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This issue of the *Annual Survey of South African Law* is dedicated with gratitude to Professor JT (Jopie) Pretorius

Professor Joseph Thomas Pretorius retired from the University of South Africa and from *Annual Survey* at the end of 2017 after an illustrious career with the journal spanning some 32 years. Starting as a contributor in 1985, Jopie has throughout been a driving force behind the continuity and success of *Annual Survey*. Apart from authoring the Chapters *Negotiable Instruments* and *Miscellaneous Contracts,* he served on, and since 2007 chaired, the Editorial Board. As Chair of the Board, Jopie brought his encyclopaedic knowledge of who's who in South African law to bear in drawing together the formidable pool of expertise which has over the years promoted and maintained the journal's status as one of the leading and most authoritative legal sources in the country. His wisdom in handling the inevitable problems, and the years of experience that he applied diplomatically in dealing with academic authors have proven invaluable. He also played a pivotal and visionary role in mentoring and developing the talent of several young editors. South African academia and practice alike owe Professor Pretorius a deep debt of gratitude for his contribution to law in our country. We are very pleased to announce that he has agreed to continue serving on *Annual Survey's* Editorial Board.

As the editors of *Annual Survey of South African Law,* we wish Jopie every happiness in his retirement, and every success in his future endeavours, academic and otherwise. May the call of Wakkerstroom never fade, and may you, Bella, and your children spend many happy hours wandering the hills.

And so, with a nod to Leonard Cohen, we must regretfully say: *Now so-long [Jopie-man] it's time that [you] began to laugh, and cry, and cry, and laugh, about it all again . . .*

Leonard Cohen *"So long Marianne"* (Project Seven Music 1966)

Neville Botha, Judith Geldenhuys, Jeannie Van Wyk, and Christian Schulze

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The publication of the peer-reviewed journal *Annual Survey of South African Law* contributes to the growth of knowledge. Therefore, all participants – authors, editors, peer reviewers, and the publisher – agree on standards of proper ethical behaviour. The University of South Africa and Juta and Co Ltd, who are respectively responsible for producing and publishing the journal, recognise the ethical and other responsibilities and take our guardianship of the functions connected with the publication of the journal very seriously.

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The authors undertake to present an accurate and current account of legislative and judicial developments and to provide objective discussion. The material must contain sufficient detail and permit others to replicate the work. Making fraudulent or knowingly inaccurate statements is unacceptable. Work reflecting editorial opinion must be acknowledged as such.

The work must be original, and where the work/words of others have been used this must be appropriately quoted or cited. Plagiarism in any form is unethical behaviour, and unacceptable. Authors are not permitted, in general, to publish manuscripts. Submitting the same manuscript to more than one journal for publication is unethical and unacceptable, save in exceptional circumstances where the authors have sought approval from the editor for publication of the same material in a secondary publication; in this case, the primary reference must be cited in the secondary publication.

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The editorial board will not disclose any information about chapters submitted for publication to anyone other than the corresponding author, reviewers, and the publisher as appropriate.

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The editors take responsibility to respond to ethical complaints concerning a submitted manuscript or chapter published in the *Annual Survey of South African Law*. Any reported complaint, even if submitted years after publication, will be investigated and appropriate measures will be taken.

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The objective peer review process assists the editor-in-chief in making editorial decisions, and in improving the quality of the chapters. Peer review is a key component of scholarly communication and ensures sound standards of research and proper acknowledgment of sources used.

Unpublished materials contained in an unpublished manuscript may not be used in the reviewer's own research without the consent of the author. Reviewers must disclose any possible conflict of interests that may exist, and recuse themselves from reviews in instances where such a conflict exists.

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CRIMINAL PROCEDURE

ANDRA LE ROUX-KEMP*

LEGISLATION

CRIMINAL MATTERS AMENDMENT ACT 18 OF 2015

The Criminal Matters Amendment Act 18 of 2015 was published in *Government Gazette* 39522 of 15 December 2015 and aims to amend and regulate miscellaneous matters relating to essential infrastructure-related offences. Essential infrastructure is defined in section 1 of the Amendment Act as 'any installation, structure, facility or system, whether publicly or privately owned, the loss or damage of, or the tampering with, which may interfere with the provision or distribution of a basic service to the public'. The Act came into operation on 1 June 2016 (Proc R33 in *GG* 40010 of 24 May 2016).

CASE LAW

DUTIES OF JUDICIAL OFFICERS

It is the duty of all judicial officers to ensure that there is no irregularity or illegality in the proceedings over which they preside, and that all formalities, rules, and principles of procedure with which the law requires such a trial to be initiated and conducted, are adhered to (*S v Fethum* 1991 (1) SACR 461 486).

The right of an accused to a fair trial

Judge Goldstone in *S v Radebe; S v Mbonani* 1988 (1) SA 191 (T) said the following about the general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights (196F-I):

> If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which

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> could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation per se or the absence of the suggested advice to an accused person per se will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances.

This important duty of judicial officers to inform accused of their legal rights, including their right to legal representation, was considered in *S v Mafika* 2016 (1) SACR 623 (FB). The accused in this matter did not agree with one of the charges brought against him and refused to give his legal representative instructions in this regard. His legal representative subsequently withdrew due to lack of proper instructions. The presiding magistrate insisted, however, that all charges be put to the accused and despite the accused's objections, also instructed the prosecutor to proceed with the case (paras [1]-[3]). The reason for the trial magistrate adopting this stance as indicated on the court record, was that the accused had a problem with the charges against him and not with his legal representative. Another legal representative would, therefore, in the opinion of the magistrate, not have made a difference (para [3]).

Throughout the ensuing trial, the accused requested legal representation and indicated that he was not in a position to defend himself, to cross-examine witnesses, and to present his case. The magistrate refused these requests, and while the magistrate explained to the accused his rights of cross-examination after the testimony of each witness for the state, the magistrate merely noted on the record that the accused had not responded to these explanations (paras [4] [5]). Judge Ebrahim, writing for the majority of the High Court Free State Division, Bloemfontein, described this as 'an arrogance on the part of the presiding magistrate vis-à-vis the accused as well as an authoritarian stance in taking a summary decision not to afford the accused any opportunity to obtain legal assistance' (para [7]).

The judge noted that not even the accused's direct appeal to the presiding magistrate's

> apparent sense of fair play, by repeatedly alluding to his lack of legal expertise and his feeling of impotence in the conduct of his defence on his own without the assistance of a lawyer, as well as his need for a lawyer to bring proper legal skills to bear in the presentation of his case had any effect whatsoever in jolting the magistrate out of his state of anaesthesia as regards the accused's fundamental right to be legally represented (para [9.2]).

The failure of the trial magistrate to ensure the accused his fundamental right to a fair trial, and particularly his right to legal representation, was found to constitute a gross irregularity resulting in a failure of justice. The conviction was consequently set aside and the matter remitted back to the magistrate's court for a trial *de novo* before a different magistrate (para [11]).

The duty of a court during bail proceedings

In *S v Mathonsi* 2016 (1) SACR 417 (GP), Judge Makhafola for the Gauteng Division, Pretoria, emphasised that it is the duty of a court to guide the parties in following the correct procedure during a bail hearing. Bail hearings are furthermore *sui generis* and inquisitorial in nature and a court must, therefore, take an active role in ensuring that a just decision is made with regard to an accused's right to freedom pending a trial (para [8]).

In this matter, the appellant appeared twice before the magistrate for consideration for release on bail. The first bail application was refused – as was the second, despite its being based on new facts and evidence (para [3]). In the second bail application, both the appellant's attorney and the prosecution merely addressed the court on the new facts without presenting the court with *viva voce* evidence and/or affidavits (para [16]). On appeal against the second decision to refuse bail, it was held that the presiding officer should have taken control of the proceedings where the defence and the prosecution were lacking, by, for example, inviting the appellant to present evidence in support of the new facts (para [21]). Having found that the magistrate's court had failed to execute its duties in this regard, the second decision not to grant the appellant bail was set aside (para [29]).

Referral of cases to the High Court and responding to enquiries by the High Court

The accused in *S v Tshabalala* (case 102/2015 [2016] ZAFSHC 90, 5 May 2016) was convicted of theft after a plea of guilty in

terms of section 112(1)*(a)* of the Criminal Procedure Act 51 of 1977 and sentenced to a fine of R1 500, or in default of payment, three months' imprisonment. It was also determined that the accused was fit to possess a firearm in terms of section 103(2) of the Firearms Control Act 60 of 2000. The matter was subsequently sent on review to the High Court Free State Division, Bloemfontein, as on conviction of the accused under section 112(1)*(a)* the prosecutor proceeded to prove previous convictions against the accused and asked that a term of direct imprisonment be imposed. This is, however, not possible under section 112(1)*(a)*, which can only be relied upon where the conviction is of a trivial nature warranting a sentence other than imprisonment (para [19]). While there was, therefore, a clear error of law in this case, the discussion here will rather focus on the administration of the matter in terms of its referral to the High Court for review.

The conviction and sentence were handed down on 26 January 2015, but the High Court received them only on 10 June 2015 (paras [1] [2]). The High Court thereupon sent the review, together with queries, back to the magistrate on 19 June 2015, and this request was apparently only received by the magistrate on 29 August 2015 (para [3]). On 20 October 2015, the High Court received a reply to its queries dated 9 October 2015. In addition to this protracted correspondence, the High Court also noted that the initial review was referred in terms of section 303 of the Criminal Procedure Act and, in the response to queries raised by the High Court, it was indicated that the matter was being referred as a special review in terms of section 304(4) of the Act (para [4]).

