

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 105/2007
Case Heard: 18/03/2008
Date delivered: 28/03/2008

In the matter between:

FRANS VAN STADEN

APPELLANT

and

THE STATE

RESPONDENT

Coram: Lacock J et Williams J et Olivier J

JUDGMENT ON SPECIAL REVIEW

Olivier J:

1. The accused was convicted on a charge of murder (to which he had pleaded guilty) and sentenced to 15 years imprisonment.
2. The case has now been submitted for special review, on the basis that the accused had lodged an application for condonation and for leave to appeal against the sentence, and that the record of the trial proceedings is missing and cannot be reconstructed. The regional magistrate has apparently adopted the attitude that the conviction and sentence should without further ado be set

aside because of the unavailability of the record or a reconstruction thereof.

3. The constitutional right of an accused to a fair trial includes the right of appeal (see **s 35(3)(o)** of the **Constitution, 108 of 1996**).
4. Where an accused has the right to appeal and a missing or incomplete record makes it impossible to consider and adjudicate such appeal, the conviction or sentence will often be set aside.

*"The Constitution of the Republic of South Africa, 1996, provides, **inter alia**, through s 35, that an accused person has a right to a fair trial, which includes the right to appeal or review. If the appeal Court or the review Court is not furnished with a proper record of proceedings, then the right to a fair hearing of the appeal or review is encroached upon and the matter cannot properly be adjudicated. In that regard, the only avenue open to protect the right of the accused or the appellant is to set aside those proceedings if it is impossible to reconstruct the record."*

Per **Mavundla J** in **S v Sebothe and Others** 2006 (2) SACR 1 (T) at paragraph [8]

(see also **S v Collier** 1976 (2) SA 378 (C), **S v Quali** 1989 (2) SA 581 (E), **S v Mcophele** 2007 (1) SACR 34 (E), **S v Miggel** 2007 (1) SACR 675 (C), **S v Talenyane** 2006 (2) SACR 153 (O), **S v Appel** 2004 (2) SACR 360 (E), **S v Fredericks** 1992 (1) SACR 561 (C) and **S v K** 1991 (2) SACR 190 (B)).

5. The mere fact that the record of the proceedings might be lost or incomplete would not, however, automatically entitle an accused to the setting aside of a conviction or sentence.

- 5.1. Such relief will only be granted where a valid and enforceable right of appeal is frustrated by the fact that the record is lost or incomplete and cannot be reconstructed (see **S v K, supra**, at 192i-194b, **S v Ntantiso and Others** 1997 (2) SACR 302 (E) and **S v Leslie** 2000 (1) SACR 347 (W) at 353D-E).

- 5.2. Prerequisites for such a right of appeal are:

- 5.2.1. that such right is "*exercised with due diligence*" and that the rules and legislation regarding, **inter alia**, time limits are adhered to (see **Constitutional Criminal Procedure; A Commentary on the Constitution of the Republic of South Africa, 1996**, Steytler (1998), p 397 and **S v Zondi** 2003 (2) SACR 227 (W) at 241b-c) and failure to do so may in some cases be viewed as an abandonment of the right to appeal (see **S v Carter** 2007 (2) SACR 415 (SCA) at 421c-d and **S v Ismail, in-fra**, at p 5);

- 5.2.2. that the accused applies for leave to appeal within the prescribed period of 14 days after sentence

(see **s 309B(1)(b)(i)** of the **Criminal Procedure Act, 51 of 1977** and **Shinga v The State and Another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and Others** 2007 (2) SACR 28 (CC); and

5.2.3. that the accused advances "*his reasons or grounds for complaining that he was wrongly convicted*" (see **S v Zondi, supra**, at 240i-241b).

5.3. 5.3.1 Where an accused has failed to adhere to the prescribed time limit for the lodging of an application for leave to appeal, condonation would be required; the granting of which would then amount to leave to proceed with the late application for leave to appeal (see **s 309B(1)(b)(ii)** of the **Criminal Procedure Act**).

5.3.2 Where condonation is required, the reasons for the failure to comply with the applicable rules or legislation need to be sufficiently explained (see **S v Mohlathe** 2000 (2) SACR 530 (SCA) at 535g-536a and **S v Di Blasi** 1996 (1) SACR 1 (A) at 3f-h).

