CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/00

HANS JURGENS STEYN Applicant

versus

THE STATE Respondent

Heard on : 22 August 2000

Decided on : 29 November 2000

JUDGMENT

MADLANGA AJ:

Introduction

[1] This Court has held that the requirement of first seeking leave to appeal before lodging an appeal against a conviction or sentence in a high court is not inconsistent with the constitutionally guaranteed right of appeal.[1] The present case requires us to decide on the constitutionality of provisions which introduce a similar requirement for appeals from magistrates' courts. More specifically, we are called upon to decide whether the provisions of sections 309B and 309C of the Criminal Procedure Act 51 of 1977 (the Act) are inconsistent

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1 In *S v Rens* 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC); 1996 (1) SACR 105 (CC); and *S v Twala (South African Human Rights Commission Intervening)* 2000 (1) SA 879 (CC); 2000 (1) BCLR 106 (CC); 1999 (2) SACR 622 (CC).

with section 35(3)(o) of the Constitution which provides that "[e]very accused person has a right to a fair trial, which includes the right . . . of appeal to, or review by, a higher court."

[2] In substance section 309B[2] of the Act stipulates that an appeal against a conviction or sentence in a magistrate's court can be lodged only after leave has been obtained from that court. If leave be refused, section 309C[3] provides for a petition to the appropriate high court for leave

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[2] Section 309B provides as follows:

"**Application for leave to appeal**

(1) An accused who wishes to appeal against any decision or order of a lower court must, within 14 days or within such extended period as may be allowed on application and on good cause shown, apply to that court for leave to appeal against the decision or order.

(2) (a) The application must be heard by the magistrate whose decision or order is the subject of the prospective appeal: Provided that if that magistrate is unavailable, the application may be heard by any other magistrate of the court concerned, to whom it is assigned for hearing.

(b) Notice must be given to the attorney-general concerned and the accused of the date fixed for the hearing of the application.

(3) Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal: Provided that if the accused applies verbally for such leave immediately after the passing of the decision or order, he or she must state such grounds and they must be taken down in writing and form part of the record.

(4) . . . .

(5) . . . .

(6) If the application is granted, the clerk of the court must, in accordance with the rules of the court, transmit copies of the record and of all relevant documents to the registrar of the court of appeal."

[3] Section 309C provides as follows:

"**Petition procedure**

(1) If an application for leave to appeal under section 309B(1) or for an extension of the period referred to in that subsection or for the extension of the period within which an appeal must be noted in terms of section 309(2) (hereinafter referred to as an application for condonation), or an application to call further evidence as contemplated in section 309B(4), is refused, the accused may, within 21 days of such refusal or within such extended period as may on good cause be allowed, by petition addressed to the Judge President of the division of the High Court having jurisdiction, submit an application for leave to appeal or for condonation or for leave to call further evidence, or all such applications, as the case may be.

(2) An accused who submits a petition as contemplated in subsection (1) must at the same time give notice thereof to the clerk of the magistrate's court where the application was refused.

(3) When receiving notice of a petition as contemplated in subsection (2), the clerk

of the court must without delay submit copies of the application concerned together with the magistrate's reasons for refusal of the application, to the registrar of the court of appeal.

(4) (a) A petition contemplated in this section must be considered in chambers by two judges designated by the Judge President.

(b) If the judges referred to in paragraph (a) differ in opinion, the petition must also be considered by the Judge President or by any other judge designated by the Judge President.

(5) The judges considering the petition may—

(a) call for any further information from the magistrate who heard the application for condonation or the application for leave to appeal or

the application for leave to call further evidence, or from the magistrate who presided at the trial to which any such application relates;

(b) order that the application or applications in question or any of them be argued before them at a time and place appointed by them;

(c) whether they have acted under paragraph (a) or (b) or not—

(i) in the case of an application for condonation, grant or refuse the application and, if the application is granted, direct that an application for leave to appeal must be made, within the period fixed by them, to the court referred to in section 309B(1) or, if they deem it expedient, that an application for leave to appeal must be submitted under subsection (1) within the period fixed by them as if it had been refused by the court referred to in section 309B(1);

(ii) in the case of an application for leave to appeal or an application for leave to call further evidence, grant or refuse the application or, if they are of the opinion that the application for leave to call further evidence should have been granted, they may, before deciding upon the application for leave to appeal, or, in the case where the court referred to in section 309B(1) has granted the application for leave to appeal but has refused leave to call further evidence, set

to appeal.

The facts

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aside the refusal of the said court to grant leave to call further evidence and remit the matter in order that further evidence may be received in accordance with the provisions of section 309B(4); and

(d) refer the matter to the court of appeal for consideration, whether upon argument or otherwise, and that court may thereupon deal with the matter in any manner referred to in paragraph (c).

(6) Notice must be given to the attorney-general concerned and the accused of the date fixed for the hearing of an application under this section, and of any place appointed under subsection (5) for any hearing."

[3] The applicant and an *amicus curiae*[4] were convicted of serious offences and sentenced to substantial terms of imprisonment in separate proceedings in the regional court sitting in Pretoria. They each sought leave from the regional court to appeal[5] to the high court in terms of section 309B of the Act. Their applications were dismissed. The petitions which they subsequently lodged with the Judge President of the Transvaal High Court in terms of section 309C of the Act were also unsuccessful. The applicant thereupon sought and was granted direct access to this Court to make the constitutional challenge mentioned in paragraph 1 above.

The issues

[4] The applicant contends that the leave to appeal and petition procedure created by sections 309B and 309C denies him the right to a full and meaningful hearing by a higher court. He points to the fact that prior to the introduction of these provisions there was an unconditional right of appeal on the full trial record with full oral argument. By contrast, the right to appeal is now conditional upon leave granted either by the magistrate or on petition. The applicant further argues that an accused person convicted by a magistrate and thereafter refused leave to appeal by such magistrate, and whose petition is subsequently refused by a high court, has no access at all

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4 Mr Gert van Tonder was admitted as an *amicus* prior to the hearing of this application. He is a convicted accused who is in a similar position to that of the applicant.

5 The applicant against conviction and the *amicus* against conviction and sentence.

to the Supreme Court of Appeal, not even by way of petition to the Chief Justice. In response to this, Mr d'Oliveira for the respondent submitted that, in terms of sections 20(4) and 21 of the Supreme Court Act 59 of 1959, access to the Supreme Court of Appeal by way of petition is possible. I shall consider this submission below.

