necessarily lead to its exclusion under s 3(1).

234 Proof of official documents

(1) It shall, at criminal proceedings, be sufficient to prove an original official document which is in the custody or under the control of any State official by virtue of his office, if a copy thereof or an extract therefrom, certified as a true copy or extract by the head of the department concerned or by any State official authorized thereto by such head, is produced in evidence at such proceedings.

(2) (a) An original official document referred to in subsection (1), other than the record of judicial proceedings, may be produced at criminal proceedings only upon the order of the attorney-general.

(b) It shall not be necessary for the head of the department concerned to appear in person to produce an original document under paragraph (a), but such document may be produced by any person authorized thereto by such head.

(3) Any official who, under subsection (1), certifies any copy or extract as true knowing that such copy or extract is false, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years.

Where an original official document would be admissible a copy of it may be received provided it is certified as a true copy by the head of the department himself or a State official properly authorized by him.

If such copy is tendered to prove the truth of what it contains it is hearsay and thus inadmissible unless an appropriate exception to the rule is found to be applicable. In the absence of such an exception, however, the copy will only be received as proof of the existence of the original or for some other purpose which does not offend against the hearsay rule.

Meaning of 'official document'

An official document is one in the custody or under the control of a state official by virtue of his office (s 234(1)).

It was argued in **S v Chao 2009 (1) SACR 479 (C)** that viva voce evidence was needed to introduce the document into evidence in terms of s 234(1). This argument was rejected. The court state that there is a natural difference between a requirement that evidence be 'produced' (as this section does) and one that evidence be 'adduced'. It was not necessary for the head of department to appear in person to 'produce' a document, as the document may be 'produced' by any person so authorised or even by the prosecutor himself or herself. It is further not required that there be a witness to hand up the document: the section explicitly identifies the role of State officials with regard to official documents in their custody, and it does not refer to the role of a witness in handing up an official document as proof of its authenticity. In Chao the section was successfully invoked to allow for the production of an authorisation by the NDPP to charge an accused in terms of s 2(4) of the Prevention of Organised Crime Act 121 of 1998.

235 Proof of judicial proceedings

(1) It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be prima facie proof that any matter purporting to be recorded thereon was correctly recorded.

(2) Any person who, under subsection (1), certifies any copy as true knowing that such copy is false, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years.

Judicial proceedings may be proved by producing a copy of the record of those proceedings properly certified in terms of the requirements set out in s 235(1).

Such copy shall be prima facie proof that any matter purporting to be recorded on the record was properly recorded. The record does not, however, constitute prima facie proof of any fact it contains.

The effect of s 235(1) is that it is not necessary to call officers of the court to testify in order to prove that judicial proceedings have been correctly recorded.

Admissions made by an accused in a statement during questioning of the accused in terms of s 115 in the course of plea proceedings before a magistrate under s 119 can be proved at the subsequent trial in the Supreme Court by handing in the record of the proceedings before the magistrate as an exhibit under s 122(4) read with s 235.

RECORD OF BAIL APPLICATION – ADMISSIBILITY AT TRIAL

In the pre-Constitutional era it had been held that the record of the evidence of a bail application brought by an accused, was, in terms of s 235, admissible against him at his subsequent trial and was not affected by the privilege against self-incrimination as contained in s 203.

S v Nomzaza 1996 (2) SACR 14, the court made the following important points: First, that the evidence given by the accused will only be admissible in terms of s 235 if it is otherwise admissible—if, that is, it is not hit by some other exclusionary principle; second, that each case must be handled on its own facts; and third, that, in the light of the Constitution, there may be cases where the accused will not receive a fair trial if the bail proceedings are received against him at his subsequent trial.

In **S v Nyengane en andere 1996 (2) SACR 520 (E)** the record of the bail application was held to be inadmissible at the subsequent trial. One of the reasons for this decision was that the magistrate at the bail proceedings had failed to warn the accused that they were not obliged to answer questions that might have been self-incriminating (see notes to s 203) and to inform them of the position regarding the burden of proof: (the accused had, in fact been represented, but it was held that the inexperience and ignorance of their legal representative should not count against them).

Section 60(11B)(c) of the CPA provides for the admissibility of evidence given by the accused in bail proceedings. The status of evidence received under this section was considered by the Supreme Court of Appeal in **S v Machaba & another 2016 (1) SACR 1 *(SCA)***. Handing in a bail application in terms of s 60(11B)(c), said the court, 'is a shortcut to achieving the same object as provided for in s 235 of the CPA', and this 'has the effect that the record is prima facie proof that any matter recorded on the record was properly recorded'. The record 'does not, however, constitute prima facie proof of any fact it contains'. See, too, **Director of Public Prosecutions, Transvaal v Viljoen 2005 (1) SACR 505 (SCA)**, where Streicher JA said that it did not follow from the fact that the record of bail proceedings forms part of the record of the trial that evidence adduced during those proceedings must be treated as if that evidence had been adduced and received at the trial. The record of the bail proceedings, he added, 'remains what it is, namely a record of what transpired during the bail application'.

It was argued before the Constitutional Court in **S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC)** that s 60(11B)(c) infringed the right of an accused not to incriminate himself. The court held that although there was a certain tension between the right of an accused to make out a case for release on bail by adducing all the supporting evidence and the battery of rights under s 35(1) and (3) of the Constitution, that tension was not unique to applicants for bail, and its mere existence did not 'sound constitutional alarm bells'. The court added that choices often had to be faced by people living in open and democratic societies, and such choices were often hard. An accused had to take many key decisions as to whether to speak or to remain silent; but the choice remained that of the accused. Although the policy was that the prosecution had to prove its case without the accused being compelled to furnish supporting evidence, the right to silence was in no way impaired if the accused, acting freely and in the exercise of an informed choice, elected to testify in support of a bail application. Nor would it be impaired (retrospectively) if the testimony so given were subsequently held against the accused. Provided trial courts remained alert to their duty to exclude evidence that would impair the fairness of the proceedings before them, there could be no risk that evidence unfairly elicited at bail hearings could be used to undermine the right to be tried fairly. The court held, therefore, that the court in Botha had gone unnecessarily far in creating a broad and radical remedy for an ill that could and should have been treated conservatively and selectively (as suggested in **Nomzaza** in respect of the pre-constitutional position**). There is, thus, in short, no warrant for creating a general rule**

for excluding such evidence: it is for the trial court, rather, to decide whether a valid objection exists to its reception in a specific case. It 'follows that there is no inevitable conflict between s 60(11B)(c) of the CPA and any provision of the Constitution'

In **S v Porthen & others 2004 (2) SACR 242 (C)** the court held that the probable effect of a failure to advise accused of the fact that their evidence at the bail hearing might be used against them at their trial was to render their evidence at the bail hearing inadmissible against them at the trial.

In **S v Agliotti 2012 (1) SACR 559 (GSJ)**, the 'warning in terms of s 60(11B)(c) is an important constitutional safeguard that impacts directly on whether an accused person receives a fair trial'.

Where it is the defence that introduces the contents of the bail proceedings into the trial, such as may happen when there is an admission made under s 220 or reference to or use of parts of the record of those proceedings during the cross-examination of a State witness, the accused may lose his shield in this regard: **S v Balkwell & another 2006 (1) SACR 60 (N)**.

The Constitutional Court, in **S v Basson 2007 (1) SACR 566 (CC)**, considered the role of an appeal court faced with a decision as to whether to interfere with a trial court's discretionary powers to exclude the bail record. In Basson the trial court had held that the admission of the bail record as evidence in the criminal trial would result in an unfair trial and excluded the evidence. It relied on a range of considerations, in particular the fact that the prosecutor had acted unfairly in the bail proceedings by preventing the accused from having access to documents in the State's possession and the fact that much of the questioning of the accused in the bail hearing was undertaken solely for the purpose of laying a foundation for cross-examination in the subsequent trial (since the accused had already conceded that the State had a prima facie case against him). The Constitutional Court dismissed an appeal against this decision.

NOTE FOR PRACTICE:

Prosecutors should always ensure that the proceedings are fair – to the accused and the State.

Prosecutors should be aware that the record of the Bail Application may become admissible at trial and request that the court follow the correct procedure.

It is the duty of the magistrate to warn the accused of his rights and inform the accused that the record may be used at the subsequent trial – however, a diligent prosecutor must ensure that the magistrate duly warns the accused.

Further, a prosecutor should ensure that the cross examination at the stage of Bail Application is not directed at the purpose of gaining ammunition to be used at trial.

236 Proof of entries in accounting records and documentation of banks

(1) The entries in the accounting records of a bank, and any document which is in the possession of any bank and which refers to the said entries or to any business transaction of the bank, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges—

(a) that he is in the service of the bank in question;

(b) that such accounting records or document is or has been the ordinary records or document of such bank [sic];

(c) that the said entries have been made in the usual and ordinary course of the business of such bank or the said document has been compiled, printed or obtained in the usual and ordinary course of the business of such bank; and

(d) that such accounting records or document is in the custody or under the control of such bank [sic],
be prima facie proof at such proceedings of the matters, transactions and accounts recorded in such accounting records or document.

(2) Any entry in any accounting record referred to in subsection (1) or any document referred to in subsection (1) may be proved at criminal proceedings upon the mere production at such proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges—

(a) that he is in the service of the bank in question;

(b) that he has examined the entry, accounting record or document in question; and

(c) that a copy of such entry or document set out in the affidavit or in an annexure thereto is a correct copy of such entry or document.

(3) Any party at the proceedings in question against whom evidence is adduced in terms of this section or against whom it is intended to adduce evidence in terms of this section, may, upon the order of the court before which the proceedings are pending, inspect the original of the document or entry in question and any accounting record in which such entry appears or of which such entry forms part, and such party may make copies of such document or entry, and the court shall, upon the application of the party concerned, adjourn the proceedings for the purpose of such inspection or the making of such copies.

(4) No bank shall be compelled to produce any accounting record referred to in subsection (1) at any criminal proceedings, unless the court concerned orders that any such record be produced.

(5) In this section—

***'document'** includes a recording or transcribed computer printout produced by any mechanical or electronic device and any device by means of which information is recorded or stored; and*

***'entry'** includes any notation in the accounting records of a bank by any means whatsoever.*

The effect of this section is that in criminal proceedings entries in accounting records and documentation of banks are *prima facie* proof of their contents upon the production of an affidavit that complies with the requirements as set out in s 1*(a)* to *(d)* and s 2*(a)* to *(c)*.

Requirements

Accounting records and documents in the possession of a bank shall be admissible in evidence in terms of s 236(1) of the CPA provided they are accompanied by **an affidavit** by a person stating that

(a) they are in the service of the bank;

(b) they are ordinary records and documents of the bank;

(c) the entries have been made and the documents compiled, printed or obtained in the usual and ordinary course of the business of the bank;

(d) the records or documents are in the custody or under the control of the bank.

An entry, record or documents will constitute proof of its contents if accompanied by an affidavit in which the deponent states that: she is in the service of the bank, that she has examined the entry or record and that the attached copy is a correct copy.

The person against whom such records and documents are admitted, may inspect the record or document.

A bank can only be compelled to produce such records and documents by an order of court.

236A Proof of entries in accounting records and documentation of banks in countries outside Republic

(1) The entries in the accounting records of an institution in a state or territory outside the Republic which is similar to a bank in the Republic, and any document which is in the possession of such an institution and which refers to the said entries or to any business transaction of the institution, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges—

(a) that he is in the service of the institution in question;

(b) that such accounting records or document are or were the ordinary records or document of the institution;

(c) that the said entries have been made in the usual and ordinary course of the business of such institution; and

(d) that such accounting records are or document is in the custody or under the control of such institution,

be prima facie proof at such proceedings of the matters, transactions and accounts recorded in such accounting records or document.

(2) Any entry in any accounting record contemplated in subsection (1) or any document contemplated in subsection (1) may be proved at criminal proceedings upon the mere production at such proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges—

(a) that he is in the service of the institution in question;

(b) that he has examined the entry, accounting record or document in question; and

(c) that a copy of such entry or document set out in the affidavit or in an 0annexure thereto is a correct copy of such entry or document.

(3) A document purporting to be an affidavit shall for the purposes of this section have no effect unless—

(a) it is obtained in terms of an order of a competent court or on the authority of a competent government institution of the state or territory concerned, as the case may be;

(b) it is authenticated in the manner prescribed in the rules of court for the authentication of documents executed outside the Republic; or

(c) it is authenticated by a person, and in the manner, contemplated in section 8 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963).

(4) The admissibility and evidentiary value of an affidavit contemplated in subsections (1) and (2) shall not be affected by the fact that the form of the oath, confirmation or attestation thereof differs from the form of the oath, confirmation or attestation prescribed in the Republic.

(5) A court before which an affidavit contemplated in subsections (1) and (2) is placed may, in order to clarify obscurities in the said affidavit, on the request of a party to the proceedings order that a supplementary affidavit be submitted or that oral evidence be heard: Provided that oral evidence shall only be heard if the court is of the opinion that it is in the interests of the administration of justice and that a party to the proceedings would be materially prejudiced should oral evidence not be heard.

(6) In this section—

*'**document'** includes a recording or transcribed computer printout produced by any mechanical or electronic device and any device by means of which information is recorded or stored; and*

***'entry'** includes any notation, by any means whatsoever, in the accounting records of an institution contemplated in subsection (1).*

Proof of entries in accounting records and documentation of banks in countries outside the Republic are regulated by s 236A of the CPA.

The requirements as set out in s236 (above) are applicable

Sub-sections (3) (4) (5) are equivalents to the relevant sub-sections of s212A - the requirements set out in s212A are also applicable.

237 Evidence on charge of bigamy

(1) At criminal proceedings at which an accused is charged with bigamy, it shall, as soon as it is proved that a marriage ceremony, other than the ceremony relating to the alleged bigamous marriage, took place within the Republic between the accused and another person, be presumed, unless the contrary is proved, that the marriage was on the date of the solemnization thereof lawful and binding.

(2) At criminal proceedings at which an accused is charged with bigamy, it shall be presumed, unless the contrary is proved, that at the time of the solemnization of the alleged bigamous marriage there subsisted between the accused and another person a lawful and binding marriage—

(a) if there is produced at such proceedings, in any case in which the marriage is alleged to have been solemnized within the Republic, an extract from the marriage register which purports—

(i) to be a duplicate original or a copy of the marriage register relating to such marriage; and

(ii) to be certified as such a duplicate original or such a copy by the person having the custody of such marriage register or by a registrar of marriages;

(b) if there is produced at such proceedings, in any case in which the marriage is alleged to have been solemnized outside the Republic, a document which purports—

(i) to be an extract from a marriage register kept according to law in the country where the marriage is alleged to have been solemnized; and

(ii) to be certified as such an extract by the person having the custody of such register, if the signature of such person on the certificate is authenticated in accordance with any law of the Republic governing the authentication of documents executed outside the Republic.

(3) At criminal proceedings at which an accused is charged with bigamy, evidence—

(a) that shortly before the alleged bigamous marriage the accused had been cohabiting with the person to whom he is alleged to be lawfully married;

(b) that the accused had been treating and recognizing such person as a spouse; and

(c) of the performance of a marriage ceremony between the accused and such person,

shall, as soon as the alleged bigamous marriage, wherever solemnized, has been proved, be prima facie proof that there was a lawful and binding marriage subsisting between the accused and such person at the time of the solemnization of the alleged bigamous marriage.

This section creates three presumptions to assist the State on a charge of bigamy.

It must be emphasized at the outset, however, that the first and second of these presumptions (contained in subsections (1) and (2)) have the effect of placing an onus on the accused (the onus in its true and primary sense, that is). They are, therefore, unlikely to survive a constitutional challenge, since they fly in the face of the presumption of innocence set out in s 35(3)*(h)*.

Section 237(1)

Once it is shown that a previous marriage ceremony took place within the Republic between the accused and another person it will be presumed that this previous marriage was lawful and binding on the date of its solemnization. There is no mention of the continuation of the marriage in this presumption, merely that it was lawful at the time it was solemnized. Before this presumption may be invoked it must at least be shown that the ceremony was solemnized by a competent marriage officer **(R v Damons 1952 (1) PH H47 (C))**. The effect of the words 'unless the contrary is proved' is that the accused bears the onus of proving that this previous marriage was not lawful and binding.

Section 237(2)

On the production of an extract from a marriage register which complies with the respective requirements of paragraphs *(a)* and *(b)* and which purports to record a marriage between the accused and another person it will be presumed unless the contrary is proved that those parties were lawfully married at the time the alleged bigamous marriage was solemnized. This subsection therefore creates a presumption of continuity and it places the onus on the accused to prove that the previous marriage has been terminated. The requirements relating to the extract from the marriage register are different according to whether the marriage is alleged to have been solemnized within the Republic (see para *(a)*) or outside the Republic (see para *(b)*).

Section 237(3)

This subsection also creates a presumption of continuity, but its *effect* differs from subsec (2) in that it places on the accused a duty to adduce evidence rather that the onus in its primary sense. This presumption will therefore usually be invoked where the certificate required under subsec (2) cannot be procured. In order to avail itself of this presumption the prosecution need only provide *evidence*—as opposed to *proof*—of the matters contained in

paras *(a)*, *(b)* and *(c)*. Failure to furnish evidence on any one of these items is, however, fatal to the prosecution's cause. Furthermore, the presumption may only be invoked when such evidence is joined by proof of the alleged bigamous marriage.

238 Evidence of relationship on charge of incest

(1) At criminal proceedings at which an accused is charged with incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007—

(a) it shall be sufficient to prove that the person against whom or by whom the offence is alleged to have been committed, is reputed to be the lineal ascendant or descendant or the sister, brother, stepmother, stepfather, stepdaughter or stepson of the other party to the incest;

(b) the accused shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

(2) Whenever the fact that any lawful and binding marriage was contracted is relevant to the issue at criminal proceedings at which an accused is charged with incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, such fact may be proved prima facie in the manner provided in section 237 for the proof of the existence of a lawful and binding marriage of a person charged with bigamy.

Incest is sexual intercourse between persons who are not allowed to be married to each other owing to their relationship.

Intent is required for conviction, which means that the accused must be aware of the relationship, although there is a rebuttable presumption in paragraph (*b*) that he or she was in fact aware.

If both parties were aware, they are accomplices.

Section 238 was amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 to include a reference to the definition of incest in section 12 of Act 32 of 2007, and to make it clear that incest can also be committed against a male.

Section 12 of Act 32 of 2007 - *(2) For the purposes of subsection (1)-*

(a) the prohibited degrees of consanguinity (blood relationship) are the following:

(i) Ascendants and descendants in the direct line; or

(ii) collaterals, if either of them is related to their common ancestor in the first degree of descent;

(b) the prohibited degrees of affinity are relations by marriage in the ascending and descending line; and

(c) an adoptive relationship is the relationship of adoption as provided for in any other law.

Incest – Authorisation of the National Director of Public Prosecutions

It is important to note that in terms of s12(3) of Act 32 of 2007 - The institution of a prosecution of a person who is a child at the time of the alleged commission of the offence of incest must be authorised in writing by the National Director of Public Prosecutions.

239 Evidence on charge of infanticide or concealment of birth

(1) At criminal proceedings at which an accused is charged with the killing of a newly-born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.

(2) At criminal proceedings at which an accused is charged with the concealment of the birth of a child, it shall not be necessary to prove whether the child died before or at or after birth.

Section 239(1): Infanticide

What is a 'newly born child' for the purposes of s 239(1)? In **R v Adams 1929 CPD 452** a child between three and four weeks' old was held not to be newly born for the purpose of s 338 of Act 31 of 1917 which empowered a judge to pass a sentence other than the death sentence upon a woman convicted of murdering her newly born child. In **R v Belliana Mackinini 1931 WLD 20**, however, a ten-day-old child was held to be newly born for the purpose of that section.

Infanticide is a term which refers to the murder of a new born baby. The crime of murder requires proof that the accused killed a human being. A person must have been alive before a death can be caused.

A child which has allegedly been killed is deemed to have been born alive if it is proved that the child breathed. This can be proved by medical evidence

Section 239(2): Concealment of birth

Section 113(1) of the General Law Amendment Act 46 of 1935, as amended by the Judicial Matters Amendment Act 66 of 2008, provides that

'any person who without a lawful burial order, disposes of the body of any newly born child with the intention to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence'.