Mocumie J and Opperman AJ for the Bloemfontein High Court, observed that there are no guidelines in magistrates' courts across the country on the administration of a referral of review cases by a magistrate's court to the High Court (para [6]). The practice is for a magistrate to alert the Chief Magistrate, Senior Magistrate, Quality Assurance Officer, or a magistrate based at a station where he or she serves as the head of office, of a mistake or oversight that can only be corrected by a High Court. The case is then referred by the designated official by way of a covering letter identifying the problem and proposing a remedy or seeking direction or guidance on how the matter should be dealt with. It is important, however, that this covering letter is written by the designated official at that magistrate's court and not the magistrate responsible for the mistake or oversight (para [7]).

Where a matter has been sent on review to the High Court, and that court requests a magistrate to furnish reasons for a conviction or sentence, that request should be regarded as 'one of an extremely urgent nature' (para [11]), and the clerk of the court is likewise duty bound to comply with the provisions of section 303 of the Criminal Procedure Act which require that

> [t]he clerk of the court in question shall within one week after the determination of a case referred to in paragraph *(a)* of section 302(1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his consideration.

Although the Criminal Procedure Act does not explicitly attach any consequences to non-compliance, any delay has the potential of causing the accused prejudice and can result in 'an irreversible collapse of justice' (para [12]).

In *S v Nyumbeka* 2012 (2) SACR 367 (WCC), the full bench of the Western Cape High Court reiterated the role of a magistrate when imposing a reviewable sentence as follows (paras [21] [22]):

> [21] When imposing a reviewable sentence, magistrates should check:
> (i) that it had been entered into the review register;
> (ii) that the full record had been properly typed, where it had been handwritten, and transcribed, where there was a mechanical recording of the proceedings;
> (iii) that all the evidence presented at the trial is included and, where it is not available, try and reconstruct such evidence from the handwritten notes, with the assistance of all the parties concerned;
> (iv) that all documents and annexures are attached to the record;
> (v) that no incomplete or incorrect record is sent on review, because this would lead to delays, . . . Should this happen, the magistrate would be clearly negligent in executing his/her duties and functions imposed by the law, especially section 303 of the Criminal Procedure Act 51 of 1977.
>
> [22] Whilst the preparation of a record for a review and an appeal is primarily a function of the clerk of the court, it is ultimately the function of the magistrate to see to it that a proper record is sent to the high court. The clerk of the court, unlike the one in this case, should see to it that this is done timeously and within the periods prescribed by law,

and should follow up after having checked the register, as to why reviews are delayed. . . .

Appointing assessors

Section 93*ter*(1) of the Magistrates' Court Act 32 of 1944 provides a magistrate to summons any one or two persons who, in his or her opinion, may be of assistance at the trial or in the determination of an appropriate sentence. Where assessors are appointed to assist a magistrate at trial, the appointment must be made before any evidence has been led, and where the assessors are appointed to assist in sentencing, mention is specifically made of the consideration of community-based punishment. The appointment of assessors by a magistrate is, therefore, a matter which falls within the discretion of the magistrate, and this discretion must be exercised on the basis of what the magistrate deems expedient for the administration of justice. However, where an accused stands trial in a regional court on a charge of murder – whether together with other charges or not – the presiding magistrate must be assisted at trial by two assessors, unless the accused explicitly requests that the trial proceed without assessors, and even then, the presiding magistrate may still exercise a discretion and appoint one or two assessors.

The accused in *Gayiya v S* 2016 (2) SACR 165 (SCA) was arraigned in a regional court on five charges, the first being kidnapping, the second a charge of assault with intent to cause grievous bodily harm, and the final three charges of murder. The accused pleaded guilty to counts one and three, but not guilty to counts two, four and five (para [1]). The magistrate returned a guilty verdict on counts one and three and proceeded to question the accused with regard to the remaining charges in terms of section 115 of the Criminal Procedure Act. In answering these questions, the accused made certain admissions which were recorded in terms of section 220 of the Act. The state then closed its case without leading further evidence and the accused also closed his case, despite the explanation offered by the regional magistrate that the exculpatory parts of his plea explanation were not evidence in his favour, and that he had to testify under oath if he wished them to have any evidential value. The accused was subsequently also convicted on counts two, four, and five on the strength of the formal admissions recorded in terms of section 220 of the Criminal Procedure Act (para [2]). It was only after the accused and the prosecution had addressed the court on

sentence, and the regional magistrate had committed the accused for sentence to the High Court in terms of section 52*(a)*(i) of the Criminal Procedure Act, that the regional magistrate informed the accused of his right to have assessors appointed (para [4]). The accused hereupon indicated that he did not need assessors at the trial, but wanted assessors present at the sentencing stage (para [4]).

The magistrate's court which had tried and convicted the accused in *Gayiya v S* 2016 (2) SACR 165 (SCA) had, therefore, not been properly constituted in that the peremptory provisions of section 93*ter*(1) of the Magistrates' Court Act 32 of 1944 had not been met. The regional magistrate in this case should have informed the accused of his right to have two assessors present at trial before the commencement of the trial and, furthermore, the law requires that the magistrate be assisted by two assessors in a murder trial before a regional court, unless the accused requests that the matter proceed without assessors (para [8]). This defect cannot be waived by an accused *ex post facto* (para [11]). The convictions and sentences were consequently set aside (para [12]).

Also see *S v Nhlapo* 2016 (1) SACR 489 (GP) where it was held that the failure to appoint assessors is a gross irregularity (para [10]; and *S v Mokalaka* 2010 (1) SACR 88 (GNP); *S v Naicker* 2008 (2) SACR 54 (N)).

Discharging an accused in terms of section 174 of the Criminal Procedure Act 51 of 1977

The respondents in *S v Moreroa* (case A523/2015 [2016] ZAGPPHC 30, 22 January 2016) were charged with one count of corruption and three counts of having contravened section 6*(a)–(c)* of the Prevention of Organised Crime Act 121 of 1998. At the end of the state's case, the respondents applied for, and were granted, a discharge in terms of section 174 of the Criminal Procedure Act. Appealing this decision, the appellants argued that the magistrate had applied the incorrect test in deciding to order their discharge. They submitted that the correct test is whether a reasonable presiding officer could have convicted on the evidence which had been placed before him (para [11]).

Judge Jansen for the Gauteng Division of the High Court, Pretoria, held that the correct interpretation of section 174 of the Criminal Procedure Act was laid down in *R v Shein* 1925 AD 6 and has applied ever since. This interpretation requires that a court

order the discharge of an accused where it is of the view that there is no evidence of his or her having committed the offence in the charge sheet or any other offence which may arise in terms of a competent verdict (paras [50] [51]).

In another case, *S v M* (case 2/2016 [2016] ZAFSHC 41, 18 March 2016), the two accused were charged with rape, robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, and two counts of housebreaking with the intent to contravene provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The accused pleaded not guilty to all the charges and at the close of the state's case, brought an application for discharge in terms of section 174 of the Criminal Procedure Act (para [5]). The prosecution did not oppose the application with regard to accused 1, but argued that the evidence against accused 2 did not allow for a discharge (para [6]).

Section 174 of the Criminal Procedure Act provides for an accused to be discharged at the close of the prosecution's case, if the court is of the opinion that there is no evidence that he or she committed the offence referred to in the charge, or any other offence of which he or she may be convicted in terms of the charge. In such circumstances, a court may return a verdict of not guilty (para [9]). This requires that the court evaluate the evidence at the close of the prosecution's case differently from how that evidence would be evaluated at the end of a trial. This is because a discharge in terms of section 174 of the Criminal Procedure Act is a *sui generis* interlocutory procedure – ie, a question of law and not of fact – and it is also for this reason that assessors are prohibited from participating in rulings in terms of section 174 (para [10]).

The test to determine whether there is indeed no evidence upon which a reasonable court acting carefully would convict, was articulated in *S v Shuping & others* 1983 (2) SA 119 (B): 'The first consideration is whether there is evidence on which a reasonable person may convict. If the answer is ''yes'', a discharge should be refused. If the answer is ''no'', it must be asked whether there is a reasonable possibility that the defence evidence might supplement the state's case' (para [11]). With regard to the second leg of the test, it was further held in *S v Lubaxa* 2001 (2) SACR 703 (SCA) that a minimum of evidence was required for a person to be convicted. In the absence of such a minimum of evidence, a person ought not to be prosecuted

merely on the expectation that at some stage he or she might incriminate him- or herself, or supplement the state's case (para [12]).

However, this minimum of evidence cannot be equated with a standard of proof – ie, whether it is beyond a reasonable doubt or on a balance of probabilities. The test is, as indicated above, *sui generis* and must be applied with judicial discretion in light of the specific facts and circumstances of each case. Judge Opperman for the Free State High Court, Bloemfontein in *S v M* (case 2/2016 [2016] ZAFSHC 41, 18 March 2016), describes this test as 'a combination of the first leg of the *Shuping*-case, the dictum in the *Lubaxa*-case and the principles of a fair trial in terms of the Constitution of the Republic of South Africa (1996)' (para [16]). Further, in applying the provisions of section 174, the following considerations must be taken into account as per *S v Gqozo* (2) 1994 (1) BCLR 10 (Ck) (*S v M* above para [16]):

1. An innocent person must as far as possible never be convicted of a crime.
2. The conviction of a guilty person must be obtained with the best possible endeavours. The prosecution representing the community must fulfil their duties within the framework of the law and the available facts.
3. The right to remain silent and the satisfaction of the responsibility which is on the State must be satisfied as far as possible.
4. The rights of the accused are very important.
5. The right of the community to see that justice is done is equally important.
6. To achieve these goals instruments should be used in such a way that justice is done to everybody.