[5] In *Rens* and *Twala*[6] what was in issue was the constitutionality of the leave to appeal procedure, in respect of high court trials, provided for in section 316 read with section 315(4) of the Act. This Court held that the approach to the Supreme Court of Appeal by way of petition, when leave to appeal has been refused by a high court, satisfies the constitutional right of appeal. The test laid down in those cases was whether the available procedure ensures that the higher court will be in a position to make an informed reassessment of the issues raised.[7] Because leave to appeal is required in both courts, the temptation is to conclude, as did Mr d'Oliveira in his argument in this Court, that the magistrates' courts' leave to appeal procedure also complies with section 35(3)(o). The question is: does it? I propose to deal with this under two headings: the nature of the magistrates' courts' leave to appeal procedure; and the institutional context.

The nature of the magistrates' courts' leave to appeal procedure

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6 Above n 1.

7 *Rens* above n 1 at para 26; *Twala* above n 1 at para 20.

[6] The test of "adequate reappraisal . . . and [the making of] an informed decision" was first enunciated in *S v Ntuli*.[8] *Ntuli* was concerned, among others, with the question whether the provisions of section 309(4)(a) read with section 305 of the Act were inconsistent with the right of appeal then contained in section 25(3)(h) of the interim Constitution. The effect of the two sections was to allow the prosecution of an appeal, in person, by a person serving a term of imprisonment after having been convicted by a magistrate's court, only if such person had first obtained a certificate from a judge that there were reasonable grounds of appeal. Didcott J said:

> "The requirement that a Judge's certificate has to be obtained obviously operates, in each case hit by it, as a restriction on the full access to the Supreme Court which is enjoyed by those who are free to prosecute their similar appeals to finality and usable for the determination of the appeals themselves. That is not, however, the end of the matter. The question which we must answer is this. Does a prisoner seeking a certificate exercise his or her constitutional right 'to have recourse by way of appeal or review to a higher Court' in that very application, by means of that very application, and irrespective of its result? Does the requirement itself cater sufficiently, in other words, for such 'recourse by way of appeal or review'? That phrase sounds rather vague. But the minimum that it envisages and implies, I believe, is the opportunity for an adequate reappraisal of every case and an informed decision on it."[9]

He made other observations which in my view are helpful in the determination of this

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8 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC); 1996 (1) SACR 94 (CC) at para 17.

9 Id.

matter. At paragraph 12 of the judgment he said the following:

> "It does not follow in my opinion that, if leave to appeal is a condition compatible with s 25(3)(h), the same must necessarily go for Judges' certificates. For the similarities between the two mechanisms are accompanied by a difference important enough, as I view it, to distinguish the one from the other."[10]

[7] After setting out the distinguishing features between the two procedures, Didcott J concluded at paragraph 16 of the judgment:

> "[The procedure requiring judges' certificates], one therefore sees, is unsystematic and works in a haphazard way. It exposes the process to the real danger that appeals which deserve to be heard are stifled because their merits never attract judicial attention. The inherent likelihood of some worthy appeals suffering that fate surely speaks for itself. The number of cases where it actually happens is unascertainable, but may well be substantial. . . . [W]e must apply our minds to the constitutional tolerability of the statutory provision in point which, by neglecting to regulate the process, opens the door to such a state of affairs."

[8] I must turn to examine the leave procedure in the magistrates' courts to determine whether it too lends itself to similar criticism.

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10 The reference here is to leave to appeal against a high court judgment.

[9] After the refusal of leave to appeal by a magistrate, all that the clerk of a magistrate's court is required to submit to the high court for consideration, along with the petition, are copies of the refused application for leave and the magistrate's reasons for refusing the application.[11] This is a bare minimum of information that is to be placed before the judges who consider the petition. Not even the judgment sought to be appealed against (or reasons for it) *must* be lodged with the high court. Of course, there is nothing preventing the petitioner from annexing a copy of those reasons to the petition. This will generally not be done, however, if the petitioner is not represented by a lawyer. Often the judgment refusing leave is not helpful at all. It does not explain why, on the available facts, the magistrate was satisfied with the proof of guilt or imposed the particular sentence. The present application illustrates this point. This is all that the magistrate said in refusing leave:

> "Hierdie hof is van oordeel dat 'n ander hof nie tot ander bevinding sal kom as wat hierdie hof geraak het nie en die aansoek om verlof word van die hand gewys."[12]

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11 Section 309C(3) of the Act.

12 What the magistrate said here is a conclusion and he did not give reasons for the refusal of the application for leave to appeal. In my view a magistrate is obliged to give reasons for the conclusion that the application had to fail. Having said that, I am still not convinced that, in the absence of the judgment

This should be contrasted with rule 6 of the rules of the Supreme Court of Appeal which provides for the furnishing of significantly more material for consideration by the judges of appeal, including a copy of the judgment sought to be appealed against.[13]

[10] In *Ntuli* Didcott J concluded that the high court leave to appeal procedure conduces to the placing of sufficiently detailed information before the then Appellate Division and that this

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sought to be appealed against (and/or reasons for it), reasons for the refusal of the application would suffice.

[13] Rule 6(2) reads:

> "Every such application shall be accompanied by—
> (a) a copy of the order of the court *a quo* appealed against;
> (b) where leave to appeal has been refused by that court, a copy of that order;
> (c) a copy of the judgment delivered by the court *a quo*; and
> (d) where leave to appeal has been refused by that court, a copy of the judgment refusing such leave:
> Provided that the registrar may, on written request, extend the period for the filing of a copy of the judgment or judgments."

establishes a proper framework for the consideration of petitions. He went on to say:

> "The judges handling each [petition] are furnished as a matter of course with the basic information which pertains to it. From that they can tell whether they have enough material by then to assess the prospects of success on appeal and may safely proceed to do so, or whether more is needed and had better be gathered first. They can see, in particular, how helpful or not they might find it to obtain and study either the entire record of the trial or some selected excerpts, with special reference to the passages cited in the petition."[14]

[11] In my view the paucity of information, which in terms of section 309C(3) must be lodged with the high court, does not allow for an adequate reappraisal and the making of an informed decision on the application. This situation is not much improved by the provisions of section 309C(5) which make it possible for the judges considering a petition to call for further information. The language of these provisions is permissive. As a result, some judges may insist on the production of the record. Others may not. Once again the observations of Didcott J in *Ntuli* are in point:

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[14] Above n 8 at para 14.