The elements of this offence are thus

(a) a disposal

(b) of the dead body

(c) of a newly born child

(d) with intent to conceal the fact of birth.

This section is concerned with the disposal of the body of the newly born child. It is not necessary to prove that the child was born alive or that the child was alive at any time before the body was disposed.

The disposal of a baby that was still-born is sufficient for this section to apply.

Concealment of birth: DPP's written authorisation required

It should be noted that a prosecution for contravention of s 113(1) must in terms of s 113(3) be authorised in writing by the Director of Public Prosecutions having jurisdiction.

240 Evidence on charge of receiving stolen property

(1) At criminal proceedings at which an accused is charged with receiving stolen property which he knew to be stolen property, evidence may be given at any stage of the proceedings that the accused was, within the period of twelve months immediately preceding the date on which he first appeared in a magistrate's court in respect of such charge, found in possession of other stolen property: Provided that no such evidence shall be given against the accused unless at least three days' notice in writing has been given to him that it is intended to adduce such evidence against him.

(2) The evidence referred to in subsection (1) may be taken into consideration for the purpose of proving that the accused knew that the property which forms the subject of the charge was stolen property.

(3) Where the accused is proved to have received the property which is the subject of the charge, from a person under the age of eighteen years, he shall be presumed to have known at the time when he received such property that it was stolen property, unless it is proved—

(a) that the accused was at that time under the age of twenty-one years; or

(b) that the accused had good cause, other than the mere statement of the person from whom he received such property, to believe, and that he did believe, that such person had the right to dispose of such property.

As a general rule evidence of an accused's prior misconduct is admissible in criminal proceedings.

As discussed in s227 – the bad character of the accused may not be used by the State.

Further, the prosecution is generally prohibited from disclosing the accused's previous convictions (see s 211)

The section assists the prosecution by permitting the reception of evidence which might otherwise be inadmissible (sub-ss (1) and (2)) and by creating a presumption as to the accused's guilty knowledge (sub-s (3)). The constitutional status of sub-s (3) has not yet been evaluated.

The provisions of this section were a response to the difficulty of proving the requisite *mens rea* on charges of receiving stolen property knowing it to be stolen. Further assistance to the

prosecution is furnished by s 197*(c)* which provides that the accused may be required to answer questions relating to his bad character or previous convictions where the proceedings against him are such as are described in s 240 or 241 (see the notes to s 197).

Section 240(1)

The presumption of guilty knowledge created in this subsection may not be invoked where the accused proves

(a) that he was himself under twenty-one years of age at the relevant time or

(b) that he had good cause to believe and that he did believe that the person from whom he received the property had the right to dispose of it.

Section 240(1) and (2)

Where an accused is charged with receiving stolen property knowing it to be stolen the prosecution may lead evidence that he was within the twelve months prior to his first appearance on the charge in question found in possession of other stolen property (s 240(1)). Such evidence may be used to prove that the accused knew that the property which forms the subject of the charge was stolen (s 240(2)). Where the requirements of this section are not satisfied, for example where the State tenders evidence that the accused was found in possession of other stolen property *fifteen* months before he first appeared on the present charge, such evidence may nevertheless be admissible in terms of the similar fact rule (see the notes to s 210). While these provisions assist the State in proving the accused's guilty knowledge it is clear that such knowledge may also be inferred from the circumstances.

241 Evidence of previous conviction on charge of receiving stolen property

If at criminal proceedings at which an accused is charged with receiving stolen property which he knew to be stolen property, it is proved that such property was found in the possession of the accused, evidence may at any stage of the proceedings be given that the accused was, within the five years immediately preceding the date on which he first appeared in a magistrate's court in respect of such charge, convicted of an offence involving fraud or dishonesty, and such evidence may be taken into consideration for the purpose of proving that the accused knew that the property found in his possession was stolen property: Provided that not less than three days' notice in writing shall be given to the accused that it is intended to adduce evidence of such previous conviction.

This section, similar to s240 provides the prosecution with the means to prove *mens rea (guilty mind).*

The two provisions differ, however, in the following respects:

(a) Only evidence of a conviction may be received in terms of s 241. Section 240(1), on the other hand, allows the prosecution to show that the accused was 'found in possession of other stolen property'. The scope of the former provision is, however, broadened by allowing a conviction of *any* offence involving fraud or dishonesty to be proved.

(b) The reception of the evidence described in s 241 is conditional upon proof that the property which forms the subject of the charge was found in possession of the accused. Section 240(1) contains no such condition.

(c) A conviction may be proved in terms of s 241 if it fell within the period of five years immediately preceding the date on which the accused first appeared in a magistrate's court on the charge in question. The corresponding period in s 240(1) is only twelve months.

Section 241 only applies where an accused is charged with receiving stolen property knowing it to be stolen. It does not apply to a charge of theft or other related offences.

242 Evidence on charge of defamation

If at criminal proceedings at which an accused is charged with the unlawful publication of defamatory matter which is contained in a periodical, it is proved that such periodical or the part in which such defamatory matter is contained, was published by the accused, other writings or prints purporting to be other numbers or parts of the same periodical, previously or subsequently published, and containing a printed statement that they were published by or for the accused, shall be admissible in evidence without further proof of their publication.

243 Evidence of receipt of money or property and general deficiency on charge of theft

(1) At criminal proceedings at which an accused is charged with theft—
(a) while employed in any capacity in the service of the State, of money or of property which belonged to the State or which came into the possession of the accused by virtue of his employment;
(b) while a clerk, servant or agent, of money or of property which belonged to his employer or principal or which came into the possession of the accused on account of his employer or principal,
an entry in any book of account kept by the accused or kept under or subject to his charge or supervision, and which purports to be an entry of the receipt of money or of property, shall be proof that such money or such property was received by the accused.

(2) It shall not be necessary at proceedings referred to in subsection (1) to prove the theft by the accused of a specific sum of money or of specific goods, if—
(a) on the examination of the books of account kept or the entries made by the accused or under or subject to his charge or supervision, there is proof of a general deficiency; and
(b) the court is satisfied that the accused stole the money or goods so deficient or any part thereof.

This section aims to overcome the difficulty of proving *(a)* the receipt in certain cases of allegedly stolen money or property by an accused person who is in the service of the State or who is a clerk, servant or agent of another and *(b)* the specific amount of money or the specific

goods actually stolen where such money or goods were stolen over a period in different amounts or numbers.

The section facilitates the proof of such matters in the following ways:

(a) Subsection (1) provides that an entry in any book of account kept by or subject to the charge of such person and which purports to be an entry of the receipt of money or property shall be 'proof' of the receipt of such money or property by the accused.

(b) Subsection (2) dispenses with the need to prove the specific sum of money or specific goods stolen if on an examination of the books of account there is proof of a general deficiency and it is proved that the accused stole the money or goods in question or any part thereof.

244 Evidence on charge relating to seals and stamps

At criminal proceedings at which an accused is charged with any offence relating to any seal or stamp used for the purposes of the public revenue or the post office in any foreign country, a despatch purporting to be from the officer administering the government of such country and transmitting to the State President any stamp, mark or impression and stating it to be a genuine stamp, mark or impression of a die-plate or other instrument provided or made or used by or under the direction of the proper authority of such country for the purpose of denoting stamp duty or postal charge, shall on its mere production at such proceedings be prima facie proof of the facts stated in the despatch.

245 Evidence on charge of which false representation is element

If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false.

This section was held to be unconstitutional in **S v Coetzee & others 1997 (1) SACR 379 *(CC)***. The Constitutional Court held that, since the effect of the presumption was to oblige a court to convict an accused where the probabilities were evenly balanced and where there was a reasonable doubt as to whether the accused in fact had the requisite knowledge, the presumption fell into 'the class of "reverse onus" provisions which have been held by this Court to infringe the right of an accused person to be presumed innocent as envisaged in s 25(3)(c) of the [interim] Constitution' (now s 35(3)(h) of the final Constitution) (at para 6). The function and effect of the presumption was to relieve the prosecution of the burden of proving one of the essential elements of the offence—knowledge of the falseness of the representation. It was, therefore, in conflict with the long-established rule of the common law that it was for the prosecution to prove the guilt of the accused beyond a reasonable doubt, and it clearly infringed the constitutionally entrenched presumption of innocence.

246 Presumptions relating to certain documents

Any document, including any book, pamphlet, letter, circular letter, list, record, placard or poster, which was at any time on premises occupied by any association of persons, incorporated or unincorporated, or in the possession or under the control of any office-bearer, officer or member of such association, and—

(a) on the face whereof a person of a name corresponding to that of an accused person appears to be a member or an office-bearer of such association, shall, upon the mere production thereof by the prosecution at criminal proceedings, be prima facie proof that the accused is a member or an office-bearer of such association, as the case may be;

(b) on the face whereof a person of a name corresponding to that of an accused person who is or was a member of such association, appears to be the author of such document, shall, upon the mere production thereof by the prosecution at criminal proceedings, be prima facie proof that the accused is the author thereof;

(c) which on the face thereof appears to be the minutes or a copy of or an extract from the minutes of a meeting of such association or of any committee thereof, shall, upon the mere production thereof by the prosecution at criminal proceedings, be prima facie proof of the holding of such meeting and of the proceedings thereat;

(d) which on the face thereof discloses any object of such association, shall, upon the mere production thereof by the prosecution at criminal proceedings, be prima facie proof that the said object is an object of such association.

This section has not been a subject of a constitutional court decision (as yet), however, it is likely to be found to offend against the rights of the accused by placing a "reverse onus" of burden of proof. It is likely to be deemed unconstitutional – similar to s245.

247 Presumptions relating to absence from Republic of certain persons

Any document, including any newspaper, periodical, book, pamphlet, letter, circular letter, list, record, placard or poster, on the face whereof it appears that a person of a name corresponding to that of an accused person has at any particular time been outside the Republic or has at any particular time made any statement outside the Republic, shall, upon the mere production thereof by the prosecution at criminal proceedings, be prima facie proof that the accused was outside the Republic at such time or, as the case may be, that the accused made such statement outside the Republic at such time, if such document is accompanied by a certificate, purporting to have been signed by the Secretary for Foreign Affairs, to the effect that he is satisfied that such document is of foreign origin.

This section creates another exception to the rule against hearsay (see the notes to s 216) in that a document which satisfied the requirements of the section constitutes prima facie proof that the accused was absent from the Republic or made a statement outside the Republic at the time indicated on the face of that document.

Once the document is received the accused bears the burden of adducing contrary evidence, but this does not affect the incidence of the primary onus. Whether this is enough to save the section from constitutional invalidity remains to be seen.

248 Presumption that accused possessed particular qualification or acted in particular capacity

(1) If an act or an omission constitutes an offence only when committed by a person possessing a particular qualification or quality, or vested with a particular authority or acting in a particular capacity, an accused charged with such an offence upon a charge alleging that he possessed such qualification or quality or was vested with such authority or was acting in such capacity, shall, at criminal proceedings, be deemed to have possessed such

qualification or quality or to have been vested with such authority or to have been acting in such capacity at the time of the commission of the offence, unless such allegation is at any time during the criminal proceedings expressly denied by the accused or is disproved.

(2) If such allegation is denied or evidence is led to disprove it after the prosecution has closed its case, the prosecution may adduce any evidence and submit any argument in support of the allegation as if it had not closed its case.

This section creates a presumption that relieves the prosecution of the burden of adducing evidence as to the qualification, authority or capacity of the accused where this quality constitutes an essential element of the offence with which he is charged.

Once the allegation is denied the presumption falls away and the State is obliged to adduce evidence to establish the requisite qualification, capacity or authority.

An unusual feature of this presumption is that it may be rebutted by a mere denial that the accused possessed the alleged qualification, authority or capacity as well as by the customary mode of furnishing proof to the contrary. Such a denial must, however, be expressly made.

This aspect of the 'reverse onus' may save the section from constitutional invalidity, although this cannot be regarded as certain.

249 Presumption of failure to pay tax or to furnish information relating to tax

When an accused is at criminal proceedings charged with any offence of which the failure to pay any tax or impost to the State, or of which the failure to furnish to any officer of the State any information relating to any tax or impost which is or may be due to the State is an element, the accused shall be deemed to have failed to pay such tax or impost or to furnish such information, unless the contrary is proved.

The presumption created by this section applies to any offence of which the failure to pay tax or the failure to furnish information to an officer of the state relating to tax is an element.

250 Presumption of lack of authority

(1) If a person would commit an offence if he—

(a) carried on any occupation or business;

(b) performed any act;

(c) owned or had in his possession or custody or used any article; or

(d) was present at or entered any place,

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the 'necessary authority'), an accused shall, at criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.

(2) (a) Any peace officer and, where any fee payable for the necessary authority would accrue to the National Revenue Fund or the Railway and Harbour Fund or a provincial revenue fund, any person authorized thereto in writing by the head of the relevant department or sub-department or by the officer in charge of the relevant office, may demand the production from a person referred to in subsection (1) of the necessary authority which is appropriate.

(b) Any peace officer, other than a police official in uniform, and any person authorized under paragraph (a) shall, when demanding the necessary authority from any person, produce at the request of that person, his authority to make the demand.

(3) Any person who is the holder of the necessary authority and who fails without reasonable cause to produce forthwith such authority to the person making the demand under subsection (2) for the production thereof, or who fails without reasonable cause to submit such authority to a person and at a place and within such reasonable time as the person making the demand may specify, shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

That section relieves the State of the burden of having to specify, negative or prove 'any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence'

The section is applicable in circumstances where a person requires a licience or authority to perform a specific function or carry out a specific business. Eg driving a motor vehicle; possession of a firearm; or practicing as a medical practitioner, etc.

The effect of subsection(1) is that if a person would commit an offence if he engaged in any of the activities specified in paras *(a)–(d)* without being the holder of the 'necessary authority' (as defined) he will, if he is charged with the commission of that offence, be deemed not to have been the holder of such authority unless the contrary is proved. The onus thus rests on the accused to establish on a balance of probabilities that he was the holder of the necessary authority.

A constitutional challenge to the validity s 250(1) on the basis that the subsection violated the presumption of innocence by creating an unacceptable 'reverse onus' failed in **S v Fransman 2000 (1) SACR 99 (W)** for the following reasons:

(1) The presumption in s 250(1) does not place the entire onus on the accused;

(2) it is easy for an accused to discharge the onus, so that there is no chance of his being convicted if he is innocent;

(3) the question as to whether the accused has the requisite licence or authority is peculiarly within his knowledge

(4) the presumption is both rebuttable and reasonable in view of the ease with which a licence may be produced compared to the time and effort which the state would have to invest in order to prove its non-existence; and

(5) the fact that the presumption is justified by important legislative objectives such as controlling the possession of unlicensed firearms.

251 Unstamped instrument admissible in criminal proceedings

An instrument liable to stamp duty shall not be held inadmissible at criminal proceedings on the ground only that it is not stamped as required by law.

252 The law in cases not provided for

The law as to the admissibility of evidence which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law.

252A Authority to make use of traps and undercover operations and admissibility of evidence so obtained

(1) Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).

(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:

(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;

(b) the nature of the offence under investigation, including—

(i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(ii) the prevalence of the offence in the area concerned; and

(iii) the seriousness of such offence;

(c) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;

(d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;

(e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;

(f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;

(g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;

(h) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;

(i) whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;

(j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;

(k) any threats, implied or expressed, by the official or his or her agent against the accused;

(l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;

(m) whether the official of his or her agent acted in good or bad faith; or

(n) any other factor which in the opinion of the court has a bearing on the question.

(3) (a) If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:

(i) The nature and seriousness of the offence, including—

(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public the maintenance of public order or the national economy is seriously threatened thereby;

(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;

(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or

(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;

(ii) the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to—

(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;

(bb) the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution;

(iv) whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and

(v) any other factor which in the opinion of the court ought to be taken into account.

(4) An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.

(5) (a) An official or his or her agent who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, shall not be criminally liable in respect of any act which constitutes an offence and which relates to the trap or undercover operation if it was performed in good faith.

(b) No prosecution for an offence contemplated in paragraph (a) shall be instituted against an official or his or her agent without the written authority of the attorney-general.

(6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence.

(7) The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute.

This section regulates the procedure for engaging in traps or undercover operations.

***S v Kotzé* 2010 (1) SACR 100 (SCA)** the court noted that the section applies:

a. *only* to those carried out by a 'law enforcement officer, official of the State or any other person authorised thereto for such purpose'; and,
b. *only* those carried out 'in order to detect, investigate or uncover the commission of an offence or to prevent the commission of any offence'

No substantive defence of entrapment was created by this section. However, following the general recommendations made by the South African Law Commission, the legislature opted for a qualified rule of exclusion.

Section 252A(3)*(a)* — which must be read with s 252A(1) and 252A(2) — provides as follows:

"If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation ***the conduct goes beyond providing an opportunity to commit an offence****,* the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, *if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice*."

To avoid the conviction of people who are victims of unfair or improper trapping or undercover operations the section creates, not a defence of entrapment, but an evidentiary rule that is predicated upon a distinction between two classes of conduct engaged in by traps or undercover operations: *(a)* conduct that 'does not go beyond providing an opportunity to commit an offence' (sub-s (1)); and *(b)* conduct that does. Evidence obtained in the course of conduct of the which does not go beyond creating an opportunity to commit an offence 'shall be admissible' (sub-s (1)); whereas the admissibility of evidence obtained in the course of conduct which does go beyond the creating an opportunity to commit an offence, is made the subject of a judicial discretion set out in sub-s (3)*(a)*, according to which a court 'may' exclude such evidence 'if the evidence was obtained in an improper or unfair manner and the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice'

Section 252A(3)*(b)* stipulates that the court — when considering the admissibility of the evidence — "shall weigh up the public interest against the personal interest of the accused". The same section also requires the court to have regard to several factors, if applicable. These factors are set out in s 252A(3)*(b)*(i) to 252A(3)*(b)*(vi).

Section 252A(3)*(b)*(iii) provides that one of the factors the court is required to consider, is "the nature and seriousness of any infringement of any fundamental right contained in the Constitution."

Section 252A(6) provides that if the question is raised whether entrapment evidence should in terms of s 252A(3)*(a)* be excluded,

"the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence."

S v Kotzé 2010 (1) SACR 100 (SCA) the court stressed that it was important for presiding officers faced with challenges to the admissibility of the evidence of a trap to be aware of and apply the requirement that the accused must furnish the grounds on which the admissibility of the evidence is challenged.

The question whether evidence should be excluded in terms of s 252A(3)*(a)*, may — on application of the accused or the prosecution, or by order of the court mero motu — be adjudicated as a separate issue in dispute, that is, by having a trial within a trial.

It should be noted that the discretionary rule of exclusion created by s 252A(3)*(a)*, remains subject to the provisions of s 35(5) of the Constitution.

Evidence obtained as a result of a trap or undercover operation which went beyond creating an opportunity to commit an offence, may still in the discretion of the court be deemed admissible. However, where the entrapment evidence was unconstitutionally obtained, the provisions of s 35(5) must prevail: the court *must* exclude the evidence if it is satisfied that admission would result in one of the consequences identified in s 35(5).

Note: All traps and undercover operations must be authorized by the Director of Public Prosecutions in the specific division. Written authorisation must be granted by the DPP prior to commencement of the trap or undercover operation.
There are specific guidelines for the application and authorization of traps and undercover operations and prosecutors must ensure that the guidelines are followed.

253 Saving of special provisions in other laws

No provision of this Chapter shall be construed as modifying any provision of any other law whereby in any criminal proceedings referred to in such law certain specified facts and circumstances are deemed to be evidence or a particular fact or circumstance may be proved in a manner specified therein.

254 . . .*[S 254 repealed by s 99(1) of Act 75 of 2008.]*

The repeal of s 254 of the Act and the provisions of the Child Justice Act 75 of 2008

The repealed s 254 of the Act gave the court the power to refer a juvenile accused to a children's court in certain circumstances. With effect from 1 April 2010, the position is governed by ss 50 and 64 of the Child Justice Act 75 of 2008. Section 64 provides as follows:

'64 Referral of children in need of care and protection to children's court

If it appears to the presiding officer during the course of proceedings at a child justice court that a child is a child in need of care and protection referred to in section 50, the court must act in accordance with that section.'