5.4 In **S v Thobakgale and Others** 1998 (1) SACR 703 (WLD) Flemming DJP succinctly summarised the position of an accused who has failed to take timeous steps to appeal and who requires condonation (at 710C):

"When a party wishes to appeal after expiry of the limited time, he no longer has a 'right' to appeal. The Court is dealing with the resuscitating of a right which perished."

5.4.1 Although the judgment has in some cases not been followed in other respects, this approach has not been challenged (compare also **S v Lesala and Another** 2002 (2) SACR 8 (OPD) at 11c-d).

5.4.2 It will, however, for purposes of this judgment be accepted that the right to apply for condonation would also be a feature of an accused's right to a fair trial.

6. The underlying rationale for the fact that the setting aside of a conviction or sentence would be competent relief where the record of the trial proceedings is lost or incomplete (and cannot be reconstructed), is that the State is burdened with the responsibility of keeping proper record of trial proceedings and that an accused's right to a fair trial (and therefore also the right of appeal) should not be frustrated by the State's failure to do so (see **S Zondi, supra**, at 243i-244b and **S v S** 1995 (2) SACR 420 (T) at 424b).
7. As already stated there can, however, only be a protectable right of appeal (or to apply for condonation) where the accused has complied with the applicable rules and legislation or, if not, is able to furnish a sufficient explanation for such failure. It would lead to an untenable situation, where finality in criminal

proceedings is indefinitely delayed, if accused persons were to be allowed to blatantly disregard the law and then still claim that a right of appeal has been frustrated by the loss of the record of the trial proceedings.

8. At the same time it should be kept in mind that crime affects fundamental rights like the right to life, the right to freedom and security of the person and the right to property (see ss 11, 12 and 25 of the Constitution). South Africans have the right to "*live in peace and harmony*" and "*to be free from fear*" (see **s 198(a)** of the **Constitution**). The objects of the police service "*to prevent, to combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic of their property, and to uphold and enforce the law*" (see **s 205(3)** of the **Constitution**), and the effective execution thereof, are also relevant factors that should be taken into account. The interests of society, and of those responsible for the enforcement of the law, should therefore not be lost sight of.

9. The fact that an accused himself/herself is to blame for the situation that, at the stage when steps are eventually taken to appeal, the record is not available and cannot be reconstructed, should therefore in my view in any event be a relevant consideration in deciding whether the unavailability of the record (and the fact that the application for condonation and for leave to appeal therefore cannot be considered) has led to a failure of justice which would justify the setting aside of a conviction or sentence.

*"A similar impasse – a lost record with no prospect of reconstructing one – arose in **S v Marais** 1966 (2) SA 514 (T). That being the situation, the Court at 516 G-H observed that:*

*'The appellant has been seriously frustrated and prejudiced **owing to a fault on the part of the State's servants**. She is entitled to an appeal as of right. She is entitled to receive a copy certified as correct. This cannot be achieved. She has been frustrated in a basic right. She has been deprived of this **through no fault of her own**. In all these circumstances the only thing to do is to exercise the powers granted in s 98 of Act 32 of 1944, as amended, and to set aside the whole of the proceedings'*

And at 517A-B the judgment proceeded:

*'If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, **through no fault on the part of the appellant**, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice.'*

In the result in that case the proceedings in the magistrate's court were set aside, and – it followed – the conviction and sentence were likewise rescinded. I endorse what was said in the quoted passages from that judgment ..."

(My own emphasis)

Per **Kumleben JA** in **S v Joubert** 1991 (1) SA 119 (AD) at 126E-I.

10. The relevance of blame on the part of the accused in such cases was again emphasised in **Makhudu v Director of Public Prosecutions** 2001 (1) SACR 495 (SCA) at 499b.

11. The facts of the present matter are as follows:
 - 11.1. The appellant was convicted and sentenced on 8 February 2002.
 - 11.2. No steps were taken to appeal, until a notice of appeal was lodged with the Registrar of this Court on 3 June 2005; in other words approximately three years and four months after the conviction and sentence. The accused never applied for condonation for the late filing of the notice of appeal.
 - 11.3. It was not until April/May 2006 that the accused lodged an application for leave to appeal, as well as an application for condonation, with the Clerk of the Magistrates' Court, Uppington.
 - 11.4. In February 2007 the accused again signed documentation (for an application for leave to appeal and for condonation), which documentation was received by the said Clerk on 11 April 2007.
 - 11.5. It is not clear why no further steps were taken in respect of the notice of appeal and the application lodged in April/May 2006. The accused has not explained this and has made no mention thereof. In fact, in argument on his behalf before the matter was submitted for special review, it was for some reason stated that the accused had not, before February 2007, applied for leave to appeal.
 - 11.6. Due to the fact that I was concerned that an appeal against the sentence might already have been heard and finalised, my secretary went through the records of the Registrar. No trace of any such appeal could, however, be found.