With regard to whether the credibility of state witnesses ought to be taken into consideration in deciding whether to grant a discharge, it was held that this should play only a limited role, and that the evidence should be ignored only if it was of such poor quality that no reasonable person could possibly accept it (para [20]).

In considering the applications for discharge of the two accused on these considerations and the test as described above, the court concluded that it would indeed be unconstitutional to put the first accused on his defence in light of the poor quality of the evidence against him, but that the second accused was to stand trial as his version of the events lacked detail, was vague and general, and there was little possibility, given his defence, that he

would advance the state's case if the case were to continue and he were to enter the witness box (para [25]).

Duty to assist an unrepresented accused with cross-examination

The duty of a trial judge to assist an unrepresented accused with cross-examination was emphasised in *Crowther v S* (case A458/2015 [2016] ZAWCHC 32, 11 March 2016). The appellant in this case was convicted on one count of theft and sentenced to three years' imprisonment. Throughout his trial, the appellant was unrepresented and on appeal, he argued that the magistrate had failed in his duty to assist him (the appellant) with cross-examining the state witnesses, and that this ultimately resulted in the violation of his right to a fair trial. It was also submitted that the magistrate had misdirected himself in finding that the state had proved all the elements of the offence, and that the appellant's version could not reasonably possibly be true (paras [1] [2]).

The additional burden placed on a presiding officer in hearing a matter in which the accused is without legal representation, was remarked on as follows in *S v Sebatana* 1983 (1) SA 809 (O):

> The presiding officer . . . has a duty to assist the accused in presenting his defence by way of cross-examination by, for example, expressly asking him whether he agrees with each material allegation made against him by a State witness. In this way, it should in most instances rapidly become clear which evidence is disputed, and the presiding officer can himself put the necessary question or contention to the State witness. This would at least give the accused the impression that he is being fairly treated during the trial (*S v Sebatana* 1983 (1) SA 809 (O) 810; *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO & another* 1989 (3) SA 368 (E)).

In *S v Lekhetho* 2002 (2) SACR 13 (O), it was held that mere lip service to the duty to explain his procedural rights to the accused is not enough, and '[t]he right to cross-examine is one such important right. Failure to explain it and to assist the unrepresented accused when necessary in its exercise is an irregularity' (*S v Lekhetho* paras [10] [11]).

In *Crowther v S*, the presiding magistrate did not explain the purpose of cross-examination to the appellant, or how he should conduct such cross-examination, nor did the magistrate assist the accused in presenting his cross-examination in a meaningful way (para [9]). Furthemore, the prosecution's cross-examination of the appellant centred on reasons why the appellant had not disputed the evidence of other witnesses. It was held that it was

unfair where an undefended accused's failure to cross-examine properly was due to the absence of any assistance by the court (para [10]). The appellant also had not received the complainant's witness statements before the commencement of the trial, a fact which emerged only after the complainant had given her testimony (para [11]). The court therefore found that a substantial injustice in this matter had prejudiced the appellant's case and vitiated the entire proceedings. The conviction and sentence were set aside (paras [14] [15]).

'Benefit' in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA)

The correct interpretation of the word 'benefit' in section 18(1) of the POCA was at issue in *National Director of Public Prosecutions v Ramlutchman* 2016 (1) SACR 362 (KZP). The respondent benefited from the fraudulent misrepresentations and corruption relating to a contract for building schools and argued that 'benefit' in this instance could not be the proceeds of the contract, but, at most, would amount to the profit after deducting the costs of construction from the contract price (para [2]). The appellant, in turn, had failed to discharge the onus of proving the amount of the benefit in the court *a quo,* and submitted that the 'benefit' in this case was equivalent to the 'proceeds of unlawful activities' which equalled the amount of the proceeds of the contract for building schools. The court consequently had to decide whether 'proceeds of unlawful activities' equalled everything 'received', and whether everything 'received' was equal to 'benefit', and further, whether 'benefit' equalled 'proceeds' or 'gains' (para [2]).

Chapter 5 of the POCA is titled 'Proceeds of unlawful activities' and provides, inter alia, that no person should benefit from the fruits of unlawful activities. It also grants the state a civil remedy of preservation, seizure, and forfeiture of property derived from unlawful activities and the various offences created in terms of the Act. 'Proceeds of unlawful activities' is defined in section 1 of the POCA as 'any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any

property representing property so derived.' Section 18(1)*(a)* of the POCA further empowers a court to enquire into any benefit an offender convicted of an offence in terms of the Act may have derived from that offence, and to make an order against the offender for payment to the state of any amount it considers appropriate. The jurisdictional prerequisites for invoking the confiscation of property in terms of Chapter 5 of the POCA are: the person must be convicted of an offence; must have benefited from the fruits of that offence; and the benefit must have been derived, received, or retained (para [10]). Establishing whether these jurisdictional prerequisites exist in a case is a factual enquiry and is not dependent on the discretion of a court (para [15]).

This interpretation of the concept 'benefit', however, was described by Pillay J for the High Court KwaZulu-Natal Division, Pietermaritzburg, as purposive in nature and the judge clearly rejected a black-letter law approach (para [11]). Pillay J also emphasised that the 'variety of factual circumstances in which the Chapter 5 may arise for consideration would resist an inflexible approach', and it is, therefore, not possible to 'straight-jacket' the concept 'benefit' to mean only the 'proceeds of unlawful activities' (para [11]). The concept 'benefit' was first considered by the Constitutional Court in *S v Shaik & others* 2008 (2) SACR 165 (CC). In this case, the court rejected a narrow interpretation of the word 'benefit' and unanimously pronounced as follows (*S v Shaik* above para [60]):

> [Section] 12(3) provides that a person will have benefited from unlawful activities if he or she has received or retained any proceed of unlawful activities. What constitutes a benefit, therefore, is defined by reference to what constitutes 'proceeds of unlawful activities'. It is not possible in the light of this definition to give a narrower meaning to the concept of benefit in s 18, for that concept is based on the definition of the 'proceeds of unlawful activities' . . . 'Proceeds' is broadly defined to include any property, advantage or reward derived, received or retained directly or indirectly in connection with or as a result of any unlawful activity . . . [section] 18(2) expressly contemplates that a confiscation order may be made in respect of any property that falls within the broader definition, and is not limited to a net amount.

With regard to *how* 'benefit' should be determined, a three-stage process was suggested in *National Director of Public Prosecutions v Gardener* 2011 (1) SACR 612 (SCA) paragraphs [17] [18]. First, it must be established that the offender had benefited from the offence for which he or she has been

convicted. Then the value of the benefit must be determined, and finally, the amount of the benefit recoverable from the defendant must be considered. Given the extraordinary breadth and scope of Chapter 5 of the POCA, courts must also ensure that any confiscation order complies with the Constitution of the Republic of South Africa, 1996, and that equity, fairness and proportionality guide the court's exercise of its discretion in making a finding in terms of the provisions of this Act (*National Director of Public Prosecutions v Ramlutchman* 2016 (1) SACR 362 (KZP) para [8]). In exercising this discretion, courts should also consider the following:

- In considering proportionality, courts must recognise the fundamental differences between confiscation of benefits of crime in terms of Chapter 5 of the POCA, which deals with the unlawful proceeds of crime, and the forfeiture procedures of Chapter 6 of the POCA, which deals with property used as an instrumentality of an offence (para [18]).
- Courts should also guard against differentiating between serious and less serious offences as any 'interpretation that permits some offenders to retain the benefits of their unlawful activity whilst others are compelled by confiscation orders to relinquish their ill-gotten gains is manifestly unjust, irrational, and discriminatory' (para [19]).
- The purpose of section 18(1) of the POCA is furthermore not to punish, but rather to deprive an offender of any benefit that he or she may have derived from the offence (para [20]). It is therefore important not to conflate an offender's sentence with the granting of a confiscation order. These are two separate enquiries: 'the impact of the crime on the victim [for example] is irrelevant to the computation of the benefit' derived by the offender from the offence (para [23]).

On the facts of the case under discussion, it was, therefore, held that '[o]n a purely factual and common sense approach the entire amount received as the proceeds of unlawful activities cannot be a benefit if it is not exclusively a gain or profit' (para [33]). Thus, the cost of the construction component of the proceeds in this matter could not be equated with gain or benefit, and the appellant's 'all-or-nothing' argument, if it succeeded, would result in an unjustified enrichment at the expense of the respondent (para [33]). The respondent paying more than the amount by which he had actually benefited, is also prohibited in

terms of section 18(2)*(a)* of the POCA. The appeal was consequently dismissed (para [34]; also see *National Director of Public Prosecutions v Mtungwa* 2006 (1) SACR 122 (N)).

Pleas

Key to how a criminal proceeding progresses is the plea that the accused (and his or her co-accused) elects to enter in answer to the charges or counts laid by the prosecution. Section 106 of the Criminal Procedure Act lists all the possible pleas available to an accused. In the discussion below, relevant case law dealing with a guilty plea, as well a procedural matter relating to the consequences of having entered a plea, are considered.