Section 50 of Act 75 of 2008 provides as follows:

'50 Referral of children in need of care and protection to children's court

If it appears to the inquiry magistrate during the course of a preliminary inquiry that—

(a) a child is in need of care and protection referred to in section 150(1) or (2) of the Children's Act, and it is desirable to deal with the child in terms of sections 155 and 156 of that Act; or

(b) the child does not live at his or her family home or in appropriate alternative care; or

(c) the child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth,

the inquiry magistrate may stop the proceedings and order that the child be brought before a children's court referred to in section 42 of that Act and that the child be dealt with under the said sections 155 and 156.'

255 Court may order enquiry under Prevention and Treatment of Drug Dependency Act, 1992

(1) (a) If in any court during the trial of a person who is charged with an offence other than an offence referred to in section 18, it appears to the judge or judicial officer presiding at the trial that such person is probably a person as is described in section 21(1) of the Prevention and Treatment of Drug Dependency Act, 1992 (in this section referred to as the said Act), the judge or judicial officer may, with the consent of the prosecutor given after consultation with a social worker as defined in section 1 of the said Act, stop the trial and order that an enquiry be held in terms of section 22 of the said Act in respect of the person concerned by a magistrate as defined in section 1 of the said Act and indicated in the order.

(b) The prosecutor shall not give his consent in terms of paragraph (a) if the person concerned is a person in respect of whom the imposition of punishment of imprisonment would be compulsory if he were convicted at such trial.

(2) (a) If the person concerned is in custody he shall for all purposes be deemed to have been arrested in terms of a warrant issued under section 21(1) of the said Act and shall as soon as practicable be brought before the said magistrate.

(b) If the person concerned is not in custody the said judge or judicial officer shall determine the time when and the place where the person concerned shall appear before the said magistrate, and he shall thereafter for all purposes be deemed to have been summoned in terms of section 21(1) of the said Act to appear before the said magistrate at the time and place so determined.

(3) As soon as possible after an order has been made under subsection (1) of this section, a prosecutor attached to the court of the said magistrate shall obtain a report as is mentioned in section 21(2) of the said Act.

(4) The provisions of the said Act shall mutatis mutandis apply in respect of a person who appears before a magistrate, as defined in section 1 of the said Act, in pursuance of an order made under subsection (1) of this section as if he were a person brought before the said magistrate in terms of section 21(1) of the said Act and as if the report obtained in terms of subsection (3) of this section were a report obtained in terms of section 21(2) of the said Act.

(5) If an order is made under subsection (1) in the course of a trial, whether before or after conviction, and a magistrate under the said Act orders that the person concerned be detained in a treatment centre or registered treatment centre, the proceedings at the trial shall be null and void in so far as such person is concerned.

(6) A copy of the record of the proceedings at the trial, certified or purporting to be certified by the registrar or clerk of the court or other officers having custody of the record of such proceedings or by the deputy of such registrar, clerk or other officer or, in the case where the proceedings were taken down in shorthand or by mechanical means, by the person who transcribed the proceedings, as a true copy of such record, may be produced at the said enquiry as evidence.

Section 255 of the Criminal Procedure Act must be read with **s 37 of the Prevention of and Treatment for Substance Abuse Act 70 of 2008.** Section 37 states as follows:

'S37 Court may order enquiry in terms of this Act

Section 255 of the Criminal Procedure Act, 1977 (Act 51 of 1977), applies with the changes required by the context to an enquiry ordered by the court if, in any court during a trial of a person who is charged with an offence other than an offence referred to in section 18 of the said Act, it appears to the officer presiding at the trial that such person is probably a person contemplated in section 33(1).'

The following sections in Act 70 of 2008 are of special importance in the application of s 255 of the Criminal Procedure Act:

s 33 (admission of involuntary service user to treatment centre);

s 34 (admission and transfer of children);

s 35 (committal to treatment after enquiry); s 36 (committal to treatment after conviction)

Note:

1. In terms of subsection 1(a) the consent of the prosecutor is required before the trial can be converted into an enquiry
2. The prosecutor shall not give such consent, if the offence for which the accused is charged would attracted a custodial sentence. This is most relevant to offences which are stated in the Criminal Law Ammendment Act 105 of 1997 – Minimum sentences.
3. The trial can not be converted into an enquiry where the accused is charged with offences mentioned in section 18 of CPA – offences not subject to prescription after 20 years.

Competent Verdicts (ss 256-270)

There is an instance where a competent verdict is regulated by a statutory provision falling outside ss 256 to 270 of the Act.

Eg. 'Conviction of “statutory intoxication” as a competent verdict on any charge: Section 1 of the Criminal Law Amendment Act 1 of 1988’.

The Cybercrimes Act 19 of 2020 also contains competent verdicts for some of the crimes created by the Act.

Competent verdicts are only possible when permitted by statutory provisions.

Competent verdicts: General rules and principles

The following general rules and principles are applicable to competent verdicts:

(a) If the main charge is proved, an accused should be convicted thereof and no resort may be taken to the provisions of ss 256–270.

(b) It is extremely desirable that an undefended accused should be informed timeously of the competent verdicts which may be returned against him, especially where these verdicts relate to offences which place an *onus* on the accused.

It is irregular for a trial court to warn an accused of the risks of being convicted of a competent verdict *only after* the court has noted the accused's admissions in regard to such competent verdict.

(c) It is not necessary that competent verdicts should formally be mentioned in the charge sheet or indictment. It is submitted that reference in a charge sheet to the possible application of a competent verdict can be useful and is advisable. But the competent verdicts must be explained to the accused before he pleads, as the accused will in this way 'know the case he has to meet in its entirety'.

S v Motsomi (unreported, T case no C726/04, 12 September 2005) the court stated: *'It is a fundamental and time-honoured principle of our criminal law that every accused must be fully and properly advised of the charge which he/she is facing with sufficient details to be able to answer thereto. (See section 35(3)(a) of the Constitution). This hallowed principle is intended to avoid the possibility of "a trial by ambush". This requires that where the State intends to rely on competent verdicts in terms of section 256 to 270 of the Code, that such an accused be informed of all relevant competent verdicts even before he pleads to the charge. Such a step will put such an accused in a position to know and make an informed decision inter alia as to how to plead, which facts to admit and how to conduct his defence. (See* ***S v Velela 1979 (4) SA 581 (C)*** *and* ***S v Kester 1996 (1) SACR 461 (8) at 469i****. Furthermore, such an approach will avert any possible prejudice to such an accused, particularly if he is illiterate, unsophisticated and unrepresented.'*

S v Mashinini & another 2012 (1) SACR 604 (SCA) at [11]: *'Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge is sufficiently detailed and clear to an extent where an accused person is able to respond and, importantly, to defend himself or herself. In my view, this is intended to avoid trials by ambush.'*

(d) The legality of competent verdicts in terms of ss 256–270, is subject to the principle that the accused should not have been prejudiced in the presentation of his case. An accused has a right to know the case he has to meet

(e) There can in principle be no prejudice if the accused had legal representation

In **S v Hasane & others (unreported, NCK case no K/S 01/2017, 12 May 2020)** all the legal representatives of the accused formally informed the trial court at the plea stage of proceedings that 'the competent verdicts applicable to their charges' had been explained to the accused. There is indeed considerable merit in this practice. It can prevent most of the difficulties that can be encountered should issues arise regarding competent verdicts during the trial itself or later in the course of post-trial proceedings.

(f) Conviction on a competent verdict must be regarded as an acquittal on the main count and does not debar an appeal on a question of law (see **Director of Public Prosecutions, Gauteng v Pistorius 2016 (1) SACR 431 (SCA) at [7]–[9]**).

(g) Presiding judicial officers have a responsibility to consider competent verdicts on a specific charge and should not leave it to prosecutors to alert them to such possible verdicts (**S v Marothi (unreported, FB case no R47/2020, 18 June 2020) at [6]**). This, of course, does not mean that prosecutors should leave it to the bench to raise issues regarding competent verdicts.

Conviction of 'statutory intoxication' as a competent verdict on any charge: Section 1 of the Criminal Law Amendment Act 1 of 1988

Section 1(1) of the above Act provides that in certain defined circumstances a person who voluntarily consumes alcohol (or uses any drug) to the point where criminal non-responsibility sets in *and* who, whilst in this condition, commits a crime of which he would have been convicted but for the lack of criminal responsibility, is guilty of an offence.

Competent verdicts in terms of the Cybercrimes Act 19 of 2020

Certain sections of the Cybercrimes Act 19 of 2020 came into effect on 1 December 2021 (Proc R42, *GG* 45562 of 30 November 2021).
Part IV introduced a detailed and lengthy exposition of possible competent verdicts. For example:

s 18(2) provides that when the evidence on a charge of contravening s 3(1) (unlawful interception of data) does not prove the offence itself or an attempt, conspiracy, incitement or

instruction to commit that offence, but proves the contravention of one of a range of other listed offences created in the Act, the accused may be convicted of the offence so proved.
The list of offences that serve as competent verdicts to s 3(1) is:

- unlawful access to computer systems of computer data storage (s 18(2)*(a)*, with reference to s 2(1) and (2));
- unlawful possession of data with the knowledge or suspicion that it has been unlawfully intercepted (s 18 (2)*(b)*, with reference to s 3(2) and (3)); and
- the use or possession of a software or hardware tool, for purposes of unlawful interception of data (s 18(2)*(c)*, with reference to s 4(1)).

Section 18(10) provides for situations when there is insufficient proof of any of the preceding offences related to unlawful data access and interception, or cyber fraud and forgery or any competent verdict thereof. A conviction is then permitted of an offence which is proved because its essential elements are included in the offence so charged.

Note: this is not a complete list of competent verdicts in terms of the Cybercrimes Act. See further s 18(3)–(9), for the complete exposition of competent verdicts to all the newly created cybercrimes.
Regarding the three malicious communication offences (s 18(11), referring to ss 14–16).

256 Attempt

If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit the offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence.

In terms of the general principles of our common law, attempts to commit common-law and statutory crimes are punishable.
Section 18(1) of the Riotous Assemblies Act 17 of 1956 provides that any person who attempts to commit an offence against a statute or statutory regulation shall be guilty of an offence.
Section 17 of the Cybercrimes Act 19 of 2020 provides specifically for the option to convict an accused of an attempt to commit one of the offences in Part I or II (cybercrimes (ss 2–12) or malicious communications (ss 14–16)).

While s 17 creates the offence of attempt, s 18(1)*(a)* makes it a competent verdict in respect of the relevant offence charged in terms of the Cybercrimes Act 19 of 2020.
It goes further to allow a conviction on an attempt in respect 'of any other offence of which an accused may be convicted on the offence charged', in other words of a competent verdict (s 18(1)*(b)*).

257 Accessory after the fact

If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence of which he may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence or, as the case may be, such other offence, and shall, in the absence of any punishment expressly provided by law, be liable to punishment at the discretion of the court: Provided that such punishment shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory.

Definition

An accessory after the fact is someone who after the completion of the crime unlawfully and intentionally associates himself or herself with the commission of the crime by helping the perpetrator or accomplice to evade justice.

In terms of this definition, there is no distinction between accessory-after-the-fact liability and the crime of defeating or obstructing the course of justice (or attempting to do so).

A typical example of an accessory after the fact is someone who does not play a part in the killing of another, but who intervenes after the victim's death has resulted and assists the perpetrator by disposing of the corpse, or helping the perpetrator to evade justice in some other way.

However, where the accused renders assistance after the completion of the crime, and such assistance was, in fact, promised before the crime was complete, then, of course, the accused can be an accomplice.

Furthermore, since theft is a 'continuing crime' in the sense that it continues to be committed as long as the thief, his agent or a party to the theft is in possession of the stolen property, one who assists such a person after the original taking, but while the theft 'continues', could be either a perpetrator or an accomplice.

Two theories

Two broad approaches to the definition of accessory after the fact liability have been identified**.**

A The 'association' approach

This approach requires that an accessory after the fact is someone who unlawfully and intentionally assists the perpetrator(s) after the completion of the crime by associating himself or herself with the commission of the crime.

This approach finds support in the Privy Council decision in **Nkau Majara [1954] AC 235 (PC)** where the court concluded:

To constitute a person an accessory after the fact in South Africa it is sufficient to establish that assistance was given to the principal offender in the circumstances from which it would appear that the giver 'associated' himself with, in the broad sense of that word, the offence committed.

In **Augustine 1986 (3) SA 294 (C)** Marais J emphasised that mere approval of the commission of the offence expressed after the event is not sufficient for accessory-after-the-fact liability.

"The use of the word 'associates'... is perhaps unfortunate, because it tends to obscure the fact that something more than mere ratification or approval of an offence is required before criminal liability will exist. The writer of a letter of congratulation to the killer of a detested member of the community may be associating himself with the crime of murder, but he is certainly not an accessory or an accomplice, and he attracts no criminal liability."

In **Morgan, 1993 (2) SACR 134 (A)** *the Appellate Division expressed a preference for the narrow approach to the liability of the accessory after the fact by* ***defining the required 'association' as 'helping the perpetrator evade justice'***

B The 'defeating or obstructing the course of justice' approach

In terms of this approach, a person is only an accessory after the fact if he or she has some specific objective, i.e. helping the perpetrator or accomplice evade justice, by, for instance, hiding them from the police, helping them to escape or disposing of the evidence of the crime.

This is the approach which the Appellate Division favoured in **Morgan** (supra). The reason for a separate offence of being an accessory after the fact now falls away, since the offence of defeating (or obstructing) the course (or administration) of justice (or of attempting to do so) adequately covers the conduct of the alleged accessory after the fact.

The Supreme Court of Appeal in **Pakane 2008 (1) SACR 518 (SCA)** has acknowledged that there is 'in our law generally no distinction between accessorial liability and defeating the course of justice' and that to convict an accused of both offences would amount to an unacceptable duplication of convictions.

258 Murder and attempted murder

If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but—

(a) the offence of culpable homicide;

(b) the offence of assault with intent to do grievous bodily harm;

(c) the offence of robbery;

(d) in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth;

(e) the offence of common assault;

(f) the offence of public violence; or

(g) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

Murder and conspiracy to assault

Conspiracy to assault is not a competent verdict on a charge of assault. See **S v Mitchell & another 1992 (1) SACR 17 (A)**

Culpable homicide: s 258 as read with s 256

A verdict of attempt to commit culpable homicide is not possible in our law (**S v Ntanzi 1981 (4) SA 477 (N)**)

259 Culpable homicide

If the evidence on a charge of culpable homicide does not prove the offence of culpable homicide, but—

(a) the offence of assault with intent to do grievous bodily harm;

(b) the offence of robbery;

(c) in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth;

(d) the offence of common assault;

(e) the offence of public violence; or

(f) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

It must be noted that, culpable homicide will be proved if it is proved that the accused acted negligently (as measured by the Reasonable man test).

However, for the prosecution to succeed in invoking the application of the competent verdicts, it must prove that the accused had the intention to commit the said competent verdict.

260 Robbery

If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or, as the case may be, attempted robbery, but—

(a) the offence of assault with intent to do grievous bodily harm;

(b) the offence of common assault;

(c) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law;

(d) the offence of theft;

(e) the offence of receiving stolen property knowing it to have been stolen; or

(f) an offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955).

(g) . . .

the accused may be found guilty of the offence so proved, or, where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, of both such offences.

Section 260 provides that on a charge of robbery where robbery or attempted robbery is not proved, the accused may be convicted of both theft and assault with intent to do grievous bodily harm (or both theft and common assault) where these offences are proved (**S v Matjeke 1980 (4) SA 267 (B)**; **S v Jabulani 1980 (1) SA 331 (N)**).

This provision does not amount to some form of duplication of convictions permitted by statutory law, but really only acknowledges the practical reality that the evidence on a charge of robbery might not disclose a causal link between the violence and the taking or removal of the object.

In **S v Chimola (unreported, GSJ case no A054/2018, 7 May 2021)** *'the evidence further established that the appellant and the deceased managed to exercise full and effective control over the items found on the appellant and on the driveway and that the complainant had lost control over those items. The facts thus did not establish robbery but did establish the offence of theft, which is a competent verdict of the offence of robbery. The facts pertaining to the*

attack on the complainant by both the appellant and the deceased in his bedroom established the offence of assault. Although a monkey wrench was used in the attack on the complainant he was not injured as a result, but sustained only minimal bruises'.

261 Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault

(1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—

(a) assault with intent to do grievous bodily harm;

(b) common assault;

(c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

(g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of—

(a) common assault or;

(b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the accused may be found guilty of the offence so proved.

In **S v Scheepers (unreported, GP case no A116/2019, 5 August 2020)** the charge sheet in which contravention of S 3 of Act 32 of 2007 (ie, rape) was alleged, also specifically stated that the charge was to be read with s 261 of the Criminal Procedure Act 51 of 1977. This is a practice that must be encouraged: the accused is made aware of the wide variety of possible competent verdicts even before he has pleaded.

Meaning of 'rape'

The Constitutional Court extended the common-law definition of rape to include acts of non-consensual penetration of a penis into the anus of a female (see **Masiya v Director of Public**

Prosecutions, Pretoria (Centre for Applied Legal Studies & another, Amici Curiae) 2007 (2) SACR 435 (CC)).

It should be noted, however, that the Constitutional Court also held that this extended definition of rape would only be applicable to conduct which took place after the date of judgment, i.e, 10 May 2007.

The Constitutional Court's expanded definition of common-law rape was, in turn, on 16 December 2007 replaced by the statutory offences rape and compelled rape as contemplated in ss 3 and 4 of Act 32 of 2007.

Section 261(1)

The fact that an attempt is referred to in the opening words of s 261(1) and not in any of the subparagraphs of s 261(1), can be attributed to the fact that s 256 already provides for a conviction of attempt where the charge alleges actual rape.

Section 261(1)*(g)–(h)* and (2)*(b)*

The references in the above sections to ss 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 must be read subject to **Teddy Bear Clinic for Abused Children & another v Minister of Justice and Constitutional Development & another 2014 (1) SACR 327 (CC)**: where the court found that Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 are unconstitutional and invalid to the extent that they impose criminal liability for consensual sexual conduct on children under the age of 16. Their unconstitutionality lies in their unjustifiable intrusion on children's rights to human dignity and privacy, and their incompatibility with the best interests of children.

The decision of the Constitutional court resulted in the amendment of the SORMA – to the effect that it is not a criminal offence for children between the ages of 12 and 16 years old to engage in consensual sexual acts with each other.

Further, if one of the parties is 16 or 17 years old, the other party should not be more than two years younger.

Note:
In terms of SORMA, the prosecution of a person 16 or 17 years old, who engages in sexual acts with a child over the age of 12 years but more than 2 years younger than the accused, must be authorized in writing by the Director of Public Prosecutions.

261A Trafficking in persons

(1) In this section—

'Basic Conditions of Employment Act' *means the Basic Conditions of Employment Act, 1997 (Act 75 of 1997);*

'Criminal Law (Sexual Offences and Related Matters) Amendment Act' *means the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007);*

'Immigration Act' *means the Immigration Act, 2002 (Act 13 of 2002); and*

'Prevention and Combating of Trafficking in Persons Act' *means the Prevention and Combating of Trafficking in Persons Act, 2013.*

(2) If the evidence on a charge of trafficking in persons provided for in section 4 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, does not prove the offence of trafficking in persons or the involvement in the offence, but the offence of—

(a) assault with intent to do grievous bodily harm;

(b) common assault;

(c) rape as provided for in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;

(d) compelled rape as provided for in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;

(e) sexual assault as provided for in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;

(f) compelled sexual assault as provided for in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;

(g) compelled self-sexual assault as provided for in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;

(h) debt bondage as provided for in section 5 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;

(i) the possession, destruction, confiscation, concealment of or tampering with documents as provided for in section 6 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;

(j) using the services of a victim of trafficking as provided for in section 7 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;

(k) conduct facilitating trafficking in persons as provided for in section 8 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;

(l) transporting a person within or across the borders of the Republic knowing that the person is a victim of trafficking as provided for in section 9(1) or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;

(m) entering or remaining in, or departing from the Republic as provided for in section 49(1)(a) of the Immigration Act;

(n) knowingly assisting a person to enter or remain in, or depart from the Republic as provided for in section 49(2) of the Immigration Act;

(o) employing a child as provided for in section 43 of the Basic Conditions of Employment Act; or

(p) forced labour as provided for in section 48 of the Basic Conditions of Employment Act,

the accused may be found guilty of the offence so proved.