> "No uniform practice prevails there. Some judges obtain the record habitually, once the case is not the sort where the information already available satisfies them that a certificate should be granted straight away. Others do so rarely, being content by and large to rely rather on the magistrate's account of the trial. The refusal of a certificate on that footing worries one. Those judges who do not read the record will have no means of knowing whether the evidence substantiated the findings made by the magistrate on the credibility of witnesses and other factual issues. They will not learn of any procedural irregularities that may have marred the trial. Nothing dispels their ignorance on those scores. Nothing alerts them to flaws in the magistrate's findings or conduct of the proceedings which are hidden for the time being but the record may in due course reveal. No petition prepared by counsel is there to guide them in that direction. Nor is the possible presence of such defects likely to have been mentioned either by the prisoner or even by the magistrate, the one oblivious to the true character of the features in question, the other failing to attribute any such character to them."[15]

[12] The situation of an accused person, wanting to appeal from a magistrate's decision, is very much less favourable than one who seeks to appeal against a conviction or sentence in a high court. When an unrepresented accused wants to appeal, after being convicted and sentenced in the magistrate's court, the task of presenting a properly formulated application to the trial court for leave under section 309B will probably prove insurmountable. Then there is the even more formidable barrier of drafting a petition to the high court for leave to appeal. The remarks of Didcott J in *Ntuli*, though made in a different context, are singularly apposite:

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[15] Above n 8 at para 15.

> "The typical product of such efforts, a product familiar to all with experience of it and hardly surprising in view of its source, is a rambling and incoherent commentary on the trial which misses points that matter, takes ones that do not, and scarcely enlightens the judge about any."[16]

The fact that the petition may ─ and on the ordinary procedure envisaged by the statute will ─ be considered in the absence of the record exacerbates the situation.[17] In this regard the points made by Didcott J in *Ntuli* are highly pertinent.[18] There is too great a risk under this procedure that a genuine miscarriage of justice will not be picked up.

The institutional context

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16 Id.

17 See para 9 above.

18 Quoted in para 10 above.

[13] In its narrower sense,[19] the object of the right to a fair trial contained in section 35(3) is "to minimise the risk of wrong convictions" and inappropriate sentences "and the consequent failure of justice".[20] This object pervades all stages of a trial until the last word has been said on appeal. In determining what is fair, the context or prevailing circumstances are of primary importance — there is no such thing as fairness in a vacuum. By "context" I am referring to such prevailing facts and circumstances as may have a bearing on the content given to a constitutional right. Examples of such facts and circumstances might be socio-economic, political, financial, as well as other resource-related considerations. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* Ackermann J said:

> "[I]t is salutary to bear in mind that the problem cannot be resolved in the abstract but must be confronted in the context of South African conditions and resources — political, social, economic and human. . . . One appreciates the danger of relativising criminal justice, but it would also be dangerous not to contextualise it."[21]

[14] Without suggesting that this Court was anticipating how the issue under consideration in this matter should be disposed of, a *dictum* by Madala J in *Rens*[22] is of relevance in this regard. It is this:

> "The fact that appeals from the Supreme Court are treated differently from appeals from

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19 For the broader sense see *S v Dzukuda and Others; S v Tshilo* 2000 (11) BCLR 1252 (CC) at paras 9-11.

20 *Twala* above n 1 at para 9.

21 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 133 (footnotes omitted). See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at paras 26 and 46.

22 Above n 1 at para 28.

> the magistrates' courts is due to differences in the standing and functioning of the courts."[23]

In my view the high courts and magistrates' courts are not only significantly different in the two respects mentioned by Madala J but also in terms of human and material resources, participation by legal representatives and other relevant considerations. It then follows that the context in which the fairness of the procedure must be judged is different. This in itself may be a sufficient basis for concluding that, even though the leave to appeal and petition procedure meets the test for fairness in respect of high courts, it does not do so at the level of magistrates' courts. Put in another way, this difference may necessitate distinguishing the instant case from *Rens* and *Twala*.

[23] This was with reference to the then applicable appeal procedure which provided for automatic appeals at the level of the magistrates' courts.

[15] The point of principle is not so much that high courts and magistrates' courts function differently or that there is a difference in their standing. Those are merely external signs of the fact that they are inherently different. Since 1656 there has been a high court in South Africa,[24] and since 1682 a two-tier system of lower and superior courts.[25] As colonisation spread to the interior, this two-tier system was extended to the whole of what is today the Republic of South Africa.[26] By the time of Union in 1910 there was, in each of the component colonies, an established system of one or more superior courts exercising both original jurisdiction in civil and criminal matters and appellate/review jurisdiction over lower courts, which exercised circumscribed and lesser civil and criminal jurisdiction. The superior courts were seen to have inherent jurisdiction to grant relief where the law recognised a right. By contrast, the powers of lower courts were confined to those afforded them by statute. They were, as the expression went, creatures of statute.

[16] This dichotomy was reinforced by the South Africa Act,[27] which created the Supreme Court of South Africa and gave it, through its several provincial and local divisions, original jurisdiction over the whole of the country. Subsequent South African legislation was consistent

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24 When the Raad van Justitie (Council of Justice) was established in Cape Town. See Van Winsen et al *Herbstein and Van Winsen The Civil Practice of the Superior Court of South Africa* 4 ed (Juta & Co Ltd, Cape Town 1997) at 2-3.

25 When a Court of Petty Cases was established in Cape Town. In the outlying districts petty civil and criminal cases were heard by courts of landdrosts and heemraden, with appeals lying to the Raad van Justitie. See Van Winsen id at 3.

26 For a fuller discussion see Hahlo and Kahn *The South African Legal System and its Background* (Juta & Co Ltd, Cape Town 1968) at 237-9; Dugard *South African Criminal Law and Procedure* Vol IV *Introduction to Criminal Procedure* (Juta & Co Ltd, Cape Town 1977) at 18-56; Hutchison et al (eds) *Wille's Principles of South African Law* 8 ed (Juta & Co Ltd, Cape Town 1991) at 30-3; Van Winsen above n 24 at 2-17.