Section 106 of the Criminal Procedure Act 51 of 1977

In *S v Fongoga & others* 2016 (1) SACR 88 (WCC), the appellants were asked to plead to two charges of rape but were ultimately convicted of only one count of rape. Therefore, while the appellants were asked to plead to two charges, a verdict was delivered on only one of those charges (paras [62] [63]). In this regard, section 106(4) of the Criminal Procedure Act specifically provides that where an accused is asked to plead to a charge – save for a limited number of exceptions – the accused will be entitled to demand that he or she be acquitted or convicted on that charge for which a plea had been entered. Thus, in correcting the error, and with due regard to section 106(4) of the Criminal Procedure Act, the appellants in *S v Fongoga & others* 2016 (1) SACR 88 (WCC) were acquitted on the other charge of rape on which the court *a quo* had not handed down a verdict (para [66]; *S v Sithole & others* 1999 (1) SACR 227 (T)).

In *S v Masilo* (case 15/2016 [2016] ZAFSHC 23, 11 February 2016), Moloi J confirmed that the withdrawal of a charge in terms of section 106(4) of the Criminal Procedure Act, after an accused has pleaded or a plea has been entered on his or her behalf, does not bring the matter to a close, as such an accused is entitled to a verdict once a plea has been entered (para [4]; *S v Sibuyi* 1993 (1) SACR 235 (A)). In this matter, the withdrawal of the charges against the accused was consequently set aside (para [6]).

Section 112 of the Criminal Procedure Act 51 of 1977

In *Dube v S* (case A532/15 [2016] ZAGPPHC 302, 29 April 2016), Thulare AJ for the High Court Gauteng Division, Pretoria,

held that where an irregularity occurred with regard to the entering of a plea of guilty, the subsequent determination of whether there had been a failure of justice as a result of this irregularity, simply requires that the court consider 'on the evidence unaffected by the irregularity or defect . . . [whether] there was proof of guilt beyond reasonable doubt' (para [14]).

The appellant in this case was convicted of having unlawfully and intentionally committed an act of sexual penetration with a person under the age of sixteen years in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. After the charge had been put to the appellant, he answered as follows: 'I dispute the rape but I did have sex with her' (para [4]). The appellant, therefore, admitted to having had sexual intercourse with the complainant, but did not understand that due to her age and despite the issue of consent, this was a criminal offence. The appellant's legal representative again explained the charge to him, indicating to the court that the appellant had misunderstood the charge. The charge was again put to the appellant and he then proceeded to plead guilty (para [4]). The legal representative indicated that this plea was in accordance with her instructions, and she proceeded to read into the record a statement prepared in terms of section 122(2) of the Criminal Procedure Act in which the appellant admitted to all the elements of the offence charged (para [5]). This statement was signed by both the appellant and his legal representative and was also confirmed by the appellant in court (paras [5] [6]).

However, during an interview with a probation officer for the purpose of sentencing, the appellant indicated that he had consensual sexual intercourse with the complainant, and that he had no intention of raping her and had never intended to plead guilty to the charge, but that his legal representative had forced him to do so (para [9]). His legal representative consequently withdrew as attorney of record and a legal representative from Legal Aid South Africa was appointed for the appellant (para [10]). At his next appearance in court, the appellant's new legal representative apologised on behalf of the appellant, and explained that there had been a misunderstanding and that the appellant indeed understood and pleaded guilty to the charge (para [10]).

Thulare AJ for the High Court Gauteng Division, Pretoria, noted that the appellant – who was 36 years of age – had, from the moment the charge was put to him, admitted to sexual inter-

course with the child under the age of sixteen years (para [12]). Of the difficulties legal practitioners experience in practice, the judge commented as follows:

> [13] The court bears in mind the difficulties experienced by legal practitioners in making sure that their clients understand the existing and applicable legal position in a cause, especially when such clients are lay persons, more so when they are illiterate or semi-illiterate. Statutory provisions add to the difficulties of untangling this reality. When the language barrier is added to the equation, the task is one of the most challenging. Added to this, is the nature of the agency of a legal practitioner, who is first and foremost approached for his or her training, skill and competency to guide the presentation of a case before a court of law. It must be borne in mind that it is the role of the attorney to advise his client.

Thulare AJ concluded that '[a] lay person's view by a client on a technical matter, differing from that of a legally trained mind of his legal representative, cannot amount to an irregularity, where the client, after the nature and import of the presentation is discussed with him, confirms in open court to the magistrate that what is presented are his instructions' (para [14]).

In another case, *Sephula v S* (case A139/2015 [2016] ZAFSHC 31, 11 February 2016), the appellant was convicted on a charge of rape and sentenced to life imprisonment. On appeal, it was argued on behalf of the appellant that his previous legal counsel had not been mandated to change his plea from not guilty to guilty in the court *a quo* after the state had presented all its evidence and just before the state prosecutor delivered his closing address (paras [4] [5]). It was also submitted that it had been a material misdirection by the trial court not to have confirmed whether the appellant had indeed instructed his counsel to change his plea, and that the appellant had therefore been wrongly convicted (para [5]).

Judge Molemela for the High Court Free State Division, Bloemfontein, emphasised that not every misdirection committed by a trial court will be sufficiently material to warrant the setting aside of a conviction and sentence. In this instance, the fact that the trial magistrate had failed to record the change of plea properly, was held not to be sufficiently serious to vitiate the guilty verdict (para [5]). This is because the plea change occurred after the state had already closed its case, the state had also presented a 'solid' case against the appellant, and the appellant had not taken issue with the closure of the case without his having taken the

witness stand (paras [6] [7]). Both the conviction and sentence were consequently confirmed (para [12]).

Police Powers

In *Raduvha v Minister of Safety and Security & another* 2016 (2) SACR 540 (CC) paragraph [3] the court summarised police powers as follows:

> Section 205(3) of the Constitution mandates the police to 'prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'. In short, the police are there to ensure that we can live, go about our daily business and sleep peacefully in our homes at night. This is a constitutional mandate. To assist them to carry out these onerous constitutional responsibilities for the safety and security of our people, the law grants them a variety of powers, including the powers to arrest and detain suspects, and enter and search premises and people under certain circumscribed circumstances.

Arrest

The applicant in *Raduvha v Minister of Safety and Security & another* 2016 (2) SACR 540 (CC) was fifteen years old when she was arrested for the unlawful obstruction of police officers in the execution of their duties in terms of section 40(1)*(j)* of the Criminal Procedure Act. The factual matrix relating to this arrest and subsequent detention dates from April 2008 when two members of the South African Police Service (SAPS) were sent to the house of the applicant's mother to investigate a complaint against the mother for contravening a protection order. When they attempted to arrest the mother, the applicant interposed herself between her mother and the police officers in an attempt to prevent the arrest. The police officers regarded this as an unlawful obstruction of the execution of their lawful duties and arrested both the applicant and her mother. They were taken to the nearest police station, where they were detained for approximately nineteen hours, before being released on the next day on warning. The public prosecutor declined to prosecute (para [7]).

Both the applicant and her mother subsequently instituted separate civil claims against the Minister of Safety and Security for unlawful arrest and detention, estimated future medical expenses, legal expenses, general damages, and *contumelia* (insult and scorn) (para [8]). The respondents denied liability and relied, respectively, on section 40(1)*(j)* of the Criminal Procedure

Act, in that the applicant had obstructed the police officers wilfully whilst effecting a lawful arrest, and on section 384(1) of the Act, in that they had acted in terms of a valid arrest warrant when they arrested the applicant's mother (para [9]). This case before the Constitutional Court only related to the claim of the applicant, as her mother had since died. The South Gauteng High Court, Johannesburg, in *Raduvha & another v Minister of Safety and Security* (cases 41997/2008 and 41998/2008, 7 August 2013) dismissed the applicant's claim for damages and found that her arrest and detention had indeed been lawful, and her appeal, *Raduvha & another v Minister of Safety and Security* (cases 41997/2008 and 41998/2008, 17 April 2015), failed. The applicant's petition to the Supreme Court of Appeal also failed (para [1]).

Before the Constitutional Court, it was argued on behalf of the applicant that even if the police officers were authorised to arrest her under section 40(1) of the Criminal Procedure Act, her arrest was nonetheless unlawful and irrational as the statutory provision gives members of the SAPS a discretion to arrest. In exercising a discretion as to whether a summary arrest is justified, police officials must, therefore, consider the prevailing circumstances (para [16]). Particularly important in this instance was the fact that the applicant was a minor and her best interests had, therefore, to take paramount importance both in the exercise of this discretion, and in terms of section 28(2) of the Constitution of the Republic of South Africa, 1996, (the Constitution) (para [17]). Moreover, in terms of section 28(1)*(g)* of the Constitution, a child may only be detained as a measure of last resort, and in this case, the applicant could easily have been left in the care and custody of her father who was present both during her arrest and during her detention at the police cells (para [19]).

Justice Bosielo, writing for the majority of the Constitutional Court, noted the importance of this case in the context of the police power to arrest and detain suspects under section 40 of the Criminal Procedure Act, and the rights of a child as per section 28 of the Constitution. In fact, it was observed that this was the first case in which the Constitutional Court had the opportunity to deal expressly with a case involving the arrest and detention of a child (para [32]). The Constitutional Court confirmed that the provisions of section 40(1) of the Criminal Procedure Act relating to the power of police officers to effect an arrest in the absence of a warrant, is a discretionary power which

'requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary' (para [42]). It was held that this is a fact-specific enquiry that depends on the unique circumstances of every case (para [42]). In considering whether the two arresting officers in this case had exercised their discretion and done so properly, the Constitutional Court agreed with the applicant that the arresting officers had not duly take into consideration the applicant's best interests as a child in terms of section 28 of the Constitution (para [48]). Regarding the police officers' testimony in this regard, it was observed that they had revealed 'a lack of knowledge and appreciation . . . of their constitutional obligation when arresting a child to consider her best interests as demanded by section 28(2)' (para [51]). It also transpired that the police officers did not consider the crucial fact that the applicant was no danger to them, and also did not attempt to flee or cause any physical harm or damage. The applicant was also near her parental home and her father was present at the time of her arrest and during her detention at the police station (para [52]).