262 Housebreaking with intent to commit an offence

(1) If the evidence on a charge of housebreaking with intent to commit an offence specified in the charge, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit the offence so specified but the offence of housebreaking with intent to commit an offence other than the offence so specified or the offence of housebreaking with intent to commit an offence unknown or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specific offence, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

(3) If the evidence on a charge of attempted housebreaking with intent to commit an offence specified in the charge, or attempted housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of attempted housebreaking with intent to commit the offence so specified, or attempted housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

Section 262(1)

On a charge of housebreaking with intent to steal and theft, it is competent for the court to convict of housebreaking with intent to commit malicious damage to property if the State fails to prove theft but manages to prove damage to property after entrance was gained.

The present wording of s 262(1) also makes it possible to convict of malicious damage to property *(simpliciter)* where the accused is charged with the crime of housebreaking with intent to commit an offence specified in the charge and the evidence does not prove the offence of housebreaking with intent to commit the offence so specified, but does in fact only prove malicious damage to property.

S v Jasat 1997 (1) SACR 489 (SCA) is an example of a case where an accused who had been charged with housebreaking with intent to steal and theft, was ultimately convicted of housebreaking with intent of contravening s 1(1) of the Trespass Act 6 of 1959.

Section 262(2)

S v Slabb 2007 (1) SACR 77 (C) the court made the valid observation that where

'perpetrators are caught after unlawfully breaking and entering into premises and the evidence is overwhelming that their intention was to commit (a) crime(s), but it is impossible for the prosecution to prove what crime(s) they intended to commit, the allegation that they intended

to commit an offence unknown and to pronounce a verdict accordingly is, in my view, the proper one. To view it any differently will in effect force the State to resort to trespass prosecutions, or to speculate in respect of some known offences, which may lead to questionable decisions. This clearly will place the prosecution in an untenable position and will make s 262 of the Act redundant.'

Where an accused is charged with housebreaking with intent to commit an offence unknown to the prosecutor and the accused tenders a valid plea of guilty establishing housebreaking with intent to steal, then he must be convicted of housebreaking with intent to steal. See **S v Kesolofetse & another 2004 (2) SACR 166 (NC)**.

A verdict of housebreaking with intent to rape is in terms of s 262(2) permitted on a charge of housebreaking to commit an offence unknown to the prosecutor; and a verdict of this nature does not preclude a conviction of rape in a separate count related to the same housebreaking (**Lekeka v S [2020] 3 All SA 485 (FB) at [32]**). In such an instance the two counts should be taken together for sentencing purposes.

In **S v M 1989 (4) SA 718 (T)** an accused who had been charged with housebreaking with intent to commit an offence unknown to the prosecutor was on the available evidence convicted by the trial court of the crime charged and indecent assault. On review it was held that in terms of s 262(2) the accused could only have been convicted of housebreaking with intent to commit indecent assault—and not of housebreaking with intent to commit indecent assault and indecent assault. See also **S v Zamisa 1990 (1) SACR 22 (N)** and **S v Blaauw 1994 (1) SACR 11 (E)**. In the latter case Zietsman JP also remarked as follows (13*g*–*h*): The Supreme Court of Appeal has confirmed that '*[h]ousebreaking is not a crime* eo nomine*; it must be accompanied by the intent to commit another offence on the premises entered*' (**S v Livanje 2020 (2) SACR 451 (SCA)**)

This conclusion is logical when one considers that the essential elements of the offence of housebreaking are:

(a) the "breaking" of premises in the legal sense by the displacement of any obstruction to entry which forms part of the premises.

(b) the entry to the premises by means of any part of the person or an instrument;

(c) the unlawfulness of the conduct complained of; and

(d) the intention to commit an offence.

It follows, therefore, that there can be no conviction for housebreaking even if a “breaking” is proved if no entry is achieved. Similarly, an unlawful breaking and entering without a concomitant intention to commit a common-law or statutory offence, does not constitute the crime of housebreaking... If, therefore, an accused person cannot be convicted of housebreaking if no intent to commit an offence is proved, there can be no conviction of an attempt to commit that offence without proof of the relevant intent.’

In **S v Bhengu 2011 (1) SACR 224 (KZP)** 'housebreaking’ was found absent as the accused had entered through a door left open by the plaintiff.

Section 262(3)

Section 262(3) was added to s 262 by s 5 of the Criminal Law Amendment Act 4 of 1992. It governs 'attempts’ whereas s 262(1) and (2) deal with the completed crimes.

263 Statutory offence of breaking and entering or of entering premises

(1) If the evidence on a charge for the statutory offence in any province of breaking and entering or of the entering of any premises with intent to commit an offence specified in the charge, does not prove the offence of breaking and entering or of entering the premises with intent to commit the offence so specified but the offence of breaking and entering or of entering the premises with intent to commit an offence other than the offence so specified or of breaking and entering or of entering the premises with intent to commit an offence unknown, the accused may be found guilty—

(a) of the offence so proved; or

(b) where it is a statutory offence within the province in question to be in or upon any dwelling, premises or enclosed area between sunset and sunrise without lawful excuse, of such offence, if such be the facts proved.

(2) If the evidence on a charge for the statutory offence in any province of breaking and entering or of the entering of any premises with intent to commit an offence to the prosecutor unknown, does not prove the offence of breaking and entering or of entering the premises with intent to commit an offence to the prosecutor unknown but the offence of breaking and entering or of entering the premises with intent to commit a specific offence, the accused may be found guilty of the offence so proved.

264 Theft

(1) If the evidence on a charge of theft does not prove the offence of theft, but—

(a) the offence of receiving stolen property knowing it to have been stolen;

(b) an offence under section 36 or 37 of the General Law Amendment Act 62 of 1955; or

(c) an offence under section 1 of the General Law Amendment Act 50 of 1956.

(d) . . .

the accused may be found guilty of the offence so proved.

(2) If a charge of theft alleges that the property referred to therein was stolen on one occasion and the evidence proves that the property was stolen on different occasions, the accused may be convicted of the theft of such property as if it has been stolen on that one occasion.

Section 264(1) only comes into play where 'the evidence on a charge of theft does not prove theft . . .' In this regard it should be borne in mind that theft is a continuing offence and the person assisting the original thief is also guilty of theft, provided there is proof that the person rendering the assistance was aware of the theft.

265 Receiving stolen property knowing it to have been stolen

If the evidence on a charge of receiving stolen property knowing it to have been stolen does not prove that offence, but—

(a) the offence of theft; or

(b) an offence under section 37 of the General Law Amendment Act, 1955 (Act 62 of 1955);

(c) . . .

the accused may be found guilty of the offence so proved.

266 Assault with intent to do grievous bodily harm

If the evidence on a charge of assault with intent to do grievous bodily harm does not prove the offence of assault with intent to do grievous bodily harm but the offence of—

(a) common assault;

(b) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or

(c) pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of the offence so proved.

267 Common assault

If the evidence on a charge of common assault proves the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, the accused may be found guilty of any such offence, or, if the evidence on such a charge does not prove the offence of common assault but the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of that offence.

268 Statutory unlawful carnal intercourse

If the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but—

(a) the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;

(b) the offence of common assault; or

(c) the statutory offence of—

(i) committing an immoral or indecent act with such other person;

(ii) soliciting, enticing or importuning such other person to have unlawful carnal intercourse;

(iii) soliciting, enticing or importuning such other person to commit an immoral or indecent act; or

(iv) conspiring with such other person to have unlawful carnal intercourse, the accused may be found guilty of the offence so proved.

269 . . .

[S 269 repealed by s 68(2) of Act 32 of 2007.]

269A

If evidence on a charge of an offence under Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, does not prove the offence so charged but proves the offence of—

(a) theft;

(b) fraud; or

(c) extortion,

the accused may be found guilty of the crime or offence so proved.

The Prevention and Combating of Corrupt Activities Act 12 of 200

Parts 1 to 4 of this Act—as referred to in s 269A of the Criminal Procedure Act—cover the following broad categories of offences:

(1) general offence of corruption;

(2) offences in respect of corrupt activities relating to specific persons;

(3) offences in respect of corrupt activities relating to receiving or offering of unauthorised gratification; and

(4) offences in respect of corrupt activities relating to specific matters.

Sections 17, 20 and 21 of Act 12 of 2004—and which are specifically referred to in s 269A of the Criminal Procedure Act—relate, respectively, to the following: offence concerning acquisition of private interest in contract; agreement or investment of public body; accessory to or after an offence; and attempt, conspiracy and inducing another person to commit an offence.

270 Offences not specified in this Chapter

If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.

Section 270 can only be invoked in respect of an offence not mentioned in the preceding sections in Chapter 26 of the Act.

In **S v Van Ieperen 2017 (1) SACR 226 (WCC)** stated: *'The magistrate's reliance on s 270 . . . to bring in a conviction of crimen injuria as a form of competent verdict was fundamentally misdirected. According to its tenor, s 270 can apply only if the charge put to the accused person is not in respect of an offence referred to in the preceding sections of ch 26 of the Act. The main charge of "sexual assault" put to the appellant is referred to in s 261(2), and the alternative charge of common assault in s 267. Both of those sections are in ch 26. The magistrate was therefore not empowered to invoke s 270. On that ground alone the conviction cannot be sustained.'*

271 Previous convictions may be proved

(1) The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.

(2) The court shall ask the accused whether he admits or denies any previous conviction referred to in subsection (1).

(3) If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted.

(4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

After conviction the State may produce to the court a list of previous convictions which it is alleged the accused committed.

- The Act does not provide a definition, but our courts have defined the concept previous conviction: it means a previous conviction, that is, a conviction by a court of law of a crime or offence. A conviction will not be a previous conviction for purposes of s 271 unless the accused has been brought before court and convicted and sentenced by that court.
- The criminal record should include record admission of guilt, by the accused.

In **S v Madhinha 2019 (1) SACR 297 (WCC)** it was observed that payment of an admission of guilt fine resulted in a conviction in terms of s 57(6), which was a *sui generis* conviction and not a court verdict for purposes of s 271.

This approach was rejected in **Mong v Director of Public Prosecutions & another [2019] 4 All SA 447 (WCC)**. Henney J took the view that payment of an admission of guilt fine results in a fully-fledged conviction once it is appreciated that s 57(6) must be read with s 57(7) which requires judicial confirmation of the payment of the admission of guilt fine. According to Henney J the court in **Madhinha** erred in its conclusion *'that such conviction and sentence cannot be regarded as a conviction and sentence that can be entered onto the criminal record book for the purposes of a previous conviction in terms of section 271'*

- If previous convictions are disputed, the State must prove these convictions beyond a reasonable doubt.

In **S v Joaza 2006 (2) SACR 296 (T)** the accused was convicted on two counts of housebreaking and theft. The magistrate took both counts together for purposes of sentencing and sentenced the accused to two years' imprisonment without the prosecutor having produced to the court a list of any previous convictions in the form of 'SAP 69'. The reason for the prosecutor's non-production of the relevant SAP 69, was—it would seem —attributable to the fact that after a delay of two months no such SAP 69 had been furnished by the police. On review the court made the following valid observations:

'Previous convictions of an accused person certainly play an important role in the assessment of a fair and just sentence. Apart from the seriousness of the offence, it is a crucial determining factor to reflect an informed punishment which the offender deserves. If persons are simply regarded as first offenders and receive lenient sentences then the administration of our criminal justice system will invite societal disdain. Although it is at the discretion of the prosecution to place the list of an offender's previous convictions before the court, I am of the view that it is prudent to do so in every case, thereby ensuring that the offender is rightly and judiciously sentenced. Let it be said that in this age of advanced information technology, any person's previous convictions can easily and swiftly be obtained from the South African Criminal Bureau data bank. Therefore, there is no excuse why the prosecution should omit to furnish a record of previous convictions to the sentencing court.'

- Convictions for crimes committed after the crime for which the accused stands to be sentenced, can also be taken into account, in the sense that it is indicative of the character of the accused to be sentenced.

In **S v N 2000 (1) SACR 209 (W)** the court held that previous convictions are normally previous offences occurring before the offence under trial and that the court usually considers only previous convictions in that sense for the purposes of sentence. However, the court is entitled to have regard to offences committed but of which the accused has not yet been convicted at the time of the offence under trial. The State may therefore prove *all* previous convictions, including those for crimes committed after the crime for which the accused person stands to be sentenced.

- A diversion order made in terms of the Child Justice Act 75 of 2008 does not constitute a previous conviction referred to in the Criminal Procedure Act. See s 59(1)*(b)* of Act 75 of 2008. This is the position for criminal record purposes.
- In cases where the accused is convicted for an offence which in terms of Act 105 of 1977, invokes a mandatory minimum sentence, the prosecution has a duty to present proof of previous conviction.

In **S v Nhlapo 2012 (2) SACR 358 (GSJ)** the court found it unacceptable that the prosecutor had merely informed the trial court that the police docket contained no SAP 69 (a record extracted from the South African Police Criminal Record System) and that the prosecution did not intend proving any previous convictions. The prosecutor did so despite the fact that the accused had been convicted of robbery with aggravating circumstances (as intended in s 1 of the Act read with s 51(2) and other relevant provisions of the Criminal Law Amendment Act 105 of 1997). The prosecutor, furthermore, adopted this passive attitude despite the fact that a probation officer had recorded in her report of 6 September 2011 that the accused told her about a previous conviction in 2008 for attempted rape.

The court took the view that the 'permissive nature' of s 271 must yield to the 'peremptory provisions' of s 51 of Act 105 of 1997, or so-called minimum sentence legislation, which is the more recent legislation, and which requires a prosecutor to present facts which a court can consider when imposing sentence. A presiding judicial officer should, indeed, insist upon proof

of form SAP 69 in order to properly discharge his sentencing functions, 'unless good reason exists to avoid a further remand where the offender is to remain in custody' Spilg J said:

'Accordingly in order for a court to discharge its adjudicative responsibilities when considering sentence, including those imposed by statute, it is necessary for the court to have details of previous convictions placed before it. To accord the prosecutor a discretion which is not subject to judicial oversight may result in like offenders being treated differently, even if the prosecutor had obtained the SAP69 beforehand. It appears that the permissive nature of s 271 (1) must yield both to the legislative intent of s 51 of [Act 105 of 1997] and the inherent danger of conferring an arbitrary and potentially discriminatory power on the prosecution. . . A failure to properly establish and inform the presiding officer of previous convictions imposed on the offender adversely affects the proper administration of justice and undermines the court's responsibilities where the minimum-sentencing regime applies under . . . Act [105 of 1997]. At best, it ought to be countenanced only in exceptional circumstances that are properly explained to the court. Ordinarily there is no apparent reason why the SAP69 should not have been requested by and provided to a prosecutor before sentencing, and in good time to enable the accused to consider it.'

Note:
The judgment in the matter of **Nhlapo** (above) should not be interpreted narrowly as being limited to cases that involve minimum sentence legislation. A prosecutor has a general duty (in conjunction with the investigating officer) to establish whether an offender has previous convictions. This is part of the prosecutor's duty to protect the public and to place before court information relevant to the exercise of the court's function.

271A Certain convictions fall away as previous convictions after expiration of 10 years

Where a court has convicted a person of—

(a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but—

(i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or

(b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.

In **S v Kaywood 2016 JDR 2203 (SCA)** on appeal against the sentence, the court found that:

"On 21 April 1999 the appellant had been convicted of assault with intent to do grievous bodily harm and had been sentenced to a fine of R600 or three months' imprisonment. The sentence was suspended for a period of five years on certain conditions. About three and a half years thereafter, on 11 September 2002 (within the period of suspension) the appellant was convicted of attempted murder and was sentenced to a fine of R1 000 or 100 days' imprisonment. In considering the two previous convictions when sentencing the appellant, the court a quo took the view that they had not been superannuated. It appears from the record that on reconsideration, the court took the view that it should have sentenced the appellant as a first offender.

It is true that under s 271A of the Criminal Procedure Act 51 of 1977 (the CPA) the appellant's previous convictions fell away after a period of 10 years from the date of conviction. The court a quo sentenced the accused on 26 June 2013.

The SCA found that: the sentences imposed in respect of the appellant's 'previous convictions' were lighter than those stipulated in s 271A. The appellant was indeed entitled to be sentenced as a first offender.

In **S v Olyn (unreported, NCK case no K/S 13/18, 15 May 2020)**, the accused argued that his previous convictions on one of the several counts of which he had been convicted should not be considered, as a period of 10 years had passed since the original conviction. In rejecting the accused's submission, the court found that whilst s 271A provides for convictions older than 10 years to fall away, there are instances where the application of this provision can be waived.

Note:

It is important to remember that – NOT ALL PREVIOUS CONVICTION FALL AWAY AFTER THE LAPSE OF 10 YEARS.

The previous conviction will only fall away if the requirements as set out in S271A have been met.

In terms of ss (1) the previous conviction for an offence where a sentence of MORE THAN six month imprisonment without the option of a fine can be imposed will only fall away if :

i) the court postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or

has not called upon him or her to appear before the court in terms of section 297(3); or

ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c).

Subsection (a) is directed at more serious offences, where it is possible sentences which a court can impose is more than 6 months imprisonment without the option of a fine. This is all common law offences and most statutory offences.

The important point to note is that, these convictions do not fall away, unless – the court chose not to impose the sentence of more than 6 months imprisonment, but postponed the passing of the sentence or caution and discharged the accused.

Subsection (b) is directed at those offences where the court is authorized to sentence an accused to a period of LESS THAN 6 MONTHS IMPRISONMENT WITHOUT THE OPTION OF A FINE.

The previous conviction does not fall away unless the penalty clause or sentencing jurisdiction for the specific offence is a period of imprisonment less than 6 months.

272 Finger-print record *prima facie* ***evidence of conviction***

When a previous conviction may be proved under any provision of this Act, a record, photograph or document which relates to a finger-print and which purports to emanate from the officer commanding the South African Criminal Bureau or, in the case of any other country, from any officer having charge of the criminal records of the country in question, shall, whether or not such record, photograph or document was obtained under any law or against the wish or the will of the person concerned, be admissible in evidence at criminal proceedings upon production thereof by a police official having the custody thereof, and shall be prima facie proof of the facts contained therein.

The document listing previous convictions is known as 'Form SAP 69'

In **S v Nhlapo 2012 (2) SACR 358 (GSJ)**:

'A SAP69 is a record extracted from the South African Police Criminal Record System. It details the offender's previous convictions, including the nature of the offence, the date of conviction and the sentence imposed. After conviction the State ordinarily produces this document in court and, in compliance with s 271(2) of the Criminal Procedure Act 51 of 1977 . . . the offender is required by the court to admit or deny its contents. The offender will usually sign the SAP69 if the previous convictions are admitted, and the presiding officer will be requested to certify, by signing in the space provided on the document, that the previous convictions are admitted. The SAP69 will also state if there is no record of a previous conviction.'

Where the accused denies the previous convictions the witness for the State (the officer commanding the Criminal Record Centre) must hand in the previous record with the fingerprints of the accused so as to enable the court to decide independently on clear evidence before it.

Where the accused refuses to admit or deny the previous convictions, the prosecution will have to prove the convictions as mentioned above.

The standard of proof is proof beyond reasonable doubt.

When handed in by the witness the list, provided that it emanates from the officer commanding the Criminal Record Centre, will be *prima facie* proof of the facts contained therein (see s 272). This is also the position as far as previous convictions in the case of other countries are concerned, provided that the document emanates from the officer having charge of the criminal records of the country in question (s 272).

Where a previous conviction does not appear on the Form SAP 69, a Form J14 may be used. It is issued by the clerk of the court, or the registrar, and may be handed in by the prosecution in terms of s 235.