27 1909 (IX Edward 7 chap 9), Part VI (sections 95-116).

with that pattern.[28] The interim Constitution recognised and reinforced this historical hierarchy in chapter 7, which dealt with the judiciary, and the distinction was carried through to chapter 8 of the final Constitution. In the result, we do not only have different levels of courts but courts that are historically and inherently different. Section 173 of the Constitution decrees that the Constitutional Court, Supreme Court of Appeal and high courts have inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice, but contains no corresponding provision regarding magistrates' courts. Also, subsections (6) and (7) of section 174 of the Constitution deal separately and differently with the appointment of judges and the appointment of other judicial officers. Likewise the remuneration and removal provisions of the Constitution in relation to judges distinguish them from other judicial officers.[29]

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28 See for instance the Administration of Justice Act 27 of 1912, the Supreme Court Act 59 of 1959, and the Republic of South Africa Constitution Act 32 of 1961.

29 See sections 176 and 177 of the Constitution.

[17] A structure in which lower courts deal with relatively less serious criminal and civil cases, subject to recourse to higher courts which also have original jurisdiction in heavier cases, is recognised in numerous jurisdictions around the world: municipal courts, district courts, magistrates' courts, county courts, and so forth.[30] The basic idea is that the bulk of comparatively less serious judicial work should be performed at the lower level(s) as inexpensively and expeditiously as possible, while it is left to higher courts to ensure quality control and to cope with more involved work. It is so that, with the incremental increase of their jurisdiction over time, magistrates' courts in South Africa do hear serious matters as well.

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30 Australia: Gibbs et al (eds) *Halsbury's Laws of Australia* Vol 8 (Butterworths, Adelaide 1996) at [125-35]; Canada: Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992) at 185-90; Ireland: Byrne and McCutcheon *The Irish Legal System* 3 ed (Butterworths (Ireland) Ltd, Dublin 1996) at 80, 89-92; Netherlands: Chorus et al (eds) *Introduction to Dutch Law* 3 revised ed (Kluwer Law International, The Hague 1999) at 52-4.

[18] In this country the lower courts play an indispensable role, ordinarily functioning under great pressure. A criminal court magistrate's lot is unenviable: a heavy case load, numerous postponements and consequent part-heard matters, long hours, difficult working conditions, relatively inexperienced legal practitioners, interpreters and investigating officers, rudimentary library facilities, and an often unsavoury physical working environment. A particularly stressful feature of such a magistrate's task is the high percentage of accused persons who do not have the benefit of legal representation and who often have language problems and cultural and educational difficulties in presenting a passable defence.[31] The whole scene differs radically from the high courts where, as Yacoob J observed in *Twala*,[32] undefended accused are usually

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31 In its report the *Botha Commission of Inquiry into Criminal Procedure and Evidence* Vol I (RP 78-1971) (Government Printer, Pretoria 1971) made the following observation at 75:

> "It is, however, also generally known that many magistrates are, especially in the early years of their judicial career, inexperienced, and that many magistrates, especially in the larger towns and cities, often work under *enormous pressure* without the assistance of legal representation on behalf of most of the accused persons. To err in such circumstances is human." (Emphasis added)

32 Above n 1 at para 21. See also *Ntuli* above n 8 at para 13.

such from choice. The high court case load is usually lighter, the human and material support resources considerably better, and the general atmosphere infinitely more conducive to fair judicial proceedings.

[19] The need for control in order to ensure qualitative justice is underscored in South Africa by the system of automatic review whereby the records of certain criminal proceedings against undefended accused persons in the magistrates' courts are routinely submitted — and have been for some 150 years[33] — to judges of the high court for assessment as to whether or not substantial justice had been done.[34] It is a system of judicial supervision whereby high court judges, sometimes acting with the assistance of the local office of the prosecuting authority, try to minimise the incidence and consequences of mistakes in the district magistrates' courts. The system is a manifestation of the hierarchical structure and functioning of high courts and lower courts. The records of automatically reviewable cases are speedily prepared and transmitted for perusal by judges in chambers, who have to satisfy themselves, from a perusal of the record together with such additional information or evidence as may be required from the magistrate, that the proceedings are in accordance with justice. The system was originally introduced, and

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33 A system of so-called automatic review was first introduced in the Cape Colony by Act 20 of 1856 and has subsisted in some or other form since. See Dugard above n 26 at 27.

34 In terms of sections 302, 303, 304 and 306 of the Act. This is not to be confused with the "review" referred to in section 35(3)(o) of the Constitution. Automatic review serves a special and limited purpose and the constitutional right of appeal or review refers to something more than this procedure. It entails its assertion and exercise by an individual who is aggrieved by a trial court's decision.

has been maintained since, to minimise the risk of wrong convictions or unjust sentences. Nothing of the kind has ever existed in relation to high courts.

[20] Indeed, it is an integral function of a superior court to exercise an entirely different kind of review jurisdiction over the proceedings in lower courts. High courts have the power to review and correct the proceedings of lower courts on a variety of grounds.[35] In the case of a high court, there is no corresponding susceptibility to review. Although the Act provides for a special entry procedure in the case of an alleged irregularity tainting a high court criminal trial,[36] at common law high court proceedings are not reviewable. Therefore, it is clear that institutionally there is a much higher degree of confidence in the regularity of high court proceedings than is enjoyed by lower courts.

[21] At the purely functional level, the difference in status of our lower and high courts is evidenced by the disparity in jurisdictional limits. With regard to criminal jurisdiction, the distinction is still quite marked, although there has been a consistent pattern of increasing penal jurisdiction for the regional courts since the introduction of these courts in 1952.[37] Nevertheless, the legislature manifestly still recognises a sufficiently marked disparity in penal jurisdictions, hence the reservation of the power to impose a sentence of life imprisonment for certain

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35 In terms of section 24(1) of the Supreme Court Act 59 of 1959 these include absence of jurisdiction, bias, malice, gross irregularity, the admission of inadmissible evidence and the like.

36 Under section 317 of the Act.

37 Regional courts were created in terms of section 3 of the Magistrates' Courts Amendment Act 40 of 1952. This section amended section 2 of the Magistrates' Courts Act 32 of 1944. In recent years the jurisdiction of regional courts has been increased incrementally and at present they can hear all criminal offences except treason (section 89(2) of the Magistrates' Courts Act). Their penal jurisdiction is also significantly higher than that of district courts.

specified crimes in terms of section 51 of the Criminal Law Amendment Act 105 of 1997 to high courts.

[22] To sum up: the risk of an error leading to an injustice is substantially greater in the magistrates' courts than in the high courts.