12. In his application of April/May 2006 the only reason advanced by the accused for the delay (at that stage of more than four years) was that it had been caused by "*gevangenis probleme*" and "*gevangenis omstandighede*". This was never elaborated upon or explained and could quite obviously not be regarded as a proper explanation for the delay.

13. In his most recent affidavit, after a lapse of five years since the date of his sentence, the accused once again simply stated that the delay had been caused by "*gevangenis omstandighede buite my beheer*". He also stated that he had only "*op 'n latere stadium verneem ... hoe appèlle werk*", but failed to explain when that was. It bears mentioning that the accused had been legally represented at the trial, as well as when he finally appeared before the regional magistrate to apply for condonation and leave to appeal.

14. The fact of the accused's completely inadequate explanation for the delay, as well as the extraordinary length of the delay (even if only until the notice of appeal was filed), would in my view in any event have militated against the granting of condonation.

"The delay involved here in noting the appeal is an inordinately long one – more than four years.

The failure to comply with Magistrates' Courts Rule 67(1) timeously is therefore gross. The longer the delay, generally speaking the more reluctant will a Court of appeal be to condone it and the more persuasive will the explanation for the delay have to be before condonation can be granted.

In this case the explanation is, in my view, far from satisfactory or persuasive. In fact, in my opinion it is totally inadequate. One of the reasons why Magistrates' Courts Rule 67(1) was worded as it was, was to avoid the very kind of situation which has arisen here, where after the lapse of a very long time the record of the trial proceedings has been lost, or parts of it have been lost, and they cannot at this stage easily be reconstructed.

In terms of s 35 of the Constitution of the Republic of South Africa, 1996, the appellant is entitled to a fair trial, and that includes a fair appeal, but there is another side to that coin. The State is also, I think, entitled to expect to be treated by the courts with a modicum of fairness. It would simply not be fair to the State, nor to the Magistrate, for that matter, in my view, to permit the appellant, in the circumstances of this case, where the record has been lost, to wait more than four years to note his appeal, without a very good explanation for the inordinate delay."

(My own emphasis)

Per **Thring J** in **S v Mantsha** 2006 (2) SACR 4 (CPD) at 7a-e.

15. Although the initial delay of almost three and a half years in this case might have been slightly shorter than that in **S v Mantsha, supra**, the explanation proffered therefor in this case has even less merit than the explanation in that matter.
16. Although it might be argued that the regional magistrate would not have been able to consider the accused's prospects of success on the merits without the record, it is extremely unlikely

that the grounds of appeal advanced by the accused would (even if the record or a reconstruction had been available) have shown such strong prospects of success as to outweigh the inadequacy of the explanation for the delay (see **S v Thobakgale and Others, supra**, at 707e).

17. Apart from the question whether the accused would have been entitled to condonation, it would not be in the interests of justice and of the society that a convicted person who has caused or contributed to the fact that not even a reconstructed version of the record is available, should be entitled to have his or her conviction or sentence in respect of such a serious crime set aside.

*"Die feit dat die oorkonde in die onderhawige geval tans nie meer bestaan nie en dat daar tans ook nie 'n sekondêre notule van die oorspronklike verrigtinge saamgestel kan word nie, is egter geheel en al te wyte aan die beskuldigde se eie skuld. Die beskuldigde het naamlik vanaf 30 Junie 1975 tot 2 Februarie 1978, d w s vir 'n tydperk van meer a(s) twee jaar en sewe maande, gewag alvorens hy besluit het om 'n Regter-sertifikaat ... aan te vra. (Hierdie sertifikaat is toegestaan). Die beskuldigde se versuim kom neer op 'n totale miskenning of verontagsaming van die stelreël **interest rei publicae ut sit finis litium** (vgl **S v Haarmeyer** 1970 (4) SA 113 (O) te 115A). Die beskuldigde het hom klaarblyklik berus by sy twee skuldigbevindings en vonnisse; vgl **Cairn's Executors v Gaarn** 1912 AD 181 te 187 en **S v Ackerman** 1965 (4) SA 740 (O) te 746H-747E.*

Hierdie berusting blyk ook uit sy geheel en al onbevredigende verklaring vandag in hierdie Hof aangaande waarom hy nie

eerder appèl aangeteken en/of om 'n Regter-sertifikaat gevra het nie."