In **R v Munro 1957 (4) SA 578 (T)** it was decided that where a clerk of court or registrar is aware of a previous conviction the Form J14 should be placed before the judge dealing with review of sentence.

273 Evidence of further particulars relating to previous conviction

Whenever any court in criminal proceedings requires particulars or further particulars or clarification of any previous conviction admitted by or proved against an accused at such proceedings—

(a) any telegram purporting to have been sent by the officer commanding the South African Criminal Bureau or by any court within the Republic; or

(b) any document purporting to be certified as correct by the officer referred to in paragraph (a) or by any registrar or clerk of any court within the Republic or by any officer in charge of any prison within the Republic,

and which purports to furnish such particulars or such clarification, shall, upon the mere production thereof at the relevant proceedings be admissible as prima facie proof of the facts contained therein.

Section 273 provides for the acceptance by a court of a telegram from the officer commanding the Criminal Record Centre, or from another court in the Republic, the content of which will be *prima facie* evidence of the facts contained therein.

A certified document emanating from a clerk of court, registrar or head of a South African prison may also be received in evidence by the court (s 273*(b)*).

The telegram or document will merely be produced to the court (usually through the prosecution) and will be *prima facie* proof of the facts contained therein.

Where the accused denies the content of such telegram or document the court will have to call the necessary witnesses and hear the necessary evidence to decide the correctness of the facts (in terms of s 274(1)).

The court can ask for the further particulars *mero motu*, or at the request of the State or the accused.

PART IV

SENTENCING

Chapter 28
Sentence (ss 274-299A)

Chapter 28 must be read subject to the provisions of Chapter 10 (ss 68-79) of the Child Justice Act 75 of 2008

Section 68 of Chapter 10 of the Child Justice Act 75 of 2008 provides as follows: 'A child justice court must, after convicting a child, impose a sentence in accordance with the provisions of this Chapter'.

The constitutional fair trial right and sentencing proceedings

Section 35(3) of the Constitution provides that every accused 'has a right to a fair trial . . . which includes' the right to be adequately and timeously informed of the applicable sentence.

Veldman v Director of Public Prosecutions, Witwatersrand Local Division 2006 (2) SACR 319 (CC): '*. . . a fair trial would also have to ensure that, in the process of the sentencing court being put in possession of the factors relevant to sentencing, the accused is not compelled to suffer the infringement of any other element of the fair trial right.*'

See also **S v Brand 2019 (1) SACR 264 (GJ)** at [30]: ' . . . *it has become a constitutional requirement that an accused be forewarned of the possibility of being declared a habitual offender before such a declaration may be made*'.

In **S v Khoza & another 2019 (1) SACR 251 (SCA)***: as a rule, fair trial rights require that the accused must, at the outset of the trial, be informed of minimum sentence provisions which the State seeks to rely on or which may be applicable. 'The accused should generally be so informed in the indictment or charge sheet; by notification by the presiding officer or in any other manner that effectively conveys the applicable provisions to the accused . . . before or at the commencement of the trial.' This was of 'particular importance' where the accused happened to have no legal representation. However, the approach as set out in the previous paragraph must remain subject to the rule that the question of prejudice to the accused determines whether a fair trial right has been infringed; and the question of prejudice is, in turn, determined by an 'objective fact-based inquiry'*

274 Evidence on sentence

(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.

After proof of previous convictions, evidence is presented to provide the court with sufficient information to be able to determine an appropriate sentence.

The State will present evidence – which would usually be in aggravation of sentence.

The defense will present evidence – which would be aimed at mitigation of sentence.

The court may itself call witnesses to give evidence regarding sentence (eg a probation officer).

All parties will be allowed to cross-examine the witnesses called by the other party.

All evidence that is relevant to determining the appropriate sentence is admissible.

In **S v EN 2014 (1) SACR 198 (SCA)** the court emphasized the importance of evidence at sentencing stage:

'Trial courts take months, and in some instances years, dealing with evidence and principles of law to establish the guilt or innocence of an accused person. However, my observation is that when it comes to the sentencing stage, that process usually happens very quickly and often immediately after conviction. Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it is to justify that sentence.'

S v Siebert 1998 (1) SACR 554 (SCA):

'Sentencing is a judicial function sui generis. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until

all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.'

In practice the defence usually leads evidence first, but there is nothing in s 274 which obliges the defence to lead evidence in mitigation of sentence first.

Section 274(2) affords the accused the right to *address* the court on any evidence received under s 274(1), as well as on the matter of sentence, and specifies that thereafter the prosecution may likewise *address* the court.

It is important to note that the sequence of the *address* on sentence is regulated by s 274(2) and not the sequence in which evidence is to be presented.

The court will enjoy a discretion to receive not only the evidence it thinks fit in order to inform itself as to the proper sentence to be passed, but also to make a ruling in respect of the sequence in which evidence on sentence is to be received.

Expert evidence in mitigation and pre-sentence reports

In **S v Magano 2014 (2) SACR 423 (GP)**: description of a 'pre-sentence report' as provided by Terblanche *Guide to Sentencing in South Africa* 2 ed (2007) at 104 (see also Terblanche *A Guide to Sentencing in South Africa* 3 ed (2016) 116):

'Any report drawn by an expert of some kind which is designed to assist the court in the quest to find an appropriate sentence can be described as a pre-sentence report. Although these reports are usually probation reports drawn by probation officers in the employ of the state . . . [m]any other reports also qualify. These include reports by private social welfare experts, criminologists, psychiatrists and clinical psychologists.'

PURPOSE OF THE PRE-SENTENCE REPORT

A pre-sentence report can cover a wide variety of matters relevant to sentencing, ranging from the

- impact of the crime on the victim
- the presence or absence of remorse on the part of the convicted offender

- provide valuable information regarding the victim's attitude to the accused and the commission of the crime
- provide the sentencing court with valuable insights into what caused the accused to commit the crime
- ensure that a convicted offender does not present a one-sided account or untrue or incorrect information in mitigation
- impact of such crimes on the community
- rehabilitation programmes which are available to address the needs of the accused
- impact of specific sentences on the offender and / his family

S v Adams 1971 (4) SA 125 (C) contains an exposition and approval of the various principles and aims which determine the nature and contents of a pre-sentence report. These have been summarised as follows in **(1980) 4 *SACC* 126 at 127**:

'It is of the utmost importance that the report should be objective, non-judgmental and yet analytical. The report must not reflect the personal standards and prejudices of the probation officer. There is also no room for emotion. Information concerning the social and domestic background of the accused is essential. The report should not be cluttered with petty detail. At the same time, however, the report must be such that it presents a picture of the accused as an individual. This may be done by referring to, inter alia, the accused's standard of formal education history of employment, financial resources, interests, relationships within the family and general state of health In essence, the report should contain only those facts which contribute to the purpose of the report. All this information should be classified under appropriate headings.'

A correctional supervision sentence, as provided for in s 276(1)*(h)*, can only be imposed after a report of a probation officer (or a correctional official) has been placed before the court. See s 276A(1)*(a)* and **S v M 2006 (1) SACR 135 (SCA)**: "*However, since correctional supervision was not an option after the appellant was found guilty of the common law offenses of rape and indecent assault, no evidence was placed before the court regarding the appropriateness of such a sentence in the case of the C appellant. . Section 276A of the Criminal Procedure Act*

51 of 1977 requires a report from a probation officer or a correctional officer before a convicted person is sentenced to correctional supervision in terms of section 276(1)(h) of that Act."

The court considers the recommendation made by the expert witness, however the court will ultimately weigh up the evidence presented and determine an appropriate sentence in the circumstances of according to the triad set out in **S v Zinn 1969 (2) SA 537 (A)**:

1. the personal circumstance of the offender
2. the nature of the offence
3. interest of society

In **S v S (unreported, KZD case no AR233/05, 22 March 2017)** a clinical psychologist testified in mitigation on behalf of the accused. She recommended a non-custodial sentence. One of the reasons for rejecting her expert opinion evidence and recommendation was that she had ignored credibility findings made by the court. At [11] Steyn J stated: *'An objective analysis of her report shows that she had placed more reliance on the accused's views than the court's findings'.*

275 Sentence by judicial officer or judge other than judicial officer or judge who convicted accused

(1) If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a superior court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a lower court or to pass sentence afresh in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be, and after consideration of the evidence recorded and in the presence of the accused, pass sentence on the accused or take such other steps as the judicial officer who is absent, could lawfully have taken in the proceedings in question if he or she had not been absent.

(2) Whenever—

(a) a judge is required to sentence an accused convicted by him or her of any offence; or

(b) any matter is remitted on appeal or otherwise to the judge who presided at the trial of an accused,

and that judge is for any reason not available, any other judge of the provincial or local division concerned may, after consideration of the evidence recorded and in the presence of the accused, sentence the accused or, as the case may be, take such other steps as the former judge could lawfully have taken in the proceedings in question if he or she had been available.

Requisites: Section 275(1)

(a) The presiding officer who convicted the accused must be absent.

Absent means any material form of absence - including transfer, leave, where it will cause great inconvenience to recall the officer, death, serious illness, where he is no longer a judicial officer, or where he has recused himself from the matter.

(b) The new presiding officer must first consider the recorded evidence.

'Evidence recorded' does not only mean viva voce evidence given under oath, but also all relevant facts brought to the attention of the original presiding officer. Failure to consider evidence recorded may lead to the setting aside of the sentence imposed by the new officer. In **S v Skhosana & 21 other cases 2015 (1) SACR 526 (GJ) at [4]** Victor J noted that 'the new presiding officer must ensure that he reads the record meticulously, listens to further evidence on sentence and takes whatever steps necessary to ensure a fair trial and completion of the matter'.

(c) The sentence must be imposed in the presence of the accused, after the opportunity was given to him to address the court on the matter of sentence and to lead such evidence on sentence as he may deem necessary.

(d) The new magistrate must be totally objective. Where the magistrate was transferred after conviction, the prosecutor, having been appointed a judicial officer, assumed the role of magistrate in terms of s 275 and sentenced the accused, it was held to be a gross irregularity (**S v Louw; S v Noyila 1981 (4) SA 939 (E)**).

(e) Section 275(1) cannot be invoked in the absence of a proper record of the evidence which led to the conviction of the accused. In such an instance a court of review will set aside the conviction. See **S v Masemola (unreported, GP case no 731/17, 1 March 2018)**.

276 Nature of punishments

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—

(a) . . . [Para (a) deleted by s 34 of Act 105 of 1997.]

(b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B(1);

(c) periodical imprisonment;

(d) declaration as an habitual criminal;

(e) committal to any institution established by law;

(f) a fine;

(g) . . .[Para (g) deleted by s 2 of Act 33 of 1997.]

(h) correctional supervision;

(i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.

(2) Save as is otherwise expressly provided by this Act, no provision thereof shall be construed—

(a) as authorizing any court to impose any sentence other than or any sentence in excess of the sentence which that court may impose in respect of any offence; or

(b) as derogating from any authority specially conferred upon any court by any law to impose any other punishment or to impose any forfeiture in addition to any other punishment.

(3) Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1997 (Act 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court—

(a) from imposing imprisonment together with correctional supervision; or

(b) from imposing the punishment referred to in subsection (1)(h) or (i) in respect of any offence, whether under the common law or a statutory provision, irrespective of whether the law in question provides for such or any other punishment: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court is obliged to impose a sentence contemplated in section 51(1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997.

Section 276(1) is the general empowering provision authorising courts to impose sentences in all cases, whether under common law or statute, where no other provision governs imposition of sentence.

The penalty clause in a Statute will usually describe the applicable sentence for the specific crimes in terms of that statute.

Certain statutes can increase the sentencing jurisdiction of a particular court.

Example: **The Drugs and Drug Trafficking Act 140 of 1992:**
S17 sets out the penalties for the contraventions of the various sections of the act.
S64 Jurisdiction of magistrate's courts
A magistrate's court shall have jurisdiction-
(a) to impose any penalty mentioned in section 17, even though that penalty may exceed the punitive jurisdiction of a magistrate's court

Courts may impose the punishments they are entitled to impose under other legal provisions. Section 276(1) is therefore complementary to other penal provisions. It is, however, not a general provision enabling courts to impose forms of punishment which do not fall within their jurisdiction. A court of law is still limited to its own prescribed sentencing jurisdiction.

Objects of punishment

Sentencing involves a balance of the 3 factors (interest of the community; seriousness of the offence; and personal circumstances of the accused) and must achieve the aims of:

- retribution,
- prevention,
- deterrence,
- reformation or integrative theories which aim at a compromise between retribution

A sentencing court has the rather difficult task of reconciling competing interests in order to ensure a fair and just sentence. An appropriate balance must be struck.

A sentencing court 'has a duty to impose an appropriate sentence according to long-standing principles of punishment and judicial.

In **S v RO & another 2010 (2) SACR 248 (SCA)** the court stated as follows: *'Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality.) The elements at play are the crime, the offender and the interests of society or, with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.*'

In **S v Van Loggenberg 2012 (1) SACR 462 (GSJ)** Willis J said that a sentence has five important functions (at [6]):

'(i) It must act as a general deterrent, in other words, it must deter other members of the community from committing such acts or thinking that the price of wrongdoing is worthwhile;

(ii) it must act as a specific deterrent, in other words, it must deter this individual from being tempted to act in such a manner ever again;

(iii) it must enable the possibility of correction, unless this is very clearly not likely;

(iv) it must be protective of society, in other words, society must be protected from those who do it harm;

(v) it must serve society's desire for retribution, in other words, society's outrage at serious wrongdoing must be placated.'

The five important functions referred to above should also be read with the following 'basic principles pertaining to sentencing:

(a) The sentence must be appropriate, based on the circumstances of the case. It must not be too light or too severe.

(b) There must be an appropriate nexus between the sentence and the severity of the crime; full consideration must be given to all mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in **S v Zinn 1969 (2) SA 537 (A)**.

(c) Regard must be had to the interests of society (the third element of the **Zinn** triad). This involves a consideration of the protection society so desperately needs. The interests of society are reflected in deterrence, prevention, rehabilitation and retribution.

(d) Deterrence, the important purpose of punishment, has two components, being both the deterrence of the accused from reoffending and the deterrence of would-be offenders.

(e) Rehabilitation is a purpose of punishment only if there is the potential to achieve it.

(f) Retribution, being a society's expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence, then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.

(g) Finally, mercy is a factor. A humane and balanced approach must be followed.'

RESTORATIVE JUSTICE

The principles of restorative justice can also, where appropriate, be accommodated in the sentencing process.

Restorative justice is—according to *Burchell Principles of Criminal Law 4 ed (2013)* at 5—'an essentially non-punitive resolution of disputes arising from the infliction of harm, through a process involving the victim, the offender and members of the community'.

The idea is to restore the position as it was prior to the criminal conduct, mainly by the offender himself in a process which involves the victim.

'Restorative justice,': emphasises the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risks of recidivism.

See also s 73 of the Child Justice Act 75 of 2008 (restorative justice sentences in child justice courts)

'Restorative justice' is for purposes of the Child Justice Act 75 of 2008 defined as

'an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.'

SENTENCING AND THE OLDER PERSONS ACT 13 OF 2006

Section 30(4) of the Older Persons Act prescribes that: ***"If a court, after having convicted a person of any crime or offence, finds that the convicted person has abused an older person in the commission of such crime or offence, such finding must be regarded as an aggravating circumstance for sentencing purposes."***

In **S v AU & others 2014 (2) SACR 91 (GP)** the court stated as follows:

'Where elderly, defenceless, unarmed and frail people become victims of crime, courts should robustly punish offenders in order to deter others who are like-minded. Courts are the instruments through which society exerts punishment on offenders, and the punishment that courts impose on them must accordingly reflect the deep abomination with which . . . society regards such serious crime. The court should not shy away from or shirk the duty that the community has placed on it to mete out punishment to people who, for reasons of avarice, such as in the current case, show scant regard for the rights of others, and who have the audacity to violate the sanctity of others' homes.'

SENTENCING A CHILD OFFENDER IN TERMS OF THE CHILD JUSTICE ACT 75 OF 2008

Child offenders are sentenced in terms of the Child Justice Act.

The main purpose in sentencing of a child offender, is to rehabilitate the child and custodial sentences are imposed as an absolute last resort.

Child offenders are not subject to the minimum sentence legislation.

CHAPTER 10
SENTENCING (ss 68-79)

Part 1
General (ss 68-71)

68 Child to be sentenced in terms of this Chapter

A child justice court must, after convicting a child, impose a sentence in accordance with this Chapter.

69 Objectives of sentencing and factors to be considered

(1) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to-

(a) encourage the child to understand the implications of and be accountable for the harm caused;

(b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;

(c) promote the reintegration of the child into the family and community;

(d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and

(e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.

(2) In order to promote the objectives of sentencing referred to in subsection (1) and to encourage a restorative justice approach, sentences may be used in combination.

(3) When considering the imposition of a sentence involving compulsory residence in a child and youth care centre in terms of section 76, which provides a programme referred to in section 191 (2) (j) of the Children's Act, a child justice court must, in addition to the factors referred to in subsection (4) relating to imprisonment, consider the following:

(a) Whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;

(b) whether the harm caused by the offence indicates that a residential sentence is appropriate;

(c) the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm; and

(d) whether the child is in need of a particular service provided at a child and youth care centre.

(4) When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:

(a) The seriousness of the offence, with due regard to-

(i) the amount of harm done or risked through the offence; and

(ii) the culpability of the child in causing or risking the harm;

(b) the protection of the community;

(c) the severity of the impact of the offence on the victim;

(d) the previous failure of the child to respond to non-residential alternatives, if applicable; and

(e) the desirability of keeping the child out of prison.

70 Impact of offence on victim

(1) For purposes of this section, a victim impact statement means a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.

(2) The prosecutor may, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim, and, where practicable, furnish the child justice court with a victim impact statement provided for in subsection (1).

(3) If the contents of a victim impact statement are not disputed, a victim impact statement is admissible as evidence on its production.

71 Pre-sentence reports

(1) (a) A child justice court imposing a sentence must, subject to paragraph (b), request a pre-sentence report prepared by a probation officer prior to the imposition of sentence.

(b) A child justice court may, subject to paragraph (c), dispense with a presentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child.

(c) A child justice court may not dispense with a pre-sentence report where the court may-

(i) impose a sentence involving compulsory residence in a child and youth care centre providing a programme referred to in section 191 (2) (j) of the Children's Act or imprisonment; or

(ii) make an order referred to in section 50 (2) (c) (ii) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007).

(2) The probation officer must complete the report as soon as possible but no later than six weeks following the date on which the report was requested.

(3) Where a probation officer recommends that a child be sentenced to compulsory residence in a child and youth care centre providing a programme referred to in section 191 (2) (j) of the Children's Act, the recommendation must be supported by current and reliable information, obtained by the probation officer from the person in charge of that centre, regarding the availability or otherwise of accommodation for the child in question.

(4) A child justice court may impose a sentence other than that recommended in the pre-sentence report and must, in that event, enter the reasons for the imposition of a different sentence on the record of the proceedings.

Part 2
Sentencing options (ss 72-79)

72 Community-based sentences

(1) A community-based sentence is a sentence which allows a child to remain in the community and includes any of the options referred to in section 53, as sentencing options, or any combination thereof and a sentence involving correctional supervision referred to in section 75.

(2) A child justice court that has imposed a community-based sentence in terms of subsection (1) must-

(a) request the probation officer concerned to monitor the child's compliance with the relevant order and to provide the court with progress reports, in the prescribed manner, indicating compliance; and

(b) warn the child that any failure to comply with the sentence will result in him or her being brought back before the child justice court for an inquiry to be held in terms of section 79.

73 Restorative justice sentences

(1) A child justice court that convicts a child of an offence may refer the matter-

(a) to a family group conference in terms of section 61;

(b) for victim-offender mediation in terms of section 62; or

(c) to any other restorative justice process which is in accordance with the definition of restorative justice.

(2) On receipt of the written recommendations from a family group conference, victim-offender mediation or other restorative justice process, the child justice court may impose a sentence by confirming, amending or substituting the recommendations.

(3) If the child justice court does not agree with the terms of the plan made at a family group conference, victim-offender mediation or other restorative justice process, the court may impose any other sentence provided for in this Chapter and enter the reasons for substituting the plan with that sentence on the record of the proceedings.