Conclusion on whether the procedure limits the section 35(3)(o) right

[23] The inclusion of paragraph (o) in section 35(3) of the Constitution is significant. The right conferred by the paragraph is directed at ensuring that there is a reasonable procedure for correcting errors[38] that may have occurred at the trial stage.[39] In a substantial number of criminal cases, convictions result in prison sentences. During its term, imprisonment brings the liberty of the individual to a halt.[40] It also impacts on the individual's dignity. Therefore, it cannot be overemphasised that before this happens, there must be procedural checks and balances of such a nature that wrong convictions and inappropriate sentences are reduced to the barest minimum: an appropriate reassessment mechanism is an important cog in this scheme of things. For it to serve the desired purpose, the appeal procedure must be suited to the correction of error. Where (as in the magistrates' courts) the potential for error is greater, the threshold of what accords with fairness cannot appropriately be pitched at a similar level as in the procedure for appeal from

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38 Whether on matters of procedure, analysis of fact, or substantive law.

39 Ellerson "The Right to Appeal and Appellate Procedural Reform" (1991) 91 *Columbia LR* 373 at 386.

40 It is so that the imposition of a fine impacts on the individual's patrimony and therefore her property right may be implicated. This too is by no means an insignificant consideration.

high courts. In those foreign jurisdictions where restrictive appeal procedures have been introduced, the restrictions have little to do with the self-evident truth that a less restrictive appeal procedure is more likely to lead to the discovery of error than a restrictive one. They have more to do with the need to relieve appellate courts of the pressure of work brought to bear by an ever-increasing volume of appeal work[41] and considerations relevant to fairness, such as the need to avoid clogging appeal rolls with frivolous and unmeritorious appeals.[42]

[24] The automatic right of appeal undeniably allows for a meaningful reappraisal and the making of an informed decision by a higher court. It best ensures the correction of errors. The intrinsic advantages of an automatic appeal are that the court of appeal is furnished with the entire trial record and that it hears oral argument. Errors warranting correction may be apparent from the record itself. Oral argument during an appeal has the benefit of giving more content to the issues to be determined and assists in clarifying and bringing them into sharper focus. Harlon Leigh Dalton says:[43]

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41 Pattenden *Judicial Discretion and Criminal Litigation* (Clarendon Press, Oxford 1990) at 332 (on the position in England and Wales); Ellerson above n 39 at 373-4 (on the position in the United States); Duff and Hutton (eds) *Criminal Justice in Scotland* (Ashgate Publishing Ltd, Aldershot 1999) at 162 (on the position in Scotland).

42 Regarding the necessity for the restrictive leave to appeal procedure at high court level, Madala J said the following in *Ren*s above n 1 at para 25:

> "It cannot be in the interests of justice and fairness to allow unmeritorious and vexatious issues of procedure, law or fact to be placed before three Judges of the appellate tribunal sitting in open Court to rehear oral argument. The rolls would be clogged by hopeless cases, thus prejudicing the speedy resolution of those cases where there is sufficient substance to justify an appeal."

43 Dalton "Taking the Right to Appeal (More or Less) Seriously" (1985) 95 *Yale LJ* 62 at 63 n 6.

> "By severely restricting or eliminating oral argument, appellate courts reduce the likelihood that latent issues will be developed and confusing issues sorted out, that everyone's attention will be riveted on the same question at the same time . . . ."

In a commission report, Brennan J is reported to have said:

> "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument."[44]

The value of oral argument is further illustrated by the experience that convictions and sentences, that were confirmed on automatic review in terms of section 302 of the Act, have subsequently, on occasion, been set aside on appeal. By and large, this occurs as a result of the crystallisation and clarification of the issues by oral argument, something which is lacking on automatic review.[45]

[25] A point alluded to above needs emphasis. A highly restrictive form of appeal is not

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44 Quoted by Ellerson above n 39 at 397, from the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 67 FRD 195 (1975) at 254.

45 Oral argument may be heard on automatic review (section 304(2)(b) of the Act) but more often than not it is not.

appropriate where, as in the magistrates' courts, the margin of error is greater. In my view the procedure under consideration is highly restrictive. The unsatisfactory features of the sections 309B and 309C procedure discussed above make it unsuitable for the purpose envisaged in the Constitution, in that the procedure does not accord with an adequate reappraisal and the making of an informed decision. Obviously, the automatic right of appeal, the right recently displaced by the impugned sections, satisfies the constitutional prescripts. I want to make it clear that there is no intention to suggest that Parliament may not come up with an appeal procedure that falls short of the automatic right of appeal, but still satisfies the constitutional requirement of fairness or is justified in terms of the Constitution. Of course, that is something that will be considered if and when it arises.

[26] One further argument needs consideration. As indicated above, the applicant contended that once a high court has refused a petition, no recourse for further appeal exists. On the other hand, Mr d'Oliveira submitted that the provisions of sections 20(4) and 21 of the Supreme Court Act 59 of 1959 permit an applicant, who has been unsuccessful before a high court, to seek leave to appeal against that decision from the judge and, if that fails, to petition the Chief Justice for leave to appeal. He argued, accordingly, that the requirement entrenched in section 35(3)(o) of the Constitution is not infringed. It is not necessary to resolve the question of the proper interpretation of sections 20(4) and 21. I am prepared to assume for the purpose of argument that Mr d'Oliveira is correct. The further application for leave to appeal and petition would also be based on the inadequate record placed before the high court. The inadequacies in the procedure provided by sections 309B and 309C would, therefore, not be cured. Furthermore, the difficulties facing unrepresented applicants would remain acute. They would find it difficult to

identify and articulate the grounds motivating their petition to the Supreme Court of Appeal, just as they would to motivate a petition to a high court. Also, an appropriate appeal procedure must exist at the appropriate stage. Some would-be appellants may give up before reaching the stage of petitioning the Supreme Court of Appeal. For these reasons, a further application for leave to appeal, followed by a petition to the Chief Justice, would not remedy the defects identified in sections 309B and 309C.

[27] For the reasons given above, I conclude that the attenuated appeal procedure consisting in the leave and petition procedure contained in sections 309B and 309C, even if supplemented by an application for leave to appeal against a high court's refusal of leave and a petition to the Chief Justice, constitutes a limitation of the right "of appeal to, or review by, a higher court" as entrenched in section 35(3)(o) of the Constitution.

[28] The *amicus* supported the applicant's constitutional challenge and in addition advanced contentions based on sections 9[46] and 34[47] of the Constitution. However, in view of the conclusion to which I have come on the applicant's challenge under section 35(3)(o), it is unnecessary to consider the points raised by the *amicus*.

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46 Section 9 guarantees equality before the law and protection against unfair discrimination.