In finding that the applicant's arrest and detention were in violation of her constitutional rights in terms of sections 28(2) and 28(1)*(g)* of the Constitution, Bosielo AJ stated that 'an arrest of a child should be resorted to when the facts are such that there is no other less invasive way of securing the attendance of such a child before a court' (para [58]). This does not mean that children may never be the subject of an arrest, but it demands a more child-sensitive criminal justice system that reflects the values underpinning the Constitution.

In *Dlamini v Minister of Safety and Security* 2016 (2) SACR 655 (GJ), the issue was whether it could be said that a police officer had exercised his discretion properly in arresting the appellant on allegations of domestic violence without first having conducted a further investigation, in order to verify the truth of the allegations in the statement made by the appellant's wife (para [15]). In considering whether the appellant's arrest was lawful, Van Oosten J for the High Court Gauteng Local Division, Johannesburg, emphasised that the constitutionality of an arrest will always depend on the factual circumstances of the case, and in the context of allegations of domestic violence, members of the SAPS are obliged to perform their duties and exercise their powers in terms of the Domestic Violence Act 116 of 1998, as well as National Instruction 7 of 1999 issued by the National Commis-

sioner of Police pursuant to section 18(3) of the Act (paras [16] [17]). The objective of the Domestic Violence Act is to 'afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide', and the provisions of paragraph 7(1) of the National Instruction 'impose a duty on members of the SAPS to render assistance to victims of domestic violence by receiving and investigating the complaint (paras [17] [18]). Judge van Oosten also held that '[a]s a general rule, and depending on the circumstances of each case, it cannot be expected of a reasonable police officer in these circumstances to conduct a further investigation' (para [19]). The purpose of the arrest in this case was to bring the appellant before a court and, once arrested, the appellant would have been entitled to exercise all the rights enjoyed by an arrested person. It was not, therefore, for the arresting officer in this case to conduct a hearing before effecting the arrest (para [19]).

Search and seizure

Section 11(1)*(a)* and *(g)* of the Drugs and Drug Trafficking Act 140 of 1992 empowers police officials to enter or board and search premises, vehicles, vessels, or aircraft, and to search any container or other thing, if reasonable grounds exist to suspect that an offence under the Act has been, or is about to be, committed at any time by means of or in respect of any scheduled substance, drug, or property. Upon conducting such a search, police officials are also empowered to seize anything which is connected with, or can provide proof of, a contravention of a provision of the Act. In *Minister of Police & others v Kunjana* 2016 (2) SACR 473 (CC), the Constitutional Court confirmed a declaration made by the High Court, Western Cape Division, Cape Town, in *Kunjana v Minister of Police & others* (case 9073/2015 [2015] ZAWCHC 198, 3 December 2015), declaring these provisions constitutionally invalid.

While members of the SAPS also have many other statutory powers to conduct search and seizure operations, either by way of a warrant or without, Mhlantla J, writing for the majority of the Constitutional Court, explained that the powers conferred under section 11(1)*(a)* and *(g)* of the Drugs and Drug Trafficking Act were too broad, as it allowed for warrantless searches to be conducted even where there was no urgency (para [11]). The impugned provisions also do not circumscribe the time, place, or manner in which the searches and seizures can be conducted

(para [21]), and allow for police officials to seize 'anything' connected with a contravention of a provision of the Drugs and Drug Trafficking Act (para [22]). The Constitutional Court also agreed with the applicants' submission that the impugned provisions leave police officials without sufficient guidelines by which to conduct the inspection within legal limits (para [23]). And, although the effective investigation and prosecution of drug-related offences do sometimes require that the rights of individuals be limited to preserve the integrity of evidentiary material, the fundamental problem with section 11(1)*(a)* and *(g)* of the Drugs and Drug Trafficking Act was that it allowed police officials to 'escape the usual rigours of obtaining a warrant in all cases, including those cases where urgent action is not required and the delay occasioned in obtaining a warrant will not result in the items or evidence sought being lost or destroyed' (paras [20] [25]). With regard to searches without a warrant, it was also noted that constitutionally adequate safeguards must exist to justify circumstances where a search and seizure operation without a warrant would be both necessary and reasonable (para [30]).

Given that there were less restrictive measures available to achieve the purpose of the Drugs and Drug Trafficking Act, the Constitutional Court concluded that the power conferred in section 11(1)*(a)* and *(g)* of the Act was in violation of citizens' rights to privacy protected under section 14 of the Constitution, and which specifically includes the rights not to have

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.

Contrary to the usual position that a confirmation of constitutional invalidity has retrospective effect, Justice Mhlantla ordered that this declaration of invalidity operate purely prospectively so as to avoid any dislocation to the administration of justice and to ensure a smooth transition from the old to the new (paras [33] [36]; *S v Zuma & others* 1995 (2) SA 642 (CC)).

The Criminal Jurisdiction of High Courts

In South Africa, the power to institute criminal proceedings vests in the National Prosecuting Authority the (the NPA) (s 179(2) of the Constitution; National Prosecuting Authority Act 32 of 1998). The various Directors of Public Prosecution (DPP) and

Deputy Directors of Public Prosecution (DDPP) are furthermore responsible – under the control and direction of the National Director of Public Prosecutions – for instituting proceedings in the divisions for which they are responsible and in which area of jurisdictions the offences were allegedly committed and investigated. In addition, a decision to prosecute an accused in a particular division of the High Court is also subject to that court having jurisdiction over the particular case. Other statutory provisions relating to a court's jurisdiction include section 110(1) of the Criminal Procedure Act which provides for instances where an accused has entered a plea to the charges against him or her, but has not entered a plea that the particular court lacks jurisdiction. If it indeed appears that the court in question has no jurisdiction, then that court shall, in terms of this provision of the Criminal Procedure Act, be deemed to have jurisdiction in respect of the offence in question. Section 21(1) and (2) of the Superior Courts Act 10 of 2013 are also relevant. Section 21(1) provides that a division of the High Court has jurisdiction over all persons residing or being in that division, and over all causes arising and all offences triable within that division's area of jurisdiction, as well as any other matter of which it may, according to law, take cognisance (para [5]). And section 21(2) of the Act endows a division of the High Court with jurisdiction over any person residing or being outside its area of jurisdiction, but who is joined as a party to any cause in relation to which the court has jurisdiction, or who, in terms of a third-party notice, becomes a party to such a cause (para [5]).

A case in point is *S v Porritt & another* 2016 (2) SACR 700 (GJ) in which the two accused applied for declaratory orders for the proceedings against them to be postponed for hearing in Pietermaritzburg, and for any offences contained in the indictment which were allegedly committed in Johannesburg, to be centralised to the High Court sitting in Pietermaritzburg (para [1]). All the charges in the original indictment were alleged to have occurred within the jurisdiction of the High Court Gauteng Local Division, Johannesburg (para [9]). And, while the second accused had since relocated to Knysna, she remained a director of the company which was the registered owner of her residential property in Johannesburg, she continued regularly to pay rates and taxes on the property, and she remained with Porritt, her co-accused, the contact persons with the company responsible for providing security at the property (para [9]).

In November 2010, the then NDPP directed, in terms of section 111 of the Criminal Procedure Act, that 74 of the offences with which the accused were charged and which were allegedly committed at or near Pietermaritzburg within the area of jurisdiction of the Director of Public Prosecutions of the KwaZulu-Natal High Court, also be tried, together with the other charges brought before the South Gauteng High Court, by the latter court (para [11]). But on 24 May 2016, the state formally gave notice that it was withdrawing all the charges relating to the offences allegedly committed in Pietermaritzburg (para [13]). The accused, however, disputed that with the withdrawal of the 74 counts, all the other offences with which they had been charged, arose within the jurisdiction of the South Gauteng High Court (para [14]). And further, that their 'constitutional right to a fair trial was compromised if the trial was to proceed in Johannesburg' (para [16]). With regard to the latter submission, they specifically pointed to the high cost they would incur if a lengthy trial were to be conducted in Johannesburg, the impracticality of having to prepare for and participate in such a trial away from where the bulk of documentary evidence that they may need was located, and the emotionally debilitating effect of being away from home and family for protracted periods (para [36]).

Spilg J for the High Court of South Africa, Gauteng Local Division, Johannesburg, commenced his judgment on jurisdiction by restating the basic principle (para [2])

> . . . a court does not initiate the selection of the forum where a case is to be tried. Its function in so far as jurisdiction is concerned is to determine, in case of a challenge, whether the party initiating the proceedings (i e the dominus litis) has selected the correct forum. A state may, however, confer on the court a power to transfer or re-direct the case to another jurisdiction.

In addition to this, the common-law principle for determining the jurisdiction of a court requires that heed be had to when the proceedings were instituted, and the jurisdiction so determined does not then change, even if the jurisdictional ground subsequently ceases to exist (para [7]; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A); *Mamase & others v S* 2010 (1) SACR 121 (SCA)).