(4) A child justice court that has imposed a sentence in terms of subsection (2) must-

(a) request the probation officer concerned to monitor the child's compliance with the sentence referred to in subsection (2) and to provide the court with progress reports, in the prescribed manner, indicating compliance; and

(b) warn the child that any failure to comply with the sentence will result in the child being brought back before the child justice court for an inquiry to be held in terms of section 79.

74 Fine or alternatives to fine

(1) A child justice court convicting a child of an offence for which a fine is appropriate must, before imposing a fine-

(a) inquire into the ability of the child or his or her parents, an appropriate person or a guardian to pay the fine, whether in full or in instalments; and

(b) consider whether the failure to pay the fine may cause the child to be imprisoned.

(2) A child justice court may consider the imposition of any of the following options as an alternative to the payment of a fine:

(a) Symbolic restitution to a specified person, persons, group of persons or community, charity or welfare organisation or institution;

(b) payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this;

(c) an obligation on the child to provide some service or benefit to a specified person, persons, group of persons or community, charity or welfare organisation or institution: Provided that an obligation to provide some service or benefit may only be imposed on a child who is 15 years or older; or

(d) any other option that the child justice court considers to be appropriate in the circumstances.

(3) A child justice court that has imposed a sentence in terms of this section must-

(a) request the probation officer concerned to monitor the compliance with the sentence and to provide the court with progress reports, in the prescribed manner, indicating compliance; and

(b) warn the child that any failure to comply with the sentence will result in the child being brought back before the child justice court for an inquiry to be held in terms of section 79.

75 Sentences of correctional supervision

A child justice court that convicts a child of an offence may impose a sentence of correctional supervision envisaged in section 276 (1) (h) of the Criminal Procedure Act.

76 Sentence of compulsory residence in child and youth care centre

(1) A child justice court that convicts a child of an offence may sentence him or her to compulsory residence in a child and youth care centre providing a programme referred to in section 191 (2) (j) of the Children's Act.

(2) A sentence referred to in subsection (1) may, subject to subsection (3), be imposed for a period not exceeding five years or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is the earliest.

(3) (a) A child justice court that convicts a child of an offence-

(i) referred to in Schedule 3; and

(ii) which, if committed by an adult, would have justified a term of imprisonment exceeding ten years,

may, if substantial and compelling reasons exist, in addition to a sentence in terms of subsection (1), sentence the child to a period of imprisonment which is to be served after completion of the period determined in accordance with subsection (2).

(b) The head of the child and youth care centre to which a child has been sentenced in terms of subsection (1) must, on the child's completion of that sentence, submit a prescribed report to the child justice court which imposed the sentence, containing his or her views on the extent to which the relevant objectives of sentencing referred to in section 69 have been achieved and the possibility of the child's reintegration into society without serving the additional term of imprisonment.

(c) The child justice court, after consideration of the report and any other relevant factors, may, if satisfied that it would be in the interests of justice to do so-

(i) confirm the sentence and period of imprisonment originally imposed, upon which the child must immediately be transferred from the child and youth care centre to the specified prison;

(ii) substitute that sentence with any other sentence that the court considers to be appropriate in the circumstances; or

(iii) order the release of the child, with or without conditions.

(d) If a sentence has been confirmed in accordance with paragraph (c) (i), the period served by the child in a child and youth care centre must be taken into account when consideration is given as to whether or not the child should be released on parole in accordance with Chapter VII of the Correctional Services Act, 1998 (Act 111 of 1998).

(4) (a) A child who is sentenced in terms of this section, must be taken in the prescribed manner to the centre specified in the order as soon as possible, but not later than one month after the order was made.

(b) When making an order referred to in subsection (1), the child justice court must-

(i) specify the centre to which the child must be admitted, with due regard to the information obtained by the probation officer referred to in section 71 (3);

(ii) cause the order to be brought to the attention of relevant functionaries in the prescribed manner;

(iii) give directions where the child is to be placed for any period before being admitted to the centre specified in the order, preferably in another child and youth care centre referred to in section 191 (2) (h) of the Children's Act, but not in a police cell or lock-up; and

(iv) direct a probation officer to monitor the movement of the child to the centre specified in the order, in compliance with the order, and to report to the court in writing once the child has been admitted to the centre.

(c) Where the information referred to in section 71 (3) is, for any reason, not available, the presiding officer may request any official of the rank of Director or above at the Department of Social Development dealing with the designation of children to child and youth care centres to furnish that information, in respect of the availability or otherwise of accommodation for the child in question.

(d) Where a presiding officer has sentenced a child in terms of this section, he or she must cause the matter to be retained on the court roll for one month, and must, at the re-appearance of the matter, inquire whether the child has been admitted to the child and youth care centre.

(e) If the child has not been admitted to a child and youth care centre, the presiding officer must hold an inquiry and take appropriate action, which may, after consideration of the evidence recorded, include the imposition of an alternative sentence, unless the child has been sentenced in terms of subsection (3).

(f) If the presiding officer finds that the failure to admit the child is due to the fault of any official, he or she must cause a copy of the finding to this effect to be brought to the attention of the appropriate authority to take the necessary action.

77 Sentence of imprisonment

(1) A child justice court-

(a) may not impose a sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence; and

(b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time.

(2) .....

[Sub-s. (2) deleted by s. 4 (a) of Act 14 of 2014 (wef 19 May 2014).]

(3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in-

(a) Schedule 3;

(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;

(c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment-

(a) for a period not exceeding 25 years; or

(b) envisaged in section 276 (1) (i) of the Criminal Procedure Act.

(5) A child justice court imposing a sentence of imprisonment must take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.

(6) In compliance with the Republic's international obligations, no law, or sentence of imprisonment imposed on a child, including a sentence of imprisonment for life, may, directly or indirectly, deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment.

78 Postponement or suspension of passing of sentence

(1) The provisions of section 297 of the Criminal Procedure Act apply in relation to the postponement or suspension of passing of sentence by a child justice court in terms of this Act.

(2) In addition to the provisions of section 297 of the Criminal Procedure Act, the following may be considered as conditions:

(a) Fulfilment of or compliance with any option referred to in section 53 (3) (a) to (m), (q) and (7) of this Act; and

(b) a requirement that the child or any other person designated by the child justice court must again appear before that child justice court on a date or dates to be determined by the child justice court for a periodic progress report.

(3) A child justice court that has postponed the passing of sentence in terms of subsection (1) on one or more conditions must request the probation officer concerned to monitor the child's compliance with the conditions imposed and to provide the court with progress reports indicating compliance.

79 Failure to comply with certain sentences

(1) If a probation officer reports to a child justice court that a child has failed to comply with a community-based sentence imposed in terms of section 72, or a restorative justice sentence imposed in terms of section 73, or has failed to pay a fine, restitution or compensation provided for in section 74, the child may, in the prescribed manner, be brought before the child justice court which imposed the original sentence for the holding of an inquiry into the failure of the child to comply.

(2) If, upon the conclusion of the inquiry, it is found that the child has failed to comply with the sentence provided for in subsection (1), the child justice court may confirm, amend or substitute the sentence.

***276A Imposition of correctional supervision, and conversion of imprisonment into correctional supervision and** vice versa*

(1) Punishment shall, subject to the provisions of section 75 of the Child Justice Act, 2008, only be imposed under section 276(1)(h)—

(a) after a report of a probation officer or a correctional official has been placed before the court; and

(b) for a fixed period not exceeding three years, or in the case of a conviction for any offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), for a fixed period not exceeding five years.

(2) Punishment shall, subject to the provisions of section 75 of the Child Justice Act, 2008, only be imposed under section 276(1)(i)—

(a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and

(b) for a fixed period not exceeding five years.

(2A) Punishment imposed under paragraph (h) or (i) of section 276(1) on a person convicted of any sexual offence shall, if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the attendance of and participation in a sex offence specific treatment programme as prescribed in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the cost of which shall be borne by the convicted person himself or herself.

(3) (a) Where a person has been sentenced by a court to imprisonment for a period—

(i) not exceeding five years; or

(ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act 8 of 1959, and the regulations made thereunder is not more than five years in the future,and such a person has already been admitted to a prison, the Commissioner or a parole board may, if he or it is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court a quo in order to reconsider the said sentence.

(b) On receipt of any application referred to in paragraph (a) the clerk or registrar of the court, as the case may be, shall, after consultation with the prosecutor, set the matter down for a specific date on the roll of the court concerned.

(c) The clerk or registrar of the court, as the case may be, shall for the purposes of the reconsideration of the sentence in accordance with this subsection—

(i) within a reasonable time before the date referred to in paragraph (b) submit the case record to the judicial officer who imposed the sentence or, if he is not available, another judicial officer of the same court: Provided that if the evidence in the case has been recorded by mechanical means, only such parts of the record as may be indicated as necessary by such a judicial officer, shall be transcribed for the purposes of this subsection;

(ii) inform the Commissioner or the parole board in writing of the date for which the matter has been set down on the roll and request him or it to furnish him with a written motivated recommendation before that date for submission to the judicial officer; and

(iii) submit any recommendation referred to in subparagraph (ii) to that judicial officer.

(d) Whenever a court reconsiders a sentence in terms of this subsection, it shall have the same powers as if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply mutatis mutandis during such reconsideration: Provided that if the person concerned concurs thereto in writing, the proceedings contemplated in this subsection may be concluded in his absence: Provided further that he may nevertheless be represented at such proceedings or cause to submit written representations to the court.

(e) After a court has reconsidered a sentence in terms of this subsection, it may—

(i) confirm the sentence or order of the court a quo;

(ii) convert the sentence into correctional supervision on the conditions it may deem fit; or

(iii) impose any other proper sentence:

Provided that the last-mentioned sentence, if imprisonment, shall not exceed the period of the unexpired portion of imprisonment still to be served at that point.

(4) (a) A court, whether constituted differently or not, which has imposed a punishment referred to in subsection (1) or (2) on a person or has converted his sentence under subsection (3)(e)(ii), may at any time, if it is found from a motivated recommendation by a probation officer, the Commissioner or the parole board that that person is not fit to be subject to correctional supervision or to serve the imposed punishment, reconsider that punishment and impose any other proper punishment.

(b) The procedure referred to in subsection (3) shall apply mutatis mutandis to the reconsideration of any punishment under this subsection.

A convicted person can be sentenced to 'correctional supervision' (s 276(1)*(h)*) or 'imprisonment, (s276(1)(i) from which such a person may be placed under correctional supervision' by the Commissioner of Correctional Services in the latter's discretion.

PERIOD OF CORRECTIONAL SUPERVISION

- In terms of ss(1)(b) read with s276(1)(h), Correctional supervision can only be imposed for a fixed period not exceeding three years.
- It must be an uninterrupted for a fixed period.
- From the date of sentence, the period can be less than three years but not more than three years.

- The exception to the rule is created for offences in contravention of ***the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007***, correctional supervision can be imposed for a fixed period not exceeding five years.
- In terms of ss(2)(b), read with s 276(1)(i), the court may impose imprisonment not exceeding five years, from which the accused may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services.

Section 52(1) of the ***Correctional Services Act 111 of 1998*** entitles a court when ordering correctional supervision to impose any of the following stipulations to the sentence regime:

(a) house detention;
(b) community service;
(c) an order to seek employment;
(d) an order to take up and remain in employment;
(e) an order to pay compensation or damages to victims;
(f) participation in mediation between victim and offender or in family-group conferencing;
(h) financial contribution towards the cost of the community corrections to which he or she has been subjected;
(i) a restriction to one or more magisterial districts;
(j) an order to live at a fixed address;
(k) an order to refrain from using or abusing alcohol or drugs;
(l) an order to refrain from committing a criminal offence;
(m) an order to refrain from visiting a particular place;
(n) an order to refrain from making contact with a particular person or persons;
(o) an order to refrain from threatening a particular person or persons by word or action; and
(p) subjecting the offender to monitoring.

The objectives of community corrections' as recorded in s 50(1)*(a)* of Act 111 of 1998, as amended:

(i) to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner;
(ii) to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future;

(iii) to enable persons subject to community corrections to be rehabilitated in a manner that best keeps them as an integral part of society; and
(iv) to enable persons subject to community corrections to be fully integrated into society when they have completed their sentences.

Correctional supervision: Constitutional 'best interests' rights of children and court's duty when sentencing primary caregiver of minor children

Section 29(2) of the Constitution requires that a child's best interests have paramount importance in every matter concerning the child.

In **S v M (Centre for Child Law as Amicus Curiae) 2007 (2) SACR 539 (CC)** one of the issues addressed by the Constitutional Court was the following: **What are the duties of the sentencing court in the light of s 28(2) of the Constitution and any relevant statutory provisions when the person being sentenced is the primary caregiver of minor children**?

The court set out the following five guidelines in order to enhance uniformity of principle, secure consistency of treatment and, ultimately, foster individualisation of outcome:

(a) A sentencing court must establish whether a convicted person is a primary caregiver.

(b) The court should ascertain what effect a custodial sentence—if such a sentence is indeed being considered—would have on the children.

(c) Where the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court is required to apply its mind to the question whether it is essential that steps be taken to ensure that the children concerned would be adequately cared for while the primary caregiver is in prison.

(d) Where the appropriate sentence clearly does not warrant imprisonment, 'the court must determine the appropriate sentence, bearing in mind the interests of the children'.

(e) 'if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose'.

However, the court made clear that in considering *(a)* to *(e) above:*

*'a court must sentence an offender, albeit a primary caregiver, to prison if on the ordinary approach adopted in **Zinn** a custodial sentence is the proper punishment. The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence on the **Zinn** approach, one of which is a non-custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them.'*

***277** . . .*

[S 277 substituted by s 4 of Act 107 of 1990 and repealed by s 35 of Act 105 of 1997.]Z-6

***278** . . .*

[S 278 repealed by s 35 of Act 105 of 1997.]

***279** . . .*

[S 279 amended by s 5 of Act 107 of 1990 and by s 4 of Act 18 of 1996 and repealed by s 35 of Act 105 of 1997.]

In **S v Makwanyane & another 1995 (2) SACR 1 (CC)** the Constitutional Court decided that the death sentence—in terms of s 277(1)*(a)*, *(c)*, *(d)*, *(e)* and *(f)*, and all corresponding provisions of other legislation sanctioning capital punishment which were in force in any part of the national territory—was inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 (the 'interim Constitution') and accordingly invalid. It was also held that the death sentence infringed the right to life in s 9, the right to dignity in s 10 and the right not to be subjected to cruel, inhuman or degrading treatment and punishment in s 11(2) of the interim Constitution.

Minimum sentences for certain serious offences: The Criminal Law Amendment Act 105 of 1997

The Act prescribes minimum-sentence in respect of certain offences. The prescribed minimum sentence should are the ordinarily appropriate sentences to be imposed by the court, unless the court finds that substantial and compelling circumstances exist to justify a departure from those prescribed sentences.

PART I OF SCHEDULE 2

Section 51(1): Discretionary minimum sentences for certain serious offences

(1) Regional Court or High Court shall impose LIFE IMPRISONMENT for

offences mentioned in Part I of Schedule 2.

MURDER:

- *when It was planned or premeditated*
- *Victim was a :*
    - *Law enforcement officer performing his duties, whether on duty or not.*
    - *Witness that will give material evidence to any evidence referred to in Schedule 1 of CPA, at criminal proceedings.*
- *Death caused during the commission of a rape or compelled rape or attempt (Sec 3 & 4)*
- *During Robbery with aggravating circumstances or attempted robbery with aggravating circumstances*
- *The offence was committed by a person, group or syndicate acting in the execution or furtherance of a common purpose or conspiracy.*
- *Victim killed for body parts - Death by Witchcraft*
- *Victim is under the age of 18 years*
- *The death of the victim resulted from physical abuse or sexual abuse, as contemplated in paragraphs (a) and (b) of the definition of "domestic violence" in section 1 of the Domestic Violence Act, 1998 (Act No. 116 of 1998), by the accused who is or was in a domestic relationship, as defined in section 1 of that Act, with the victim.*

Attempted murder

in circumstances referred to above in relation to the offence of 'murder'.

Rape or Compelled Rape *as contemplated in section 3 or section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007—*

when the victim was:

- *Raped more than once whether by accused or by any co-perpetrator or accomplice*
- *Raped by more than 1 person, in the execution or furtherance of a common purpose or conspiracy.*

in the circumstances where the accused is convicted of the offence of rape and evidence adduced at the trial of the accused proves that the victim was also raped by-

- *any co-perpetrator or accomplice; or*
- *a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,*
- *irrespective of whether or not the co-perpetrator or accomplice*
    - *has been convicted of, or*
    - *has been charged with, or*
    - *is standing trial in respect of, the offence in question;*

The accused is a Second or subsequent offender, where convicted but not yet sentenced

by the accused who-

- *has previously been convicted of the offence of rape or compelled rape; or*
- *has been convicted by the trial court of two or more offences of rape or the offences of rape or compelled rape, irrespective of whether*
    - *the rape of which the accused has so been convicted constitutes a common law or statutory offence;*
    - *the date of the commission of any such offence of which the accused has so been convicted;*
    - *whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;*
    - *whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or*
    - *whether any such offence of which the accused has so been convicted was committed as part of the same chain of events, on a single occasion or on different occasions; or*
    - *by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; (Person knowing he has HIV/AIDS)*

Where victim is:

- *is a person under the age of 18 years;*
- *Physically disabled*
- *Mentally disabled or vulnerable due to disability*
- *An Elderly person as defined in the Older Person's Act (60 years and older)*
- *is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused;*

Rape where there is an Infliction of grievous bodily harm

TERRORISM

Any offence referred to in section 2, 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the ***Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004,*** *when it is proved that the offence has—*

- *endangered the life or caused serious bodily injury to or the death of, any person, or any number or group of persons;*
- *caused serious risk to the health or safety of the public or any segment of the public; or*
- *created a serious public emergency situation or a general insurrection.*

TRAFFICKING IN PERSONS *as provided for in section 4(1) and involvement in the offence as provided for in section 10 of the* ***Prevention and Combating of Trafficking in Persons Act, 2013.***

GENOCIDE

CRIME AGAINST HUMANITY

Any offence referred to in Part I or Part II of Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002).

PART II OF SCHEDULE 2

Section 51 (2) (a)*– a High Court or Regional Court shall impose the following minimum sentences:*

- *15 years imprisonment for first offender*
- *20 years imprisonment for a 2nd offender*
- *25 years imprisonment for a 3rd or subsequent offender*

On conviction of an accused, for the following offences:

MURDER other than part I

ATTEMPTED MURDER not mentioned in Part I

ROBBERY - with aggravating circumstances

ROBBERY - involving the taking of a motor vehicle

DEALING IN DRUGS - section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992),

- *Value is more than R50,000*
- *Value more than R10,000 with common purpose or conspiracy*
- *Offence committed by a law enforcement officer*

Any offence relating to—

The dealing in or smuggling of ammunition, firearms, explosives or armament; or

The possession of an automatic or semi-automatic firearm, explosives or armament.