47 Section 34 guarantees access to the courts.

Justification

[29] Mr d'Oliveira, contending that leave to appeal from a high court and from a magistrate's court were analogous, and consequently relying on the judgments of this Court in *Rens* and *Twala*,[48] argued that there was no violation of the section 35(3)(o) fair trial right. In the alternative, he argued that if the challenged provisions did indeed infringe such right, the limitation was justifiable in terms of section 36 of the Constitution.[49]

[30] The principles to be applied in determining a question of justification under section 36 of the Constitution are settled. The application of section 36 involves the weighing-up of

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48 Above n 1.

49 Section 36(1) provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

competing values on a case-by-case basis to reach an assessment founded on proportionality. There is no absolute standard for determining reasonableness. It is a process that requires the balancing of different interests.[50]

[50] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104. See also *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 86-8; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 68; *S v Manamela and Another (Director-General of Justice Intervening*) 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 33.

[31] Mr d'Oliveira contended that the purpose of the impugned provisions was to prevent the clogging of appeal rolls and to ensure that hopeless appeals did not waste valuable court time. These are undoubtedly legitimate and important legislative purposes which, on the face of it, relate rationally to the limitation of the right to appeal effected by the procedure in sections 309B and 309C. However, this is a matter on which evidence is important. Before meritorious appeals are subjected to a procedure that is both restrictive and potentially unfair, there should be evidence or objectively determinable factors which adequately indicate the extent to which appeal rolls are clogged and the impact hopeless appeals have on the equation. It is only when there is clarity on such factors, that rationality can be determined meaningfully. The reasonableness of the procedure is ultimately a question of degree and must be determined with due regard to its wider contextual setting. What would, among others, have to be determined is whether a right of appeal that is consistent with the fair trial principle ― and section 35(3)(o) in particular ― is *realistically* unattainable in the light of available resources in the country.[51]

[51] *Manamela* above n 50 at para 32.

[32] The state has failed to adduce any evidence on the clogging of appeal rolls, the impact of unmeritorious appeals, and the existence of any resource-related problems or other relevant considerations that could justify the existence of the procedure introduced by sections 309B and 309C. Clearly it was incumbent on the state to establish factors that justify these limitations of the right of appeal.[52] In *Ntuli*[53] a good deal of statistical information was submitted to this Court relating, among others, to the number of appeals from lower courts heard by the various high courts in 1992, 1993 and 1994, and of judges' certificates applied for and granted. In the present case the state produced no such data, nor did it refer to any objectively determinable factors that could be considered in justification of the challenged provisions.

[33] On the contrary, there is a cogent objective factor pointing in the opposite direction. The real reason for the enactment of the two sections appears to have been this Court's decision in *Ntuli*. Mr d'Oliveira conceded as much in his heads of argument. For close on a hundred years, South African law had recognised a right to appeal against a conviction or sentence in the magistrates' courts, which right was qualified in one respect only. That was the judge's certificate requirement struck down in *Ntuli*.[54] The reason for its invalidation was that it impaired the appellate component of the fair trial right and because it discriminated against

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52 See *De Lange* above n 50 at para 92; *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) at para 27; *Manamela* above n 50 at para 49; *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) at para 33 n 35.

53 Above n 8.

54 The requirement was introduced in section 103(6) of the Magistrates' Courts Act 32 of 1944. It was subsequently included in the Act in section 305 read with section 309(4)(a) before its repeal.

unrepresented persons serving prison sentences.[55] The introduction of sections 309B and 309C levelled the playing field, not by improving the position of those whom the Act had been found to prejudice in a constitutionally impermissible manner, but by cutting down the rights of all.

[55] *Ntuli* was decided under the interim Constitution where the corresponding provisions were section 25(3)(h), right of appeal, and section 8, right to equality.

[34] It may well be that a less restrictive and justifiable means of achieving the purpose contended for by the state exists. But the state contented itself in this case with the view that, because the leave and petition procedure was upheld in the context of high courts, that procedure must pass muster in the context of magistrates' courts as well. This explains why no serious attempt was made to justify the infringement of section 35(3)(o) and why justification was argued almost as an afterthought.[56]

[35] Where, as in the magistrates' courts, the margin of error is higher at the trial stage, there would have to be a delicate balancing exercise between allowing for a procedure that better guarantees the correction of errors, on the one hand, and considerations that inform the need for a restrictive appeal procedure, on the other. These considerations would, among others, include resources (for example, human and financial) to which the state alluded. All require evidence.

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[56] The state's heads of argument said nothing at all on justification. Even oral argument on that point was very brief.

[36] As pointed out above, the effect of a criminal conviction on the liberty and dignity of the individual makes it imperative that adequate procedural checks and balances limit wrong convictions and inappropriate sentences to the barest minimum. The right to appeal is, accordingly, of considerable importance in the achievement of a fair criminal justice system. A leave to appeal procedure which does not enable an appeal court to make an informed decision on the application, and which does not adequately protect against the possibility of wrong convictions and inappropriate sentences constitutes a serious limitation of the right to appeal. In this regard it would be as well to remember that a trial court's reasons for its factual findings and conclusions of law are vital to the proper functioning of an appeal process. The following comments by Goldstone J in *Mphahlele v First National Bank of SA Ltd*[57] are in point:

> "There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a

[57] 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12 (footnotes omitted).

decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer."

[37] It follows that the justification for a limitation that entails such a disadvantage must be compelling.[58] In general, statements from the bar, with which Mr d'Oliveira contented himself, cannot suffice. In the circumstances, the state has failed to establish that the section 309B and 309C procedure is reasonable and justifiable and the alternative argument based on section 36 of the Constitution must also fail.

Relief

[38] The conclusion that the magistrates' courts' leave to appeal and petition procedure is inconsistent with section 35(3)(o) of the Constitution necessitates a declaration that the procedure is invalid.[59] That such declaration must ensue in this case is self-evident. What is not

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58 *Manamela* above n 50 at para 32.

59 That is as envisaged in section 172(1) of the Constitution. Section 172(1) reads:

> "When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

so straightforward is whether the declaration must take effect forthwith. As appears from section 172(1)(b), courts deciding constitutional matters must take the dictates of justice and equity into account when making orders. The practical implications for the administration of justice must also be borne in mind. In this regard, the court may adopt what is set out in section 172(1)(b)(i) and (ii).