Therefore, in considering all the evidence presented by both the accused and the prosecution in this case, Judge Spilg found that the accused were not precluded from pleading under section 106(1)*(f)* of the Criminal Procedure Act that the High

Court of South Africa, Gauteng Local Division, Johannesburg, had no jurisdiction to try the accused for the offences with which they were being charged (para [62]). However, with regard to the argument presented on behalf of the accused in this matter, that their constitutional right to a fair trial would be infringed should the case proceed in Johannesburg and not be centralised in Pietermaritzburg, it was held that they had failed to satisfy the court of any prejudice they would suffer under section 35 of the Constitution (para [61]). The accused had a residence in Johannesburg which they could use for the duration of the trial there (paras [37]-[44]). They had, by that time, had ample opportunity to consider the documents on which the state would rely, and they should, therefore, have been in a position to locate the relevant documentary evidence needed for their defence and have this ready for a trial in Johannesburg (paras [45]-[48]). And, while the accused could not anticipate every eventuality, they would be able to apply for an adjournment once the trial started, in order to locate documents if and when necessary (para [49]). Finally, with regard to their submission that they would suffer physical and psychological strain being away from their homes and family for long periods, it was held that both accused had failed to show how this would infringe on their right to a fair trial (paras [45]-[57]).

Unreasonable Delays in Trials

The appellant in *Madiba v Director: Public Prosecutions Northern Cape* (case CA&R155/2015 [2016] ZANCHC 30, 3 June 2016), along with five co-accused, faced several charges relating to fraud and corruption. She first appeared in the magistrate's court on 17 November 2011 when the matter was referred to the High Court, Northern Cape Division, Kimberley, for trial (para [1]). After many postponements and delays, on 30 January 2015, when the matter was again postponed to 12 February 2016, the appellant applied for a permanent stay of prosecution (para [2]). It was argued on the appellant's behalf that even if a permanent stay of proceedings was not ordered, that the court should strike the criminal case against the appellant from the roll. The prosecution, in turn, submitted that they were not to blame for the delays in the proceedings, and that even if the court were to find that the delays were unreasonable, a permanent stay of prosecution against the appellant would not be appropriate, and that the court

should rather refuse a further postponement of the criminal proceedings as a less drastic remedy. It was submitted that this would then leave the prosecution with the option of temporarily withdrawing the charges against the appellant (para [3]).

On 21 August 2015, Lever AJ dismissed the appeal and held that a permanent stay of the prosecution against the appellant would indeed not be appropriate under the circumstances (para [4]). The appellant appealed this decision, contending that the court did not consider less drastic remedies such as refusing a further postponement of the criminal proceedings, or striking the criminal proceedings from the roll (para [5]). In granting the appeal, Lever AJ indicated that it was his understanding of the relevant statutory provisions that only the court before which the criminal proceedings are pending, ie the court *a quo*, could consider making these orders (para [8]).

Section 342A of the Criminal Procedure Act empowers a court before which criminal proceedings are pending, to investigate any delay in the completion of the proceedings, which appears to be unreasonable and which could cause substantial prejudice to the prosecution, the accused, or any other party involved. If the court finds that the completion of the proceedings is indeed being delayed unreasonably, it may issue any order as it deems fit to eliminate the delay or prejudice. Oliver J, writing for the majority of the High Court Northern Cape, Kimberley, explained that 'the presence of the particular pending criminal proceedings before a court is a jurisdictional requirement for the exercise by that court of the powers provided for in terms of this provision' (para [15]). The appellant's application for a permanent stay of proceedings also did not remove the case from the court *a quo* and make it a case pending before the High Court. The appellant was still jointly charged with five other co-accused in a criminal proceeding which stood postponed to February 2016 (para [18]).

Therefore, the submission made on behalf of the appellant that the reference to 'court' in section 342A of the Criminal Procedure Act ought to 'be interpreted generously, and in the spirit of leaning towards the protection of the fundamental rights of an accused person, to mean any judge of the particular division of the High Court, and therefore not necessarily the court before which the trial is to take place', was not accepted (para [22]).However, whether this case was indeed pending before the court *a quo* was a matter that both the legal counsel for the defence and the prosecution assumed, without considering the fact that the

appellant and her co-accused had not yet even been arraigned or indicted (paras [12] [24]).

The Difference between section 77(6) and 78(6) of the Criminal Procedure Act 51 of 1977

In *S v Mthimkhulu* (case 12/16 [2016] ZAECBHC 4, 5 April 2016), Judge Hartle for the High Court Eastern Cape Division, Bhisho, revisited, in a review judgment, the difference between sections 77(6) and 78(6) of the Criminal Procedure Act.

The accused in this matter was declared a state patient in terms of section 77(6) of Chapter 13 of the Criminal Procedure Act after it had been found that he was fit to stand trial, but was suffering from a mental illness or intellectual disability that excluded his being held criminally responsible for the alleged offence of murder (para [3]). This, however, was incorrect, and the matter ought to have been dealt with in terms of section 78(6) of the Criminal Procedure Act. While the accused in this case was referred for psychiatric observation in terms of both sections 77 and 78 of the Act, it was clear from the psychiatric report received that he 'was able to follow court proceedings so as to make a proper defence but he was found, at the time of the commission of the alleged offence, to be unable to appreciate the wrongfulness of the act in question' (para [8]). In terms of the psychiatric report, the panel of mental health professionals recommended that the accused be declared a state patient at Fort England Hospital in accordance with the provisions of section 42 of the Mental Health Care Act 17 of 2002 (para [8]).

The correct procedure was, therefore, for the magistrate to make a finding under section 77(5) of the Criminal Procedure Act, that the accused was capable of understanding the proceedings so as to make a proper defence, and to then continue by asking the accused to plead to the charge. The accused would then have had the opportunity to plead not guilty by reason of mental defect (paras [15] [16]). Given that this plea would not have placed the findings of the panel in dispute in terms of section 78(3) of the Act, the court could have proceeded to make a finding as recommended and in terms of section 78(6)*(a)* of the Act. This would entail the court finding the accused not guilty on the charge and declaring him a state patient in terms of the Mental Health Care Act 17 of 2002.

This important difference between sections 77 and 78 of the Criminal Procedure Act – where section 77 deals with the

capacity of an accused to understand proceedings, and section 78 deals with an accused's criminal responsibility and any effect that a mental illness or defect may have thereon – was also considered in *S v Pedro* 2015 (1) SACR 42 (WCC). Also see *S v SN* 2016 (1) SACR 404 (GP) on section 77 of the Criminal Procedure Act, and *Chauke v S* 2016 (1) SACR 408 (SCA) generally, on sections 77, 78 and 79 of the Act. See *In Re JY* 2016 (1) SACR 399 (KZP) for a discussion of the interaction between the provisions of the Mental Health Care Act and section 77(6)*(a)*(ii) of the Criminal Procedure Act 51 of 1977.

Superior Courts Act 10 of 2013: Referring a Decision on an Application for Leave to Appeal for Reconsideration

Section 17(2)*(f)* of the Superior Courts Act 10 of 2013 empowers the President of the Supreme Court of Appeal, whether of his or her own accord, or on an application filed within one month of a decision made by the Supreme Court of Appeal, to grant or refuse leave to appeal, and as the case may be, to refer the decision to the court for reconsideration and, if necessary, variation. Important, however, is that the President of the Supreme Court of Appeal can only exercise this power in exceptional circumstances, and what constitutes exceptional circumstances will depend on the merits of each case (*R v Maihlome* 1913 AD 133; *R v Kgolane & others* 1959 (4) SA 483 (A)).

In *Ntlanyeni v S* 2016 (1) SACR 581 (SCA), Judge Dambuza, writing for the majority of the Supreme Court of Appeal, held that there is no time limit for the President to refer, *mero motu*, a decision to grant or refuse leave to appeal, to the court for reconsideration in terms of this statutory provision (para [6]). Judge Dambuza explained that

> [t]he President's *mero motu* authority under section 17(2)*(f)* is not time-bound. . . . In the ordinary course of events the President will only become aware of the circumstances in an application for leave to appeal when his or her attention is drawn thereto. In this case the unfortunate circumstances in the applicant's application did not come to the attention of the President so that he could determine whether he should exercise his powers under section 17(2)*(f)* of the Act *mero motu*, until he received the applicant's application. [And despite this application having been filed outside the prescribed time limit, Judge Dambuza JA] . . . was satisfied that had his [the President's] attention been drawn thereto, other than through this application, he would have done so. It is apparent from the reasons given by the President of this court that he was satisfied that the refusal of leave to appeal to the

applicant alone within the context of the merits of the case and the mishandling of the applicant's application for leave to appeal constituted exceptional circumstances (para [6]).

Thus, the fact that the applicant in this case brought his application ten months after refusal of leave to appeal was, in the circumstances before the court, irrelevant (para [6]).

Also see *Malele v S; Ngobeni & others v S* (case 724/16 [2016] ZASCA 115, 13 September 2016) and *Gwababa v S* (case 1290/16 [2016] ZASCA 200, 7 December 2016).

The National Prosecuting Authority of South Africa

Section 179 of the Constitution provides for the establishment of a single national prosecuting authority, structured in terms of the National Prosecuting Authority Act 32 of 1998. This single national prosecuting authority has the exclusive power to institute and conduct criminal proceedings in the Republic. (Although it can be noted that the common-law right to institute a private prosecution remains intact and is unaffected by this legislative framework.) In the discussion below, important cases for the period under review and relating to the duties and powers of the national prosecuting authority will be considered.