Per **Lichtenberg AJ** (as he then was) in **S v Shiteni** 1978 (4) SA 156 (SWA) at 158A-D.

(compare **S v Sebothe and Others, supra**, at 3d)

18. It is so that the present matter can to a certain extent be distinguished from **S v Shiteni, supra**. Here there is no evidence that the record was destroyed. It is in fact not known exactly when the record or the tapes went missing. It might have happened very shortly after the accused was sentenced. There is therefore no basis for blaming the accused for the fact that the record cannot be found at this stage.
19. It is, however, a matter of simple logic that, had the accused taken timeous steps to appeal, a reconstruction of the record would in all likelihood have been possible. Had the accused taken steps within two weeks, or even within a year, the magistrate, the prosecutor, the accused and his erstwhile legal representative would in all probability have been able, if not individually then at least among themselves, to reconstruct a record from notes, or even from memory. The accused had after all pleaded guilty and there would not have been any evidence (apart from his plea explanation) as far as the conviction is concerned.
20. It is precisely because of the long delay that one cannot at this stage realistically expect the magistrate or any of the other parties concerned to make any meaningful contribution towards the reconstruction of the record or to remember any details of the trial (see **S v Quali, supra**, at 582i-j and **S v Talenyane, supra**, at paragraph [10]).

- 20.1. It is to prevent such a situation, and to ensure that criminal proceedings are brought to finality as soon as possible, that a time limit for the filing of an application for leave to appeal has been enacted and effectively approved by the Constitutional Court in the **Shinga** case referred to above.
- 20.2. It should also be kept in mind that the Director-General: Justice and Constitutional Development determines the period for which records have to be preserved and when they can be destroyed (see **s 7 of the Magistrates' Courts Act, 32 of 1944**).
- 20.3. If the mere filing of an application for leave to appeal and for condonation would entitle an accused to the setting aside of his/her conviction or sentence where no record of the trial proceedings is available (and no reconstruction is possible), irrespective of the reason for the delay in lodging such application and of the question whether the accused might be to blame for the fact that no such record is available and that no reconstruction is possible, it could lead to an abuse of the process and a travesty of justice.
- 20.4. I have to add, however, that the order issued by the Director-General in this regard in 1986 (and which is apparently still applicable) is to the effect that, where proceedings had been recorded mechanically (but no transcription had been made) and where imprisonment of more than 2 years had been imposed, the tapes will not be erased and the case record will not be destroyed before the expiration of such term of imprisonment.

- 20.5. Where less than 2 years imprisonment had in such circumstances been imposed, the record will be destroyed and the tapes erased after 2 years. Theoretically speaking such an accused would be entitled to apply for condonation and leave to appeal even after the expiry of the sentence (even if only not to have a criminal record). If the fact that the record had been destroyed would then automatically entitle such an accused to the setting aside of his or her conviction and sentence, this would clearly lead to an untenable situation. It is also extremely unlikely that the State would in such a case again institute a prosecution.
21. The accused in this matter clearly has no explanation or excuse for the delay. He therefore has himself to blame for the delay. He is therefore equally to blame for the fact that the record could not be reconstructed, because it is clear that the inability of those concerned to reconstruct the record was caused by the delay.
22. If the route of rescission is to be followed in this case the result will be that, even though the application for leave to appeal was only directed against the sentence, the conviction will also have to be set aside, because without that part of the record concerning the conviction it will be impossible to deal with the issue of sentence (see **S v Ndlovu** 1978 (3) SA 533 (T)).
23. It was placed on record that the witnesses are still available and technically speaking the accused could in such an event again be prosecuted (see **s 313**, read with **s 324**, of the **Criminal**

Procedure Act, S v Zondi, supra, at 250i-251a and **S v Quali, supra**, at 584 C-D).