EXCHANGE CONTROL,

EXTORTION,

FRAUD,

FORGERY,

UTTERING,

THEFT, or

CORRUPTION *- an offence in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004—*

- *involving amounts of more than R500 000,00;*
- *involving amounts of more than R100 000,00, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or*
- *if it is proved that the offence was committed by any law enforcement officer—*
    - *involving amounts of more than R10 000,00; or*
    - *as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.*

TERRORISM

Other than which is mentioned in Part I

RACKETEERING

MONEY LAUNDERING

ASSISTING ANOTHER TO BENEFIT FROM PROCEEDS OF UNLAWFUL ACTIVITIES

ACQUISITION, POSSESSION OR USE OF PROCEEDS OF UNLAWFUL ACTIVITIES

Where the crime relates to:

- *an offence involving ferrous or non-ferrous metal*
- *which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015.*

THEFT OF FERROUS OR NON-FERROUS METAL WHICH FORMED PART OF ESSENTIAL INFRASTRUCTURE

if it caused—

- *interference with or disruption of any basic service, as defined in section 1 of the aforementioned Act, to the public; or*
- *damage to such essential infrastructure; or*

if the offence was committed by or with the collusion or assistance of—

- *a law enforcement officer as defined in section 51(8);*
- *a security officer, who was required to protect or safeguard such essential infrastructure;*
- *an employee of, or contractor appointed by, the owner or the person in charge of such essential infrastructure; or*
- *a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy*

OFFENCE RELATING TO ESSENTIAL INFRASTRUCTURE

Any person who knows or ought reasonably to have known that he / she is dealing with essential infrastructure and:

- *tampers with, damages or destroys essential infrastructure; or*
- *colludes with or assists another person in the tampering with, damage of or destruction of essential infrastructure*

CYBER FRAUD

CYBER FORGERY

CYBER EXTORTION

A contravention of section 8, 9 or 10 of the Cybercrimes Act, 2020—

- *involving amounts of more than R500 000,00;*
- *involving amounts of more than R100 000,00, if it is proven that the offence was committed—*

- *by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or*
- *by a person or with the collusion or assistance of another person, who as part of his or her duties, functions or lawful authority was in charge of, in control of, or had access to data, a computer program, a computer data storage medium or a computer system of another person in respect of which the offence in question was committed; or*

- *if it is proven that the offence was committed by any law enforcement officer—*
  - *involving amounts of more than R10 000; or*
  - *as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or*
  - *with the collusion or assistance of another person, who as part of his or her duties, functions or lawful authority was in charge of, in control of, or had access to data, a computer program, a computer data storage medium or a computer system of another person in respect of which the offence in question was committed.*

RAPE or COMPELLED RAPE *as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007*

- *in circumstances other than those referred to in Part I*

SEXUAL EXPLOITATION OF A CHILD *or*

SEXUAL EXPLOITATION OF A PERSON WHO IS MENTALLY DISABLED

USING A CHILD FOR CHILD PORNOGRAPHY *or*

USING A PERSON WHO IS MENTALLY DISABLED FOR PORNOGRAPHIC PURPOSES

PART III OF SCHEDULE 2

Section 51 (2) (b) - a High Court or Regional Court shall impose the following minimum sentences on conviction of an accused for the offences mentioned in part III of schedule 2:

- *10 years imprisonment for first offender*
- *15 years imprisonment for a 2nd offender*
- *20 years imprisonment for a 3rd or subsequent offender*

ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM*-*

on a child-

- *under the age of 16 years; or*
- *either 16 or 17 years of age and the age difference between the child and the person who has been convicted of the offence is more than four years; or*
- *where the victim is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused.*

Part IV of Schedule 2

Section 51 (2) (c) - a High Court or Regional Court shall impose the following minimum sentences on conviction of an accused for the offences mentioned in part IV of schedule 2:

- *5 years imprisonment for a first offender*
- *7 years imprisonment for a second offender of any such offence*
- *10 years imprisonment for a third or subsequent offender of any such offence*

*If the **accused was in possession of a firearm** which he / she intended to use in the commission of the following offences:*

- *Treason;*
- *Sedition;*
- *Public violence;*
- *Robbery, other than a robbery referred to in Part I or II of this Schedule;*
- *Kidnapping;*
- *An offence involving an assault, when a dangerous wound is inflicted with a firearm, other than an offence referred to in Part I, II or III of this Schedule;*
- *Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence;*
- *Escaping from lawful custody;*
- *Any offence referred to in—*
    - *section 54 (1) of the International Trade Administration Act, 2002 (Act 71 of 2002); or*
    - *section 32(1)(a), (b), (c), (d), (k) in so far as that paragraph relates to section 21(1), (l), (m) or (o) of the Second-Hand Goods Act, 2009 (Act 6 of 2009),*
    - *involving ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015.*

Facts activating the minimum sentence provisions must be proved by the State beyond a reasonable doubt; and this requirement must be addressed by the trial court at the conviction stage, that is, in its judgment on the merits and not for the first time during the sentencing stage - **S v Baloyi 2022 (1) SACR 557 (SCA)**

MINIMUM SENTENCES AND CHILD OFFENDERS

The minimum sentence provisions of s 51 of Act 105 of 1997 do not apply to child offenders, in other words, offenders who were under the age of 18 years at the time of the commission of the crime (s 51(6)).

This followed the declaration by the Constitutional Court in **Centre for Child Law v Minister of Justice and Constitutional Development & others (National Institute for Crime**

Prevention and the Re-integration of Offenders, as Amicus Curiae) 2009 (2) SACR 477 (CC) that the provisions of s 51 were unconstitutional, 'to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence'.

SUBSTANTIAL AND COMPELLING CIRCUMSTANCE

In terms of Section 51(3)*(a) of Act 105 of 1997:*

" If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."

A sentencing court is thus entitled to impose a sentence less than the prescribed sentence if:

- substantial and compelling circumstances exist to justify the lesser sentence
- the court must record such substantial and compelling circumstances
- Regional court jurisdiction is extended to 30 years for crimes in which the prescribed sentence is Life Imprisonment.

The legislature has not defined substantial and compelling circumstances.

These will obviously be circumstances which are:

- material to the offence,
- the interests of society or
- the personal circumstances of the accused person.

The circumstances will be material in that it substantially effects the question of sentence and constitutes material mitigation.

There is no onus placed on the accused person to prove the presence of substantial and compelling circumstances, or on the State to prove the absence of such substantial and

compelling circumstances. However, there rests a clear duty on the accused or the defence to produce evidence in order to compel or convince the court that circumstances exist which justify the imposition of a lesser sentence.

S v Roslee 2006 (1) SACR 537 (SCA) the court indicated as follows:

'Although there is no onus on an accused to prove the presence of substantial and compelling circumstances, it must be so that an accused who intends to persuade a court to impose a sentence less than that prescribed should pertinently raise such circumstances for consideration. In any given case it should not be enough for an accused to argue that such circumstances should be inferred or found in the evidence adduced by the State . . .'

If no factual basis is laid for finding that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it follows that the court will be obliged under the statutory provisions to impose the prescribed sentence.

In **S v Malgas 2001 (1) SACR 469 (SCA)** the question of minimum sentences imposed in terms of ss 51, 52 and 53 of Act 105 of 1997 was considered by the Supreme Court of Appeal. It held:

(a) Section 51 has limited, but not eliminated, the court's discretion in imposing sentence;

(b) Specified sentences are not to be departed from lightly and for flimsy reasons;

(c) The legislature has however deliberately left it to courts to decide whether the circumstances of any particular case called for a departure from a prescribed sentence;

(d) In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion;

(e) All the factors traditionally taken into account in sentencing, whether or not they diminish moral guilt, will thus continue to play a role;

(f) If a sentence called for after consideration of the circumstances of a particular case render a prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, the court is entitled to impose a lesser sentence.

TIME SPEND IN CUSTODY PRIOR TO SENTENCE

The period spent in prison cannot on its own constitute 'substantial and compelling circumstances.

This is a factor which the court may consider as one of the factors in determining whether substantial and compelling circumstance exists:

S v Radebe & another 2013 (2) SACR 165 (SCA):

'(a) Pre-sentence detention is a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances for the purposes of s 51 . .

(b) such period of detention is not to be isolated as a substantial and compelling circumstance. It must be weighed as a mitigating factor, together with all the other mitigating and aggravating factors, in determining whether the effective minimum period of imprisonment to be imposed is justified in the sense of it being proportionate to the crime committed. If it is not, then the want of proportionality constitutes the substantial and compelling circumstance required under s 51(3)

(c) the reason for the prolonged period of pre-sentence detention is a factor. If the offender was responsible for unnecessary delays, then that may rebound to his detriment

(d) there is no mechanical formula or rule of thumb to determine the period by which a sentence is to be reduced. The specific circumstances of the offender, which may include the conditions of his detention, are to be assessed in each case when determining the extent to which the proposed sentence should be reduced

(e) where only one serious offence is committed, and assuming that the offender has not been responsible for unduly delaying the trial, then a court may more readily reduce the sentence by the actual period in detention prior to sentencing.

S v Vilakazi 2009 (1) SACR 552 (SCA) where it was said that in the event of a serious crime *'the personal circumstances of the offender, by themselves, will necessarily recede into the background.'*

Director of Public Prosecutions, Gauteng v Pistorius 2018 (1) SACR 115 (SCA) it was pointed out that a court should not over-emphasise the personal circumstances of the convicted offender.

COURT MAY IMPOSE A SENTENCE HIGHER THAN THE PRESCRIBED MINIMUM SENTENCE

Section 51(2) provides the minimum terms of imprisonment for the specified offences. It also provides that the court may impose a sentence higher than that minimum period.

The High Court has a maximum sentence jurisdiction of Life Imprisonment. However s51(2) provides that a Regional Court may only increase the sentence by a term of five years in excess of the prescribed minimum sentence.

It is not required that the court should forewarn the accused of its intention to impose a sentence in excess of the minimum sentence.

In **Mthembu 2012 (1) SACR 517 (SCA)** the court stated that: '*the indictment stated explicitly that the charge was murder 'read with the relevant provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997'.*

'While it may be notionally axiomatic that the State should forewarn an accused person of its intention to invoke the minimum sentencing provision, the same can hardly hold true for a court. For, surely, a court only arrives at its conclusion as to what a proper sentence is, after having received all of the evidence and hearing argument. Often it is the very act of consideration after the hearing of argument that properly concentrates the judicial mind on the task at hand. Until then such views as may be held by a court may well be no more than tentative . . . When then should the defence be apprised by the court of the fact that a sentence in excess of the ordained minimum, is contemplated? "At the outset of the sentencing phase" was counsel's answer to that question. One suspects that it would have to be as early as then. Any later may in all likelihood render the warning illusory, particularly if the complaint is—and that was the thrust of the complaint—that an accused person may (not would) conduct his or her case differently if forewarned. Notwithstanding the sui generis nature of the sentencing phase, the mere notion that a court should be obliged, ante omnia so to speak, to disclose its view, even if simply tentative, on pain that failure to do so would vitiate the proceedings and moreover, to thereafter be bound to that view (for that is its corollary), is anathema to our law. No such duty existed prior to the coming into operation of the minimum sentencing legislation. And no such duty is to be found in the legislation itself.'

NOTE:

Section 51(5)

The operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in Section 297(4) of the Criminal Procedure Act, 1977

Director of Public Prosecutions, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA)

Section 51(3)(a)

When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) An apparent lack of physical injury to the complainant;

(iii) An accused person's cultural or religious beliefs about rape; or

(iv) Any relationship between the accused person and the complainant prior to the offence being committed.

'Domestic relationship' definition Domestic Violence Act 1998, as amended, means a relationship between a complainant and a respondent in any of the following ways:

(a) They are or were married to each other, including marriage according to any law, custom or religion;

(b) They (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

(c) They are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

(d) They are family members related by consanguinity (descending from the same bloodline), affinity or adoption;

(e) They are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration;

(f) They are persons in a close relationship that share or shared the same residence.

280 Cumulative or concurrent sentences

(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

(3) Such punishments, when consisting of correctional supervision referred to in section 276(1)(h), shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such punishments of correctional supervision shall run concurrently: Provided that if such punishments in the aggregate exceed a period of three years, a period of not more than three years from the date on which the first of the said punishments has commenced shall be served, unless the court, when imposing sentence, otherwise directs.

Section 280 has several functions:

First, sub-s (1) confirms that, when a court has convicted an offender of more than one offence, it may impose a competent sentence for each of these offences.

Secondly, sub-s (2) declares that, when such several sentences all consist of imprisonment, there are different options regarding the order in which they will be served:

a. in the absence of any order by the court, such sentences will be served one after the other; or
b. (ii) the court may order that they should be served in a specific sequence; or
c. the court may order that such sentences 'shall run concurrently'

Thirdly, sub-s (3) provides for largely the same options as sub-s (2), when the sentences are not imprisonment, but correctional supervision.

S v Moswathupa 2012 (1) SACR 259 (SCA) where the court said: 'Where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe'.

281 Interpretation of certain provisions in laws relating to imprisonment and fines

In construing any provision of any law (not being an Act of Parliament passed on or after the first day of September, 1959, or anything enacted by virtue of powers conferred by such an Act), in so far as it prescribes or confers the powers to prescribe a punishment for any offence, any reference in that law—

(a) to imprisonment with or without any form of labour, shall be construed as a reference to imprisonment only;

(b) to any period of imprisonment of less than three months which may not be exceeded in imposing or prescribing a sentence of imprisonment, shall be construed as a reference to a period of imprisonment of three months;

(c) to any fine of less than fifty rand which may not be exceeded in imposing or prescribing a fine, shall be construed as a reference to a fine of fifty rand.

At present Imprisonment in South Africa does not entail any form of labour.

282 Antedating sentence of imprisonment

Whenever any sentence of imprisonment imposed on any person on conviction for an offence is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.

This section does not allow a trial court to antedate any sentence it imposes.

Where a matter is remitted back to the court *a quo* to consider sentence afresh, the court of appeal (or review) can order that the new sentences must be backdated to the date of the original sentences.

283 Discretion of court as to punishment

(1) A person liable to a sentence of imprisonment for life or for any period, may be sentenced to imprisonment for any shorter period, and a person liable to a sentence of a fine of any amount may be sentenced to a fine of any lesser amount.

(2) The provisions of subsection (1) shall not apply with reference to any offence for which a minimum penalty is prescribed in the law creating the offence or prescribing a penalty therefor.

284 Minimum period of imprisonment four days

No person shall be sentenced by any court to imprisonment for a period of less than four days unless the sentence is that the person concerned be detained until the rising of the court.

285 Periodical imprisonment

(1) A court convicting a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, may, in lieu of any other punishment, sentence such person to undergo in accordance with the laws relating to prisons, periodical imprisonment for a period of not less than one hundred hours and not more than two thousand hours.

(2) (a) The court which imposes a sentence of periodical imprisonment upon any person shall cause to be served upon him a notice in writing directing him to surrender himself on a date and at a time specified in the notice or (if prevented from doing so by circumstances beyond his control) as soon as possible thereafter, to the officer in charge of a place so specified, whether within or outside the area of jurisdiction of the court, for the purpose of undergoing such imprisonment.

(b) The court which tries any person on a charge of contravening subsection (4) (a) shall, subject to subsection (5), cause a notice as contemplated in paragraph (a) to be served on that person.

(3) A copy of the said notice shall serve as a warrant for the reception into custody of the convicted person by the said officer.

(4) Any person who—

(a) without lawful excuse, the proof whereof shall be on such person, fails to comply with a notice issued under subsection (2); or

(b) when surrendering himself for the purpose of undergoing periodical imprisonment, is under the influence of intoxicating liquor or drugs or the like; orP

(c) impersonates or falsely represents himself to be a person who has been directed to surrender himself for the purpose of undergoing periodical imprisonment,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

(5) If, before the expiration of any sentence of periodical imprisonment imposed upon any person for any offence that person—

(a) is undergoing a punishment of any other form of detention imposed by any court; or

(b) after having surrendered himself or herself pursuant to the notice issued under subsection (2), without lawul excuse, the proof whereof shall be on that person, thereafter fails to surrender himself or herself for the purpose of undergoing periodical imprisonment, as required,

any magistrate before whom that person is brought, may set aside the unexpired portion of the sentence of periodical imprisonment and, after considering the evidence recorded in respect of the offence in question, may impose in lieu of any unexpired portion any punishment within the limits of his or her jurisdiction and of any punishment prescribed by any law as a punishment for the offence in question; and

(6) Any magistrate may, if it appears from information on oath that a person who has been sentenced in terms of subsection (1) has failed to surrender himself or herself to undergo imprisonment as provided for in this section, issue a warrant for the arrest of that person in order to deal with him or her in terms of subsection (5)(b).

Periodical imprisonment means that the offender is taken up in prison from time to time for periods of not less than 24 hours. In nature it remains imprisonment but it is served in such a way that the offender is able to go to work and to stay with his family when he is released and until he is again detained.

The minimum period is 100 hours, and the maximum 2 000. It is important to note that periodical imprisonment must always be imposed alone and no other punishment may accompany it.

286 Declaration of certain persons as habitual criminals

(1) Subject to the provisions of subsection (2), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him, declare him an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted.

(2) No person shall be declared an habitual criminal—

(a) if he is under the age of eighteen years; or

(b) ...

(c) if in the opinion of the court the offence warrants the imposition of punishment which by itself or together with any punishment warranted or required in respect of any other offence of which the accused is simultaneously convicted, would entail imprisonment for a period exceeding fifteen years.

(3) A person declared an habitual criminal shall be dealt with in accordance with the laws relating to prisons.

Declaration of a person as an habitual criminal means that he will spend an unspecified period in prison not exceeding 15 years.

It may be imposed only by a regional court and the Supreme Court (s 286(1)) .

The magistrate's court has no jurisdiction in this regard and must refer a suitable case to the regional court for punishment in terms of s 114(1)

Sections 116 and 286(1) give the regional court to which an accused has been committed for sentence by the magistrate's court convicting the accused, the power to declare the accused an habitual criminal.

CIRCUMSTANCES IN WHICH A PERSON MAY BE DECLARED A HABITUAL CRIMINAL

1. The court must be satisfied that the accused habitually commits offences and that the community should be protected against him.

2. No *other sentence* may accompany the declaration (s 286(1); a compensatory fine may, however, be imposed with the declaration.

3. The *purpose* of the declaration is clear: to protect the community against those who habitually commit crimes.

4. 'Satisfaction' as to the facts that the accused habitually commits crimes and that the community should be protected against him, has been interpreted as convinced of those facts; no onus needs to be satisfied, the trial court must be convinced that the community is to be protected against the accused.

5. *Habitually commits offences* means that the accused commits crimes because he is used to it and that he 'regularly commits or has a tendency to commit offences'.

6. *The community should be protected* means that the accused constitutes a danger to society because of his habit of acting illegally, that he should be removed from society for at least 7 years and up to 15 years in order to protect the community against him.

7. The *interests of the community* are relevant.

8. Even though the court is satisfied or convinced as set out above, no obligation to declare the accused an habitual criminal arises; there is still a discretion.

286A Declaration of certain persons as dangerous criminals

(1) Subject to the provisions of subsections (2), (3) and (4), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal.

(2) (a) If it appears to a court referred to in subsection (1) or if it is alleged before such court that the accused is a dangerous criminal, the court may after conviction direct that the matter be enquired into and be reported on in accordance with the provisions of subsection (3).

(b) Before the court commits an accused for an enquiry in terms of subsection (3), the court shall inform such accused of its intention and explain to him the provisions of this section and of section 286B as well as the gravity of those provisions.

(3) (a) Where a court issues a direction under subsection (2)(a), the relevant enquiry shall be conducted and be reported on—

(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; and

(ii) by a psychiatrist appointed by the accused if he so wishes.

(b) (i) The court may for the purposes of such enquiry commit the accused to a psychiatric hospital or other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may from time to time determine, and if an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.

(ii) When the period of committal is extended for the first time under subparagraph (i), such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.

(c) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the prosecutor and the accused or his legal representative.

(d) The report shall—

(i) include a description of the nature of the enquiry; and

(ii) include a finding as to the question whether the accused represents a danger to the physical or mental well-being of other persons.

(e) If the persons conducting the enquiry are not unanimous in their finding under paragraph (d)(ii), such fact shall be mentioned in the report and each of such persons shall give his finding on the matter in question.

(f) Subject to the provisions of paragraph (g), the contents of the report shall be admissible in evidence at criminal proceedings.

(g) A statement made by an accused at the enquiry shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the question whether the accused is a dangerous criminal or not, in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible.

(h) A psychiatrist appointed under paragraph (a), other than a psychiatrist appointed by an accused, shall, subject to the provisions of paragraph (i), be appointed from the list of psychiatrists referred to in section 79(9).

(i) Where the list compiled and kept in terms of section 79(9) does not include a sufficient number of psychiatrists who may conveniently be appointed for any enquiry under this subsection, a psychiatrist may be appointed for the purposes of such enquiry notwithstanding that his name does not appear on such list.

(j) A psychiatrist designated or appointed under paragraph (a) and who is not in the full-time service of the State, shall be compensated for his services in connection with the enquiry, including giving evidence, from public funds in accordance with a tariff determined by the Minister in consultation with the Minister of State Expenditure.