Pre-trial disclosure of material evidence

Du Toit v The Magistrate & others 2016 (2) SACR 112 (SCA) concerned whether the common-law duty of the prosecution to disclose all material evidence against an accused extends to pornographic material involving children. The accused in this case was charged with the possession of child pornography in contravention of the Films and Publications Act 65 of 1996, and sought an order from the presiding magistrate that the prosecution be directed to furnish him with copies of the images said to constitute the offence charged (para [3]). The accused claimed that he was entitled, without more, to be provided with copies of the images which were alleged to constitute child pornography. He also refused to take up the prosecutor's offer of disclosure by private viewing – 'the prosecutor, who until then had objected to reproducing the images and furnishing copies thereof to the defence, offered to put arrangements in place for him, his legal representatives and any expert for the defence to view the images at an office at either the local police station or the court' (para [3]).

Both the trial magistrate and Ponnan JA, writing for the majority of the Supreme Court of Appeal, found the arrangement proposed by the prosecution to be 'sufficient/adequate' (para [4]). Judge Ponnan relied on the Canadian Supreme Court decision in *R v Stinchcombe* [1991] 3 SCR 326, 18 CRR (3d) 210, 68 CCC (3d) 1 (SCC) (para [35]), in which the following principles were set out with regard to the prosecution's duty to disclose:

(a) Justice is better served by the elimination of surprise.
(b) The fruits of the investigation in possession of the prosecution are not the property of the prosecution but of the public to ensure that justice is done.
(c) The defence has no obligation to assist the prosecution and is entitled to be adversarial.
(d) The search for the truth is advanced by disclosure of all relevant material.
(e) The prosecution must retain a degree of discretion in respect of these matters.
(f) The exercise of the prosecution's discretion should be subject to review by the court.
(g) There is a general principle that disclosure is not to be withheld if there is a reasonable possibility that failure to disclose may impede or may impair the accused's right to make full answer and defence which is a principle of fundamental justice protected under the Constitution.
(h) And, it is undesirable to lay down fixed rules relating to disclosure, instead each case must be determined on its own merits.

The Canadian Supreme Court in *Stinchcombe* also identified three situations where the prosecution may properly exercise its discretion to refuse disclosure, 'namely if the information sought is (a) beyond its control; (b) clearly irrelevant or (c) privileged' (*Du Toit v The Magistrate & others* 2016 (2) SACR 112 (SCA) para [8]).

Based on these principles, Judge Ponnan relied on the Constitutional Court decision in *Shabalala & others v Attorney-General, Transvaal & another* 1995 (2) SACR 761 (CC), and explained that the allegation by the accused that the prosecutorial disclosure is inadequate, is an assertion that his right 'to make full answer and defence' had been infringed, a right that is afforded protection under the Constitution (para [9]). In *Shabalala* (para [55]), the Constitutional Court held that the blanket docket privilege formulated in *R v Steyn* 1954 (1) SA 324 (A) could not survive the 'discipline of the Constitution', and declared that the question was a fair trial question, rather than an access to information question (para [9]). The Constitutional Court also stipulated that although the entitlement to disclosure is a matter of constitutional

right, that right is not unqualified (*Shabalala* paras [32]-[39]). Mahomed DP, writing for the Constitutional Court in *Shabalala* specified that

> [w]hat the prosecution must therefore be obliged to do (by a proper disclosure of as much of the evidence and material as it is able) is to establish that it has reasonable grounds for its belief that the disclosure of the information sought carries with it a reasonable risk that it might lead to the identity of informers or the intimidation of witnesses or the impediment of the proper ends of justice. It is an objective test. It is not sufficient to demonstrate that the belief is held bona fide. It must be shown that a reasonable person in the position of the prosecution would be entitled to hold such a belief (para [55]).

Further to this Ponnan JA, writing for the majority of the Supreme Court of Appeal in *Du Toit v The Magistrate & others* 2016 (2) SACR 112 (SCA), explained that a court in an enquiry such as the present must

> exercise a proper discretion by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution (if access is permitted), against the degree of the risk that a fair trial might ensue (if such access is denied). What is essentially required is a judicial assessment of the balance of risk not wholly unanalogous to the function which a judicial officer performs in weighing the balance of convenience in cases pertaining to interdicts *pendente lite*. Accordingly, a rather broad and flexible approach is envisaged against which to measure the opportunity of the defence in each particular case to present its case effectively to the court' (para [9]; *Shabalala & others v Attorney-General, Transvaal & another* 1995 (2) SACR 761 (CC) para [55]).

In the case under discussion, the best interests of the children depicted in the images, as well as the public's interest in ensuring that no duplication or further distribution of these materials occur, were regarded as paramount (paras [12] [13]). Moreover, it was emphasised that the integrity of the administration of justice is important, and that the prosecution should have a degree of discretion in respect of matters of this kind, to protect the privacy interests of members of the public, or to protect the public interest by preventing the commission of further criminal acts (para [16]). It was consequently concluded that the prosecution in this case had properly exercised its discretion, consistent with contemporary principles and values, and that it had done so on demonstrably justifiable grounds (para [18]).

Reviewability of a decision to discontinue a prosecution

In *Democratic Alliance v Acting National Director of Public Prosecutions & others* 2016 (2) SACR 1 (GP) Ledwaba DJP,

Pretorius and Mothle JJ of the High Court Gauteng Division, Pretoria, considered an application by the Democratic Alliance to review, correct, and set aside the decision of the Acting NDPP to discontinue the criminal prosecution of the current President, Jacob Zuma.

The decision to charge and prosecute then Mr Zuma was preceded by a protracted investigation that started in 2001 and culminated in an application on 20 November 2007 to the then Acting NDPP for the centralisation of charges in terms of section 111 of the Criminal Procedure Act (paras [10]-[12]). At the beginning of December 2007, a report to this effect and in terms of section 33 of the National Prosecuting Authority Act 32 of 1998 was submitted to the Minister of Justice and Constitutional Development. This was followed by a conversation between the then Minister and the Acting NDPP in which the Minister raised concerns regarding the safety and stability of the country should the indictment be served before the African National Congress's (ANC) Polokwane conference, where the new ANC leader stood to be elected (para [34]). For this reason, the decision was taken to delay serving the indictment and it was served only on 28 December 2007, whereafter Zuma launched an application in terms of section 179 of the Constitution for a review of this decision to prosecute him. While the matter was first decided in Zuma's favour, the Supreme Court of Appeal overturned this ruling on 12 January 2009 (para [16]). Written and oral representations were thereafter made on behalf of Zuma to the NPA and on 1 April 2009, after the ANDPP had listened to audio recordings of intercepted communications by the parties involved, he announced his decision to discontinue the prosecution (para [32]).

This decision was announced publicly on 6 April 2009 and was based primarily on the alleged manipulation of the timing of the envisaged service of the indictment on Zuma for political reasons (para [39]). The gist of the decision and the grounds on which it was based were articulated as follows (paras [39] [40]):

> In the present matter, the conduct consists of the timing of the charging of the accused . . . Even if the prosecution itself as conducted by the prosecution team is not tainted, the fact [is] that Mr McCarthy, who was head of the DSO, and was in charge of the matter at all times and managed it almost on a daily basis, manipulated the legal process for purposes outside and extraneous to the prosecution itself. It is not so much the prosecution itself that is tainted, but the legal process itself. McCarthy used the legal process for a

> purpose other than that which the process was designed to serve, i e for collateral and illicit purposes. It does not matter that the team acted properly, honestly, fairly and justly throughout. Mr McCarthy's conduct amounts to a serious abuse of process and offends one's sense of justice . . . In light of the above, I have come to the difficult conclusion that it is neither possible nor desirable for the NPA to continue with the prosecution of Mr Zuma . . . Let me also state for the record that the prosecution team itself had recommended that the prosecution should continue even if the allegations are true, and that it should be left to a court of law to decide whether to stop the prosecution.

The applicant in this present matter, the Democratic Alliance (DA), reacted immediately by launching the present application for review of the decision of 7 April 2009 (para [38]). The reviewability of a decision to discontinue a prosecution was subsequently considered in *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) and *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA). In both these cases, the Supreme Court of Appeal held that a decision to discontinue a prosecution is reviewable on the principle of legality, and on grounds of its having been irrationally made (*Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) para [23]ff; *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP) para [29]; and *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA)). The rationality of such a decision involves an evaluation of the relationship between means and ends; the link between the means used to achieve a particular purpose, and the purpose or end in itself (para [46]; *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC) paras [32] [51]). A consideration of rationality further involves both substantive and procedural issues, and both the process by which the decision was made and the decision itself must, therefore, be rationally related (para [47]; *Democratic Alliance v President of the Republic of South Africa & others* 2013 (1) SA 248 (CC)). With regard to the rationality requirement, the court concluded that while the alleged conduct by McCarthy, if proven, constituted a serious breach of law and prosecutorial policy, the form of censure chosen by the Acting NDPP – the discontinuation of the prosecution against Zuma – 'failed to demonstrate a connection or linkage to the alleged conduct of Mr McCarthy' (paras [52]-[54]). The Acting NDPP also disregarded, without

giving any reasons, the recommendation by the prosecution team that the determination of the principles of abuse of process was an exercise for a court of law, and not an extra-judicial pronouncement (paras [64] [65]; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)).

Thus, the decision to discontinue the prosecution was ultimately based on the alleged abuse of process that rested on untested allegations unrelated to the trial process and the charges against Zuma (para [71]). The decision was consequently found by the judges to be irrational and should for that reason be set aside (paras [92]-[94]).

Also see *Moti v National Director of Public Prosecutions* (case 6593/15 [2016] ZAGPPHC 456, 24 May 2016).