24. In view of the fact that the accused is now only prepared to admit having inflicted one stab wound (while the body of the deceased had two stab wounds) it would, in the event of a rescission of the conviction, in all probability be necessary for the prosecutor to present evidence on the merits. I think it goes without saying that the lapse of such a long time since the trial (let alone since the incident) will prejudice the state witnesses.
25. In any event, the setting aside of either the conviction or sentence under these circumstances (even if it is to be accepted that an accused's basic right to a fair trial should generally take precedence over the interests of the society in the finalisation of criminal trials) would in my view not be in the interests of justice:

"Since time immemorial it has been an established principle that the public interest is served by bringing litigation to finality and, of course, quite apart from the general public, there are individuals with a very special interest in seeing the end of a criminal case. Conscientious judicial officers, prosecutors and investigating officers are therefore always mindful of the interests of witnesses, especially complainants, in bringing a case to finality."

Per **Kriegler J** in **Sanderson v Attorney-General, Eastern Cape** 1998 (1) SACR 227 (CC) at 244H-245A.

(compare also **S v Legote en 'n Ander** 1999 (1) SACR 269 (O) at 273g-h)

26. Had there been an acceptable explanation for the delay, and therefore in effect also for the resultant impossibility of reconstructing the record, the position may have been different.
27. Mrs Erasmus, who appeared on behalf of the accused **pro amico** and to whom we are indebted for her efforts, suggested that a liberal approach should be adopted in applications for condonation in criminal matters, that the accused would therefore have been granted condonation and that he would accordingly have been able to have his appeal adjudicated, had it not been for the missing record.
28. I am afraid that it is not that simple. Even though applicants in criminal matters are often not legally represented, they still have to furnish a sufficient explanation for the fact that the relevant provisions have not been complied with.

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

after week in this Court, one cannot help forming the impression from what is sometimes advanced on behalf of appellants that that, or something like that, is the stance which this Court is from time to time invited to adopt. I firmly decline the invitation. The Rules are for all litigants. They must be adhered to by all litigants. That is the basic principle which applies."

Per **Thring J** in **S v Mantsha, supra**, at 6e-h.

"There is currently a great misconception amongst accused and indeed some practitioners that condonation is there for the taking"

Per **Kgomo JP** in **S v Ismail**, an unreported judgment on review in this division under case no K/S 20/2001 (delivered on 9 February 2007) at p4.

29. I am aware of the judgment in this division in **S v Moya** (review case no 68/07), in which a conviction of murder and a sentence of 15 years imprisonment were set aside because the accused had filed an application for condonation and leave to appeal, and where the record was also lost (or missing). Although it appears from the judgment that there had been a delay of five years in filing that application, the judgment does not reflect what the explanation for the delay was. The question whether the accused himself might have been to blame for, at the very least, the fact that the record could not be reconstructed, does not appear to have been raised or considered.

30. The question whether an accused, whose inexcusable delay in advancing an appeal or review has led to the situation where the record is no longer available and, more importantly, cannot be reconstructed (because the presiding officer and other Court officials cannot realistically be expected to recall details of the proceedings after an inordinate long delay), would nevertheless be entitled to rescission, was also not raised or considered in any of the cases referred to in paragraph 4 above, or to which we were referred by Mrs Erasmus.

31. In my view an accused who has without sufficient explanation not complied with the applicable rules and legislation and who is also himself/herself to blame for the situation that an appeal cannot be considered, can surely not be heard to say that his/her right of appeal is being frustrated.

32. This brings me to the question of what order the regional magistrate could or should have made and whether the matter should be remitted for that purpose.
 - 32.1. In the matter of **S v Mantsha, supra**, Thring J eventually refused condonation on the basis that the inadequacy of the accused's explanation for the delay caused any possible favourable prospects of success (that may have emerged from the record) to "*fade into insignificance*" (at 7f-g).
 - 32.2. In my view such an approach would, with respect, be legally unsound and artificial. The fact is that the prospects of success were not considered and could therefore not have been regarded as insignificant, or even have been compared to any other factor. It would quite simply be impossible to subject an

unknown to a comparison with a known fact (compare **Makhudu v Director of Public Prosecutions, supra**, paragraph [8]).