(k) For the purposes of this subsection a psychiatrist means a person registered as a psychiatrist under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974).

(4) (a) If the finding contained in the report is the unanimous finding of the persons who under subsection (3) conducted the enquiry, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(b) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under subsection (3)(a) conducted the enquiry.

(c) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under subsection (3)(a) conducted the enquiry.

When declaration is authorised

1. The court must in the first instance be *satisfied* that the person represents a danger to the physical or mental well-being of other persons *and* secondly, that the community should be protected against him. Both requirements must be met.

2. The purpose of the declaration is clear: to protect the community or other persons against those who represent a danger to their physical or mental well-being or against whom the community would generally require protection.

3. It is submitted that 'satisfaction' as to the facts that the accused represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, should be approached in exactly the same manner as s 286, which deals with habitual criminals. Terblance *Guide to Sentencing in South Africa* 2 ed (2007) 241 n 316 supports this approach.

4. It is important to note that the declaration is also competent where the accused represents a danger to the mental well-being of other persons, and that it is not limited to a situation where the accused represents a danger to the physical well-being of other persons. The phrase is a wide one indeed and it is clear that the legislature intended the court to have a wide discretion in this regard; any form of physical or mental danger to the well-being of other persons would fall within the phrase.

5. The phrase 'the community should be protected against him' means that the accused constitutes a danger to society generally because of his conduct in the criminal sense of the word, and that he should be removed from society for an indefinite period in order to protect the community against him.

6. The interests of the community are relevant here in the sense that the community should be protected by the criminal court against a person constituting a physical or mental threat to the community.

7. It is important to note that, even though the court is satisfied or convinced, as set out above, no obligation to declare the accused a dangerous criminal arises; the discretion remains. If it appears to the court that the accused is a dangerous criminal, or where it is alleged before the court that the accused is a dangerous criminal, the court has the discretion after conviction to direct that the matter be enquired into and be reported on in accordance with the provisions of sub-s (3). Where the court is therefore not satisfied or convinced on the facts before it that the accused is a dangerous criminal, but there is an allegation to the effect (presumably from the State) or it appears to the court (ie *prima facie*) that the accused is a dangerous criminal, the court may direct that the matter be enquired into and be reported on. Where there is doubt, the court will usually give the direction for a report.

8. It is obligatory for the court to inform the accused of its intention to direct that the matter be enquired into and be reported on and to explain to him the provisions of s 286A and of s 286B, with the gravity of those provisions. Obviously, this obligation is placed on the court to inform the accused of what is about to happen and to allow the accused to address the court or to take such steps during the trial as he may want to take in order to put his viewpoint in respect of such enquiry and report before the court. It is therefore necessary that the accused should be informed of his rights fully, and that the *audi alteram partem* rule should be fully applied.

9. In **S v T 1997 (1) SACR 496 (SCA)** the appellant savagely raped and sodomised a 15 year old virgin over a period of 5 hours. A 23-year-old first offender suffering from mixed personality disorder, he was sentenced to life imprisonment. On appeal the court held that the procedure and punishment set out in ss 286A and 286B were ideally suited to matters where the crime was not so serious as to warrant life imprisonment, but where the appellant represented a danger to society sufficiently serious to warrant his detention for an indefinite period and where the possibility existed that the appellant's condition could improve to such an extent that he was no longer a danger. The court referred the matter back to the trial court with a direction that the court considered acting in terms of s 286A and thereafter impose an appropriate sentence.

286B Imprisonment for indefinite period

(1) The court which declares a person a dangerous criminal shall—

(a) sentence such person to undergo imprisonment for an indefinite period; and

(b) direct that such person be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court.

(2) A person sentenced under subsection (1) to undergo imprisonment for an indefinite period shall, notwithstanding the provisions of subsection (1)(b) but subject to the provisions of subsection (3), within seven days after the expiration of the period contemplated in subsection (1)(b) be brought before the court which sentenced him in order to enable such court to reconsider the said sentence: Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question if he had not been absent.

(3) (a) The Commissioner may, if he is of the opinion that owing to practical or other considerations it is desirable that a court other than the court which sentenced the person should reconsider such sentence after the expiration of the period contemplated in subsection (1)(b), with the concurrence of the attorney-general in whose jurisdiction such other court is situated, apply to the registrar or to the clerk of the court, as the case may be, of the other court to have such person appear before the other court for that purpose: Provided that such sentence shall only be reconsidered by a court with jurisdiction equal to that of the court which sentenced the person.

(b) On receipt of any application referred to in paragraph (a), the registrar or the clerk of the court, as the case may be, shall, after consultation with the prosecutor, set the matter down for a date which shall not be later than seven days after the expiration of the period contemplated in subsection (1)(b).

(c) The registrar or the clerk of the court, as the case may be, shall for the purpose of the reconsideration of the sentence—

(i) within a reasonable time before the date contemplated in paragraph (b) submit the case record to the judicial officer who is to reconsider the sentence; and

(ii) inform the Commissioner in writing of the date for which the matter has been set down.

(4) (a) Whenever a court reconsiders a sentence in terms of this section, it shall have the same powers as it would have had if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply mutatis mutandis during such reconsideration: Provided that the court shall make no finding before it has considered a report of a parole board as contemplated in section 5C of the Correctional Services Act, 1959 (Act 8 of 1959).

(b) After a court has considered a sentence in terms of this section, it may—

(i) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;

(ii) convert the sentence into correctional supervision on the conditions it deems fit; or

(iii) release the person unconditionally or on such conditions as it deems fit.

(5) A court which has converted the sentence of a person under subsection (4)(b)(ii) may, whether differently constituted or not—

(a) at any time, if it is found from a motivated recommendation by the Commissioner that that person is not fit to be subject to correctional supervision; or

(b) after such person has been brought before the court in terms of section 84B of the Correctional Services Act, 1959 (Act 8 of 1959), reconsider that sentence and—

(i) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;

(ii) release the person unconditionally or on such conditions as it deems fit; or

(iii) where the person is brought before the court in terms of paragraph (b), again place the person under correctional supervision on the conditions it deems fit and for a period which shall not exceed the unexpired portion of the period of correctional supervision as converted in terms of subsection (4)(b)(ii).

(6) For the purposes of subsection (4)(b)(i) or (5)(i), it shall not be regarded as exceeding the jurisdiction of the regional court if the further period contemplated in those subsections and the period contemplated in subsection (1)(b), together exceed such court's jurisdiction.

(7) At the expiration of the further period contemplated in subsection (4)(b)(i) or (5)(i), the provisions of subsections (2) up to and including (6), as well as of this subsection, shall mutatis mutandis apply

287 Imprisonment in default of payment of fine

(1) Whenever a court convicts a person of any offence punishable by a fine (whether with or without any other direct or alternative punishment), it may, in imposing a fine upon such person, impose, as a punishment alternative to such fine, a sentence of imprisonment of any period within the limits of its jurisdiction: Provided that, subject to the provisions of subsection (3), the period of such alternative sentence of imprisonment shall not, either alone or together with any period of imprisonment imposed as a direct punishment, exceed the longest period of imprisonment prescribed by any law as a punishment (whether direct or alternative) for such offence.

(2) Whenever a court has imposed upon any person a fine without an alternative sentence of imprisonment and the fine is not paid in full or is not recovered in full in terms of section 288, the court which passed sentence on such person (or if that court was a circuit local division of the Supreme Court, then the provincial or local division of the Supreme Court within whose area of jurisdiction such sentence was imposed) may issue a warrant directing that he be arrested and brought before the court, which may thereupon sentence him to such term of imprisonment as could have been imposed upon him as an alternative punishment in terms of subsection (1).

(3) Whenever by any law passed before the date of commencement of the General Law Amendment Act, 1935 (Act 46 of 1935), a court is empowered to impose upon a person convicted by such court of an offence, a sentence of imprisonment (whether direct or as an alternative to a fine) of a duration proportionate to the sum of a fine, that court may, notwithstanding such law, impose upon any person convicted of such offence in lieu of a sentence of imprisonment which is proportionate as aforesaid, any sentence of imprisonment within the limits of the jurisdiction of the Court.

(4) Unless the court which has imposed a period of imprisonment as an alternative to a fine has directed otherwise, the Commissioner or a parole board may in his or its discretion at the commencement of the alternative punishment or at any point thereafter, if it does not exceed five years—

(a) act as if the person were sentenced to imprisonment as referred to in section 276(1)(i); or

(b) apply in accordance with the provisions of section 276A(3) for the sentence to be reconsidered by the court a quo and thereupon the provisions of section 276A(3) shall apply mutatis mutandis to such a case.

This section creates a form of punishment without detention in a prison.

It is usually imposed with alternative imprisonment, - imprisonment which becomes operative upon failure to pay the fine.

A fine may be imposed for all offences where there is no prescribed sentence: the ordinary jurisdiction of the court allows the court to impose a sentence in its discretion.

When a statute mentions only imprisonment, a fine cannot be imposed (section 276(2)(*a*)).

When a statute does not mention imprisonment but only a fine, the court may in terms of subsection (1) impose an alternative of imprisonment within its jurisdiction.

If the statutory provision mentions imprisonment as alternative to a fine, it is not permitted to impose imprisonment only: a fine has to be imposed with an alternative of imprisonment. However, imprisonment cannot be imposed with a fine as alternative.

PROCEDURE WHEN CONSIDERING A FINE—Although no rigid rules can be prescribed, it is submitted that the court should follow this procedure:

1. Determine whether it is a case for imprisonment without the option of a fine. If it is, the question of a fine does not arise at all.

2. If a fine is appropriate the *quantum* thereof is determined with reference to

(a) the seriousness of the offence committed;

(b) the penalty clause in the statute (if applicable); and

(c) the ability of the accused to pay.

3. It is not necessary that the fine imposed should fall within the accused's declared means, but the means have to be investigated. The court has to take into account whether family or friends are willing to help the accused pay the fine, and consider whether the accused will in such circumstances be sufficiently punished.

4. “Ability” refers primarily to income but can also include assets which can be converted to money.

5. In addition to the total amount of the fine, the court must also consider the possibility of periodic payments and their extent.

6. There is no fixed proportion between the extent of the fine and the length of imprisonment.

The alternatives are within the discretion of the sentencing officer and vary according to the circumstances mentioned above.

It should be noted that s 74 of the Child Justice Act 75 of 2008 regulates fines, or alternatives to fines, in a child justice court.

(3) A child justice court that has imposed a sentence in terms of this section must-

(a) request the probation officer concerned to monitor the compliance with the sentence and to provide the court with progress reports, in the prescribed manner, indicating compliance; and

(b) warn the child that any failure to comply with the sentence will result in the child being brought back before the child justice court for an inquiry to be held in terms of section 79.

288 Recovery of fine

(1) (a) Whenever a person is sentenced to pay a fine, the court passing the sentence may, in its discretion, issue a warrant addressed to the sheriff or messenger of the court authorizing him to levy the amount of the fine by attachment and sale of any movable property belonging to such person although the sentence directs that, in default of payment of the fine, such person shall be imprisoned.

(b) The amount which may be levied shall be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment and sale thereunder.

(2) If the proceeds of the sale of the movable property are insufficient to satisfy the amount of the fine and the costs and expenses aforesaid, a superior court may issue a warrant, or, in the case of a sentence by any lower court, authorise such lower court to issue a warrant for the levy against the immovable property of such person of the amount unpaid.

(3) When a person is sentenced only to a fine or, in default of payment of the fine, imprisonment and the court issues a warrant under this section, it may §§ 288-289suspend the execution of the sentence of imprisonment and may release the person upon his executing a bond with or without sureties as the court thinks fit, on condition that he appears before such court or some other court on the day appointed for the return of such warrant, such day being not more than fifteen days from the time of executing the bond, and in the event of the amount of the fine not being recovered, the sentence of imprisonment may be carried into execution forthwith or may be suspended as before for a further period or periods of not more than fifteen days, as the court may deem fit.

(4) In any case in which an order for the payment of money is made on non-recovery whereof imprisonment may be ordered, and the money is not paid forthwith, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (3), and in default of his doing so, may at once pass sentence of imprisonment as if the money had not been recovered.

The court may issue a warrant addressed to the sheriff authorising him to levy the amount of the fine by attachment and sale of movable property belonging to a person who has been sentenced to a fine, although there is an alternative imprisonment prescribed in terms of s 287(1).

289 Court may enforce payment of fine

Where a person is sentenced to pay a fine, whether with or without an alternative period of imprisonment, the court may in its discretion, without prejudice to any other power under this Act relating to the payment of a fine, enforce payment of the fine, whether as to the whole or any part thereof—
(a) by the seizure of money upon the person concerned;
(b) if money is due or is to become due as salary or wages from any employer of the person concerned— (i) by from time to time ordering such employer to deduct a specified amount from the salary or wages so due and to pay over such amount to the clerk of the court in question; or
(ii) by ordering such employer to deduct from time to time a specified amount from the salary or wages so due and to pay over such amount to the clerk of the court in question.

Where an accused was sentenced to a fine, a court may in its discretion enforce payment of the full fine or part thereof by ordering the seizure of money upon his person or by ordering an employer to deduct a specified amount from his salary or wages and to pay it over to the clerk of the court.

296 Committal to treatment centre

(1) A court convicting any person of any offence may, in addition to or in lieu of any sentence in respect of such offence, order that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992, if the court is satisfied from the evidence or from any other information placed before it, which shall in either of the said cases include the report of a probation officer, that such person is a person as is described in section 21(1) of the said Act, and such order shall for the purposes of the said Act be deemed to have been made under section 22 thereof: Provided that such order shall not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.
(2) (a) Where a court has referred a person to a treatment centre under subsection (1) and such person is later found not to be fit for treatment in such treatment centre, such person may be dealt with mutatis mutandis in accordance with the provisions of section 276A(4).
(b) For the purposes of the provisions of paragraph (a) the expression 'a probation officer or the Commissioner' in section 276A(4) shall be construed as the person at the head of the treatment centre or a person authorized by him.

Committal to a treatment centre is a punishment that is imposed in response to the commission of a crime.
The most important considerations guiding its imposition are the following:

(1) There must have been a conviction, regardless of the offence involved

(2) Committal may occur in addition to or in lieu of any sentence. An accused who has been committed to a centre will not be subject to prescribed sentences.

(3) The court must be satisfied that the accused is a person as described in s 33(1) of the Prevention of and Treatment for Substance Abuse Act 70 of 2008. Essentially, this means a person who is dependent on some substance and (1) is a danger to himself or his environment; (2) harms his own welfare or that of his family; or (3) commits crime to sustain the dependence.

(4) The court must be satisfied from the evidence or other information placed before it, which must include the report of a probation officer, that the accused is a person as aforesaid.

(5) Committal may not be ordered if the accused has been convicted solely on his plea of guilty under s 112(1)(a).

(6) The order of the court is deemed to be an order 'made under' s 36(1) of the Prevention of and Treatment for Substance Abuse Act 70 of 2008.

(7) The order committing an accused to a centre is subject to automatic review.

(8) The order directing a committal to a treatment centre does not have to await designation of a centre by the Director-General. The magistrate may make an order in general terms, with the name of the centre being subsequently inserted on the prescribed form.

297 Conditional or unconditional postponement or suspension of sentence, and caution or reprimand

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion—

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned—

(i) on one or more conditions, whether as to—

(aa) compensation;

(bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(ccA) submission to correctional supervision;

(dd) submission to instruction or treatment;

(ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Service Act, 1991 (Act No 116 of 1991);

[Item (ee) amended by s 4 of Act 18 of 1996.]

(ff) the compulsory attendance or residence at some specified centre for a specified purpose;

(gg) good conduct;

(hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period; or

(ii) unconditionally, and order such person to appear before the court, if called upon before the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order; or

(c) discharge the person concerned with a caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

(1A) . . .

[Sub-s (1A) inserted by s 20(b) of Act 33 of 1986 and deleted by s 99(1) of Act 75 of 2008.]

(2) Where a court has under paragraph (a)(i) of subsection (1) postponed the passing of sentence and the court, whether differently constituted or not, is at the expiration of the relevant period satisfied that the person concerned has observed the conditions imposed under that paragraph, the court shall discharge him without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

(3) Where a court has under paragraph (a)(ii) of subsection (1) unconditionally postponed the passing of sentence, and the person concerned has not at the expiration of the relevant period been called upon to appear before the court, such person shall be deemed to have been discharged with a caution under subsection (1)(c).

(4) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) of subsection (1).

(5) Where a court imposes a fine, the court may suspend the payment thereof—

(a) until the expiration of a period not exceeding five years; or

(b) on condition that the fine is paid over a period not exceeding five years in instalments and at intervals determined by the court.

(6) (a) A court which sentences a person to a term of imprisonment as an alternative to a fine or, if the court which has imposed such sentence was a regional court or a magistrate's court, a magistrate, may, where the fine is not paid, at any stage before the expiration of the period of imprisonment, suspend the operation of the sentence and order the release of the person concerned on such conditions relating to the payment of the fine or such portion thereof as may still be due, as to the court or, in the case of a sentence imposed by a regional court or magistrate's court, the magistrate, may seem expedient, including a condition that the person concerned take up a specified employment and that the fine due be paid in instalments by the person concerned or his employer: Provided that the power conferred by this subsection shall not be exercised by a magistrate where the court which has imposed the sentence has so ordered.

(b) A court which has suspended a sentence under paragraph (a), whether differently constituted or not, or any court of equal or superior jurisdiction, or a magistrate who has suspended a sentence in terms of paragraph (a), may at any time—

(i) further suspend the operation of the sentence on any existing or additional conditions which to the court or magistrate may seem expedient; or

(ii) cancel the order of suspension and recommit the person concerned to serve the balance of the sentence.

[Sub-s (6) substituted by s 21 of Act 59 of 1983.]

(7) A court which has—

(a) postponed the passing of sentence under paragraph (a)(i) of subsection (1);

(b) suspended the operation of a sentence under subsection (1)(b) or (4); or

(c) suspended the payment of a fine under subsection (5),

whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine, as the case may be, subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.

(a) postponed the passing of sentence under paragraph (a)(i) of subsection (1); or

(b) suspended the operation of a sentence under subsection (1)(b) or under subsection (4),

on condition that the person concerned perform community service or that he submit himself to instruction or treatment or to the supervision or control of a probation officer or that he attend or reside at a specified centre for a specified purpose, may, whether or not the court is constituted differently than it was at the time of such postponement or suspension, at any time during the period of postponement or suspension on good cause shown amend any such condition or substitute any other competent condition for such condition, or cancel the order of postponement or suspension and impose a competent sentence or put the suspended sentence into operation, as the case may be.

(8A) (a) A court which under this section has imposed a condition according to which the person concerned is required to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, shall cause to be served upon the person concerned a notice in writing directing him to report on a date and time specified in the notice or (if prevented from doing so by circumstances beyond his control) as soon as practicable thereafter, to the person specified in that notice, whether within or outside the area of jurisdiction of the court, in order to perform that community service, to undergo that instruction or treatment or to attend that centre or to reside thereat, as the case may be.

(b) A copy of the said notice shall serve as authority to the person mentioned therein to have that community service performed by the person concerned or to provide that instruction or treatment to the person concerned or to allow the person concerned to attend that centre or to reside thereat.

(8B) Any person who—

(a) when he reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like; or

(b) impersonates or falsely represents himself to be the person who has been directed to perform the community service in question, to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

(9) (a) If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the case may be, be arrested or detained and, where the condition in question—

(i) was imposed under paragraph (a)(i) of subsection (1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or

(ii) was imposed under subsection (1)(b), (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction,

and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence or, in the case of subparagraph (ii), put into operation the sentence which was suspended.

(b) A person who has been called upon under paragraph (a)(ii) of subsection (1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.

If the accused is convicted of an offence which is not subject to a prescribed minimum sentence – the court may:

- postpone the passing of sentence for a period not exceeding 5 years. This may be done with or without conditions.
- Suspend the operation of a sentence for a period not exceeding 5 years, subject to the accused being ordered to comply with one or more of the listed conditions.
- Suspend the payment of a fine for a period not exceeding 5 years, on condition that the accused pay the full amount of the fine in instalments before the expiry of the period of suspension.