Powers of the President in terms of section 12(6)(a) of the National Prosecuting Authority Act 32 of 1998

The applicant in *Democratic Alliance v President of the Republic of South Africa & others* 2016 (2) SACR 494 (WCC) sought to have the decision of the President not to invoke the provisions of section 12(6)*(a)* of the National Prosecuting Authority Act 32 of 1998 reviewed and set aside, and for the Deputy NDPP to be suspended and an enquiry instituted into her alleged misconduct and her fitness to hold office (para [1]). Section 12(6)*(a)* of the National Prosecuting Authority Act 32 of 1998 empowers the President of the Republic of South Africa to suspend the NDPP or Deputy NDPP from office pending an enquiry into his or her fitness to hold office, on the ground of, inter alia, alleged misconduct (para [2]).

With regard to whether or not the alleged failure by the President to invoke section 12(6)*(a)* of the National Prosecuting Authority Act can be properly characterised as 'a failure to discharge a constitutional obligation', Dolamo J for the High Court Western Cape Division, Cape Town, held that the provision 'clearly does not confer on the President an obligation to suspend or enquire into the fitness of a DNDPP to hold office. The Constitution only requires that national legislation be promulgated which must ensure that the prosecuting authority exercised its function without fear or favour' (para [13]). Yet, the matter before the court involved whether the President had exercised his powers, acquired through the provisions of section 12(6)*(a)* of the National Prosecuting Authority, rationally and lawfully. It was held that this was a matter over which the High Court had jurisdiction

(para [13]). The respondents' submission that the matter before the court in this present case was *lis alibi pendens,* and should for this reason be stayed pending the disposal of two other applications before the High Court in Pretoria, was also dismissed (para [18]). In this regard, Judge Dolamo stated that there are three requirements for successful reliance on a plea of *lis alibi pendens*: the litigation must be between the same parties; the cause of action must be the same; and the same relief must be sought in both matters (para [19]). It was clear that none of these three requirements had been met and, despite a court having a discretion to stay matters where not all of these requirements have been met, Judge Dolamo held that this matter did not warrant the exercise of such a discretion (para [19]).

The court then considered all the facts and circumstances available to the President and which he had considered in exercising his power in terms of section 12(6)*(a)* of the National Prosecuting Authority Act (paras [25]-[69]). The question here was ultimately whether the President, equipped with all this information and the surrounding circumstances, had exercised his power in terms of section 12(6)*(a)* of the Act not to suspend the Deputy NDPP or hold an inquiry into her fitness to hold office, in a rational and lawful manner (para [70]). Dolamo J agreed with the respondents that the responsibility entrusted to a President in terms of section 12(6)*(a)* of the National Prosecuting Authority Act goes beyond ensuring that the NDPP and the Deputy NDPP are fit and proper people to lead the NPA. The President must also ensure that this important institution supporting the South African democracy 'is allowed to function properly and without undue interruption which may be brought about by unwarranted suspensions of key personnel' (para [88]). In addition, '[u]nwarranted suspension brought about by untested allegations may disrupt the smooth running of the institution' (para [88]). It was held that in this matter, the President had opted for a 'cautious approach dictated by the circumstances' (para [91]).

Judge Dolamo also stated that even if he was convinced that the President should have decided otherwise, the court was not at liberty to intervene, as judicial intervention would only be warranted if the 'President exercised the power bestowed upon him by section 12(6)*(a)* of the National Prosecuting Authority Act 32 of 1998 in a manner manifestly at odds with the purpose for which the power was conferred' (para [95]). Constrained by the separation of powers doctrine, courts will only on 'rare occasions'

be allowed to interfere with the constitutional powers of the President under section 12(6)*(a)* of the National Prosecuting Authority Act (para [97]).

The Independent Police Investigative Directorate

The Constitutional Court in *McBride v Minister of Police & another* 2016 (2) SACR 585 confirmed an earlier order by the High Court of South Africa Gauteng Division, Pretoria, declaring several sections of the Independent Police Investigative Directorate Act 1 of 2011 (the IPID) inconsistent with the Constitution and therefore invalid. These were: sections 6(3)*(a)* and 6(6) of the IPID; sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, (Proclamation 103 of 1994); and regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GN R98 in *GG* 35018 of 10 February 2012). It was found that these provisions were inconsistent with section 206(6) of the Constitution and therefore invalid to the extent that they purported to authorise the Minister of Police to suspend, take disciplinary steps pursuant to the suspension, or remove the Executive Director of the IPID from office (para [1]).

Section 206(6) of the Constitution provides for the establishment of an independent police complaints body by national legislation. And it was in terms of this provision that the IPID was established with the primary duty of investigating any alleged misconduct or offence committed by a member of the SAPS. Section 4 of the Act guarantees the independence of the IPID from the SAPS (para [4]). However, it was argued on behalf of McBride that the cumulative effect of the impugned provisions did create sufficient safeguards to ensure the independence of the IPID and its officials (para [6]). The Constitutional Court, therefore, had to decide 'whether, in light of the applicable statutory framework, IPID enjoys adequate structural and operational independence, as envisaged by section 206(6) of the Constitution, to ensure that it is effectively insulated from undue political interference' (para [8]).

On this question, the High Court Gauteng Division, Pretoria, found that the independence of the IPID is expressly guaranteed and protected under section 206(6) of the Constitution, and that the IPID should be afforded protection similar to that which the Constitution requires for the Directorate for the Priority Crime Investigation (DPCI) (para [15]). In fact, the High Court held that the IPID's constitutionally guaranteed independence requires

more stringent protection, because unlike the DPCI, which is situated within the SAPS, the IPID is institutionally and functionally independent of the SAPS (para [16]). The High Court subsequently concluded that: section 6(3)*(a)* and (6) of the Independent Police Investigative Directorate Act 1 of 2011; sections 16A(1), 16B, 17(1) and (2) of the Public Service Act, 1994; and regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (above) were inconsistent with section 206(6) of the Constitution due to, inter alia, the lack of parliamentary oversight and the unilateral powers and the sole discretion of the Minister over the Executive Director of the IPID (para [17]). The Constitutional Court agreed with this finding (para [44]).

Irregularities in terms of the Child Justice Act 75 of 2008

A number of irregularities that ultimately vitiated the criminal proceedings against two minor accused occurred in *S v XM & another* 2016 (1) SACR 500 (KZP).

First, the two minor accused were incorrectly diverted in terms of the Child Justice Act 75 of 2008 for the Schedule 3 offences they had allegedly committed (para [2]). Each of the two offenders was charged with armed robbery and possession of an unlicensed firearm, in contravention of Schedule 3 of the Child Justice Act 75 of 2008, read together with the relevant provisions of the Firearms Control Act 60 of 2000 (para [5]). Offences listed in Schedule 3 to the Child Justice Act 75 of 2008 are regarded as the most serious offences and the diversion of accused minors charged with Schedule 3 offences is only possible where exceptional circumstances exist, and the DPP having jurisdiction has indicated, in writing, that the matter may be diverted (paras [10] [24]; s 52(3)*(a)* of the Child Justice Act 75 of 2008). This power of the DPP can furthermore not be delegated (para [11]; s 52(3)*(d)* of the Child Justice Act 75 of 2008). Given that the written indication by the relevant DPP is a prerequisite for a diversion, it was held that the magistrate in this case was precluded from making a diversion order under the Child Justice Act, and that his doing so constituted a fatal irregularity that vitiated the proceedings in their entirety (para [13]).

A further irregularity was that only one child offender appeared at a preliminary inquiry. The other minor accused was merely added to the subsequent Child Justice Court proceedings on the same day, without having first appeared at a preliminary inquiry

(para [14]). In this regard, section 5(3) of the Child Justice Act is clear that all children are required to appear at a preliminary inquiry in terms of the general provisions of Chapter 2 of the Act. In fact, a preliminary inquiry is generally regarded as one of the most important steps in the judicial process involving a young offender (paras [15] [16]). The court held (para [17]) that the primary purpose of such an inquiry is to safeguard the basic rights of children, and these basic rights include the right

- not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time;
- to be treated in a manner and kept in conditions that take account of the child's age;
- to be kept separately from adults, and to separate boys from girls, while in detention;
- to family, parental or appropriate alternative care;
- to be protected from maltreatment, neglect, abuse or degradation; and
- not to be subjected to practices that could endanger the child's well-being, education, physical or mental health or spiritual, moral or social development.

The regional magistrates in presiding over the cases of these two minor accused also failed to comply with the provisions of section 49(2) of the Child Justice Act (paras [18]-[20] [27] [28]). For example, if the child is not legally represented, the inquiry magistrate must explain to him or her and the parent or other adult or guardian present, the provisions of section 82(1) of the Act regarding legal representation (s 29(2)*(a)* of the Child Justice Act), or, if the child was not held in detention prior to the proceeding, the inquiry magistrate may alter or extend any conditions imposed in terms of section 24(4) of the Act, and must also warn the child and his or her parent or other adult or guardian, that the child must appear in a Child Justice Court on a specified date and at a specified time and place (s 49(2)*(c)*(i)–(ii) of the Child Justice Act). And finally, with regard to the diversion option chosen by the inquiry magistrates, it was noted that as the two minor accused had been charged with Schedule 3 offences in terms of the Child Justice Act, the appropriate diversion option was a level-two option and not a level-one diversion option as selected by the inquiry magistrates and which was really only a reporting order in terms of section 53(1)*(d)* of the Child Justice Act (paras [21] [25]).