[39] Until May 1999, when the impugned sections became operational, the high courts were handling automatic appeals from magistrates' courts. As indicated under the discussion of justification, there has been no serious suggestion by the state that automatic appeals were done away with because high courts could not cope with them. Therefore, if we leave aside for a moment the implications of automatic appeals in respect of the *Ntuli* situation,[60] a declaration of invalidity is going to place the high courts[61] in the same position as they were prior to May 1999. Under these circumstances, a declaration of invalidity that takes effect forthwith would be appropriate. Does the *Ntuli* situation necessitate a different approach?

[40] In *Ntuli* this Court declared the certificate procedure invalid. After considering the impact that a sudden increase in automatic appeals would have on the courts and the need for a new system that would adequately address that impact, the Court concluded that it was necessary

60 I.e. convicted and serving accused persons who want to prosecute their appeals in person.

61 As well as magistrates' courts in so far as they have to furnish reasons for judgments and see to the lodging of appeal records.

to allow time for consideration of options and the adoption of amending legislation.[62] To that end, the declaration of invalidity was suspended until 30 April 1997.[63]

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62 Above n 8 at para 28.

63 The *Ntuli* judgment was delivered on 8 December 1995.

[41] The Department of Justice did not use the time given to it fruitfully. The "sorry tale" of delay that followed on the order is told in *Minister of Justice v Ntuli.*[64] A few days before the 17 month breathing-space allowed for amendments to the Act was due to expire, a hurried and ineffectual attempt was made to obtain an extension of the period from this Court. In the course of his judgment explaining the Court's unanimous rejection of the application, Chaskalson P said the following:

> "[35] It was recognised in the judgment that, notwithstanding the importance of these rights, time should be allowed to remedy the defect in the Criminal Procedure Act. No information was placed before this Court at the time of the hearing of *S v Ntuli* to suggest that the remedial steps required in order to comply with the interim Constitution would be complicated and would require more than the generous period of almost 17 months allowed by the Court for this purpose.
>
> [36] In view of the importance of the matter, the importance of the rights involved, and the clear indication in the Court's judgment that the ongoing breach of rights would not be allowed to endure beyond 30 April 1997, one would have expected a prompt reaction by the Department of Justice to the Court's order, and that steps would have been taken as a matter of urgency to determine the course to be pursued to remedy the defect, and to formulate the legislation, if any, needed for that purpose.
>
> [37] The sorry tale of what in fact happened has already been set out and need not be repeated. The delays were inexcusable. So, too, was the delay in launching the present proceedings, which were initiated only five days before the period of suspension would terminate, and in circumstances in which it was not reasonably possible for a decision to be given before the period of suspension had expired."

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64 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) (*Ntuli* (2)).

[42] After the refusal of the application for an extension of time, the department was faced with a dilemma. Its response was the easy option of introducing, and piloting through Parliament, the leave to appeal and petition procedure now in issue. Because that procedure had passed muster at high court level, it was presumably assumed that it would do likewise at the level of magistrates' courts. Therefore, in order to address the *Ntuli* decision,[65] the department opted for — and Parliament accepted — equal but less favourable treatment for all. As is apparent from my conclusion, the assumption was wrong and the option bad.

[43] What is also apparent is that little heed has been paid to the serious warnings sounded by Chaskalson P in *Ntuli* (2)[66] that:

> ". . . an essential component of the administration of justice is the recognition of the fundamental rights of accused persons . . . legislation must be drafted and introduced with the sense of urgency that the situation demands. . . [and crucially in the present context] the importance of ensuring that all relevant information is placed before the Court at the time of the proceedings for a declaration of invalidity. Such information should be directed both to the justification for the infringement, if that contention is to be advanced, and to the consequences that will ensue if an order of invalidity is made. More often than not this Court has been asked to make an order in terms of s 98(5) of the interim Constitution [i.e. for the suspension of an order of invalidity] without having any

65 I.e. the declaration of invalidity of the "certificate procedure".

66 Above n 64 at paras 40-1.

> information before it as to the time needed for remedial action to be taken. . . . In future more will be required. It is the duty of the Minister responsible for the administration of the statute who wishes to ask for an order of invalidity to be suspended, whether under the interim or the 1996 Constitution, to place sufficient information before the Court to justify the making of such an order, and to show the time that will be needed to remedy the defect in the legislation. This should be done with due regard to the importance of the fundamental rights enshrined in the Constitution, and to the fact that it is an obligation of the government to ensure that such rights are upheld . . . ."

[44] Ultimately, therefore, and notwithstanding these pertinent observations, the Court is once again forced to consider whether to suspend an order of invalidity, and to do so without adequate input by the department concerned. Nearly five years have elapsed since the judgment was delivered in *Ntuli*, yet nothing effective has been done to redress the infringement of the fundamental rights of the category of accused persons it highlighted. Instead, their rights have been infringed afresh by analogous and no less invasive provisions which have been imposed on all others convicted in the magistrates' courts.

[45] The question that looms again is whether another extension of time should be allowed in the interests of good government; and, if so, should that decision be influenced by the same considerations that dictated the extension in *Ntuli*? What weight, if any, should be attached to the unsatisfactory response to the *Ntuli* decision or, rather, the lack of an adequate response? The pervading obligation is to give meaningful content to the command in section 7(2) of the Constitution that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." That Bill, so section 8(1) of the Constitution tells us, "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." In responding to a suspended order of invalidity relating to the Bill of Rights, the executive and the legislature should be alive

to the fact that, until they have acted pursuant to such order, there is a continuing infringement of the Constitution. The infringement should not persist longer than is strictly necessary. It is so that the suspension of an order of invalidity and the giving of time to address issues attendant upon such order are sanctioned by the Constitution itself.[67] However, this mechanism is intended to avert disorders or dislocation that may arise as a result of an immediate declaration of invalidity. This is understandable and accords with good governance, but the mechanism by no means sanctions tolerance for that which has already been adjudged inconsistent with the Constitution. Even in the face of this Court's suspension of an order of invalidity, it is imperative that obligations imposed by the Constitution remain. Any unconstitutionality must be cured "diligently and without delay."[68] The dilatoriness in addressing the *Ntuli* situation was incompatible with the state's constitutional obligations.

[46] Even though the state has seen fit not to furnish any hard data, we cannot ignore the probability that the sudden increase in the appeal rolls that will result from an immediate declaration of invalidity, will have a major impact on our court system, the full ramifications of which are not immediately imaginable. It is notorious that high courts are already overburdened and such a sudden increase in their workload might well prove impossible to handle. Also, the

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67 Section 172(1)(b) set out above in n 59.