- 32.3. Had the record been available it could conceivably have appeared that the accused in fact had excellent prospects of success with the application for leave to appeal, and eventually with an appeal (compare **S v Masuka and Others** 1985 (3) SA 908 (AD) at 912H).
 - 32.4. This brings me to the second problem that I have with the approach adopted in **S v Mantsha**. In the matter at hand, like in **S v Mantsha**, the record is merely missing. There is no indication of it having been destroyed or that it could not at some later stage be found.
 - 32.5. In fact, that is precisely what happened in **S v Moya**, referred to above, where the record was discovered after the conviction and sentence had already been set aside.
 - 32.6. Should the record be found after an application for condonation had already been refused, and it should then appear that the accused in fact has excellent prospects of success, it could be argued that the accused would not be entitled to lodge another application for condonation.
33. In my view the better approach would be the one adopted in **S v Shiteni, supra**, where the appeal was struck from the roll because the accused was himself to blame for the fact that no record was available for the purposes of the appeal. Here there is no record, making it impossible to consider the prospects of

success with the application for leave to appeal and, therefore, to adjudicate the application.

34. The accused has already stated on oath what his explanation for the delay (and, in effect, for the resulting impossibility of reconstruction) is. It was never suggested to the regional magistrate that there might be another or better explanation for condonation.
35. It would therefore serve no purpose to remit the matter to the regional magistrate. The "*explanation*" tendered by the accused was obviously devoid of any merit and, because he had only himself to blame for the fact that it was impossible to produce at least a reconstruction of the record for the purposes of an application for condonation and for leave to appeal, the order the regional magistrate should, in my view, have made, was to strike the application from the roll.
36. To summarise, I am of the view that the proper approach in cases where the unavailability of at least a reconstructed record renders it impossible to finalise an application for condonation (and leave to appeal), would be to determine whether the accused is to blame for this and, if so, to what extent.
37. This would probably appear from the explanation in the application for condonation, because it would be the same delay that resulted in the impossibility of at least reconstructing the record. If not, the accused and his/her legal representative should be afforded the opportunity of explaining why the delay and the resulting impossibility of reconstruction should not be attributed to the accused.

38. Should it then appear that the accused is substantially to blame for this, the proper order would be to strike the matter from the roll (on the basis that the application cannot be entertained without the record and the accused is to blame therefore).
39. Only in the event of it appearing that the accused is not to blame for this state of affairs, would the setting aside of a conviction or sentence possibly be justified, in which case the presiding officer must then submit the matter for special review and for consideration of such relief.
40. It is not clear why no further steps were apparently taken following the filing of the notice of appeal or the application of April/May 2006.
- 40.1. In my view it cannot, however, be expected of this Courts to speculate about whether the record would have been available at any of those stages. Even if it had, the inordinate length of even those delays, the inadequacy of the accused's explanation (in the case of the notice of appeal there was in fact no application for condonation and therefore no explanation at all) and the improbability that the grounds of appeal advanced by the accused would have shown such strong prospects of success as to outweigh the lack of a sufficient explanation for the delay, would have militated against the granting of condonation.
- 40.2. I am nevertheless of the view that the Registrar should investigate this to ensure that criminal appeals do not become lost in the system and are

processed and finalised as speedily as possible (see **S v Heslop** 2007 (1) SACR 461 (SCA)).

41. In conclusion reference has to be made to the fact that it appears from remarks by the regional magistrate in this matter that poor administration in the offices of the Upington Magistrates' Courts led to the loss of not only this record, but numerous other records as well.

41.1. He states that the custody and control of records have become chaotic and out of control and that this state of affairs is caused by personnel of that office who neglect to replace records properly and who, as soon as some order is restored, "*krap alles weer om en los dit net so.*"

41.2. It could never be in the interests of society at large, not to mention those involved in the fight against crime, that convictions and sentences are set aside and that criminals are set free because of laxity and poor administration.

41.3. I therefore intend directing that his judgment be brought to the attention of the Director-General: Justice and Constitutional Development.

42. In the premises I would make the following orders:

- 1. The order made by the regional magistrate is substituted with the following order:
The application for condonation and for leave to appeal is struck from the roll.**
- 2. The Registrar is directed to furnish the Director-General: Justice with a copy of this judgment.**

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I agree and it is so ordered:

H J LACOCK
JUDGE
NORTHERN CAPE DIVISION

I agree:

C C WILLIAMS
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff:	Adv S L Erasmus
Instructed by:	KIMBERLEY
For the Respondent:	Adv A H van Heerden
On behalf of:	Director of Public Prosecutions, KIMBERLEY