68 Section 237 of the Constitution.

costs of the transcription of all records will certainly have a significant impact on financial resources. More importantly, the additional transcription workload is likely to result in delays in the production of records. In turn, the ripple effect could be that the hearing of all appeals is delayed. These are realities that cannot be ignored. In order to avoid dislocation in the appeal process it seems necessary to suspend the declaration of invalidity so that the state may take necessary, reasonable steps to address the impact of such declaration. Of course, because of the previous delay after the decision in *Ntuli*, the period of suspension must be relatively short. Also, because of the absence of evidence from the government, there is no tangible basis for making the period longer. An appropriate approach is to couple a short period of suspension with an option for the Minister to seek an extension of the period of suspension and/or a variation of terms accompanying the suspension.

[47] During the period of suspension, and in the interests of justice and equity,[69] it is necessary to ameliorate the adverse effects of the leave to appeal and petition procedure contained in sections 309B and 309C. The lodging of the full trial record and reasons for judgment when the section 309C petition serves before a high court would go a long way in that direction. However, if this were to be done in all petitions, problems of costs and delays would arise. Because of these practical considerations it may be necessary to limit the requirement of lodging the record and reasons for judgment. Accused persons worst affected by the absence of the record are those prosecuting appeals in person. It seems appropriate in respect of such accused persons that, in addition to the documents mentioned in section 309C(3), the clerk of the magistrate's court concerned must also submit the record of proceedings and the reasons for

69 Section 172(1)(b) of the Constitution set out above in n 59.

conviction, sentence or both (depending on what is sought to be appealed against). However, insisting on the preparation and lodging of the record in all appeals prosecuted in person may not adequately address the practical considerations referred to above.

[48] A further restriction, therefore, seems necessary, but before dealing with that, it is necessary to deal with the implications of section 302(1)(b) of the Act. This section reads:

> "The provisions of paragraph (a) shall be suspended in respect of an accused who has appealed against a conviction or sentence and has not abandoned the appeal, and shall cease to apply with reference to such an accused when judgment is given."[70]

What is envisaged in the section is an appeal proper, not an application for leave to appeal. Therefore, an application for leave to appeal does not suspend an automatic review.

[49] In proceedings which are automatically reviewable in terms of section 302 of the Act the record is prepared, as a matter of course, for consideration by a judge or judges of the high court. In such cases, even though the section 309C petition will be considered without a record, the automatic review, to a large extent, serves as a safety valve. Purely as an interim measure, and to address the highlighted difficulties, the lodging of records is not necessary in reviewable cases.

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[70] Section 302(1)(a) stipulates that certain sentences are subject to automatic review. It is that automatic review that gets suspended in terms of section 302(1)(b).

[50] In my view something should also be said about the imposition of fines. We cannot ignore the reality that, because of endemic poverty, for many in our society an option of a fine would be a pie in the sky. To them a sentence with the option of a fine means an effective term of imprisonment. In the circumstances, I take the view that even in those cases where a person has been given a sentence with the option of a fine, the lodging of the record should be insisted on if the unsuspended portion of the alternative term of imprisonment is in excess of three months.

[51] On the assumption that corrective measures taken by the state during the period of suspension will not render the declaration of invalidity superfluous,[71] upon the expiry of that period automatic appeals will be restored. A striking down of sections 309B and 309C will necessitate the concomitant striking down of the words "subject to section 309B" in section 309(1)(a) of the Act.

[52] The applicant and the *amicus* have succeeded in persuading the Court that the impugned provisions are inconsistent with the Constitution and, therefore, invalid. Despite their success, the proposed order does not afford them any personal benefit. Ordinarily litigants approach courts seeking a personal benefit. Where, as in the present case, they succeed, but derive no such benefit from their endeavours, that may be a disincentive to the making of constitutional challenges. The development of our constitutional jurisprudence is largely dependent upon such

[71] Depending on its content, amending legislation (should that be the option taken) could have that effect.

challenges. Discouraging challenges might reduce the momentum of this development. In *S v Bhulwana; S v Gwadiso*,[72] O'Regan J said:

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. In principle, too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants (see *US v Johnson* 457 US 537 (1982); *Teague v Lane* 489 US 288 (1989))."[73]

In my view this is not an appropriate case in which the applicant and the *amicus* should derive a personal benefit. They were legally represented when their applications for leave to appeal and subsequent petitions were brought. I can think of no basis for singling them out for relief and not subjecting them and others that are in a similar position to the conditions of suspension as set out in the order. This is, therefore, a case where the interests of good government outweigh the interests of the individual litigants.

Order

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72 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC).

73 Id at para 32.

[53] The following order is made:

1. Sections 309B and 309C of the Criminal Procedure Act 51 of 1977 are inconsistent with the Constitution and are declared invalid.

2. The words "subject to section 309B" in section 309(1) of the Criminal Procedure Act 51 of 1977 are inconsistent with the Constitution and are declared invalid.

3. The declarations of invalidity in paragraphs 1 and 2 of this order are suspended for a period of six months from the date of the order.

4. During the period of such suspension, clerks of the court shall, when submitting documents to a high court in terms of section 309C(3) of the Criminal Procedure Act 51 of 1977, submit copies of the record of proceedings in the magistrate's court and the magistrate's reasons for the judgment appealed against in every case in which ―

   (a) the applicant for leave to appeal has been ―

      (i) sentenced, without the option of a fine, to a prison sentence of which the unsuspended portion is in excess of three months, or

(ii) given an option of a fine but that fine has remained unpaid for a period of two weeks from the date of sentence and the unsuspended portion of the alternative term of imprisonment is in excess of three months; and

(b) the applicant for leave to appeal is prosecuting the application for leave in person; and

(c) there is no automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977.

5. The Minister of Justice and Constitutional Development may at any time before the expiry of the period of suspension provided for in paragraph 3 above, apply to this Court for an order varying the terms stipulated in paragraph 4 or extending the period of suspension provided for in paragraph 3 or both.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Madlanga AJ.

For the applicant : L Wepener SC and JLCJ van Vuuren instructed by Martin Botha Attorneys.

For the respondent : JA van S d'Oliveira SC, E Matzke and ECJ Wait instructed by the National Director of Public Prosecutions, Pretoria.

For the *amicus*: H Kriel instructed by Schwellnus Spies Haasbroek Inc.