

University of the Western Cape



Faculty of Law

The Legal Effects of Payment of an Admission of Guilt Fine in South Africa

**Mini-thesis submitted in partial fulfilment of the requirements for the award
of the LLM degree in the Department of Criminal Justice and Procedure**

By

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DECLARATION

I thereby declare that, **The Legal Effects of Payment of an Admission of Guilt Fine** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed.....
Nondumiso Mkonto
May 2019

Signed.....
Dr A J Hamman
May 2019



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Minor Offences

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Child Justice Act

Constitutional rights

Criminal Procedure Act

Criminal record

Expungement

Government Gazette

Magistrates

National Prosecuting Authority



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CHAPTER ONE

“Fast procedures are not always the best”

1.1 INTRODUCTION

A person should at all times try to avoid the blemish of a previous conviction and a criminal record entered against his name. A criminal record entered against his name could have detrimental consequences for an individual. An accused is usually aware of this if he is involved in a trial and is thereafter convicted and sentenced. However, the same result could occur where a person paid an admission of guilt fine. Such a person could be aware that he has attained a record, but it could also be that a payee¹ of a fine is very unaware that he has attained a criminal record that is entered against his name. This study focusses on the legal consequences of the payment of such an admission of guilt fine and will endeavour to investigate the remedies available to an uninformed payee of such fines.

1.2 BACKGROUND

Imprisonment is a very harsh sentence.² It entails that a person is removed from society and placed in a correctional facility where his movements are limited for a certain period. Even the mere participation in a trial for a lay person, who is unaware of court and trial process and proceedings, could be a taxing experience. The Criminal Procedure Act (CPA)³ has certain positive provisions like section 57 that allows an accused to escape the trial and prison. The payment of an admission of guilt fine is one way of finalising trivial criminal and civil matters.

1 An accused who subsequently pays an admission of guilt fine.

2 Muntingh & Giffard The Effect of Sentencing on the Size of the South African Prison Population. Civil Society Prison Reform Initiative. Available at <https://acjr.org.za/resourcecentre/The%20impact%20of%20sentencing%20on%20the%20size%20of%20the%20prison%20population.pdf>.

3 Act 51 of 1977.

This admission of guilt fine seems like a softer option but there are some long-term legal repercussions, which may adversely affect the payee. This research aims to identify some of these legal consequences. Finalising matters by way of admission of guilt fines is one way to relieve the clogging of court rolls and reduce the backlog of cases that are prevalent in South African courts. In essence, this type of payment only serves as a “quick fix” solution to a bigger problem. However, the consequences could be detrimental to the payee. The payment of such an admission of guilt fine has the same consequences as tendering a guilty plea and a subsequent sentence imposed by a court of law.⁴ The convicted person is then saddled with a criminal record.

Although the offence for which the payment was made, might have been of a trivial nature, that criminal record remains noted against a person’s name for a minimum period of 10 years.⁵ Unfortunately, in most cases people are unaware that they have attained such a record and are oblivious to the fact that a record could be removed.⁶ Such a removal application procedure could also be costly.⁷ Ultimately, for most South Africans, particularly the indigent, the payment of an admission guilt fine could be a lifetime punishment. This study focuses on the identification and analyses some of the legal effects, which occur because of the payment of an admission of guilt fine.

The aims of this research are to investigate whether there are any remedies available to persons who have paid such an admission of guilt fine. A person may have been unaware of the legal consequences of such payment. The payment may have been made mistakenly and

4 Admission of guilt fine law society
<https://www.lssa.org.za/upload/files/Brochures/LSSA%20AOGF.pdf>.

5 Section 271(B)(1) of the CPA.

6 Faeza The challenge of having a criminal record <https://www.news24.com/MoveMag/Archive/the-challenge-of-having-a-criminal-record-20170728>.

7 How to get a criminal record cleared <https://www.lawforall.co.za/get-criminal-record-cleared>.

could have been regarded as payment for bail. It could also be that the police officers, who have facilitated the payment, did not explain the impact and the consequences of the payment to the payees. As a result of not realising that there is a criminal record noted against their names, such person will not even enquire about the possible expungement of such a record.

1.3 STATEMENT OF THE PROBLEM

One way in which a criminal case may be finalised without an appearance in court is through the payment of an admission of guilt fine.⁸ In lay terms, the person admits his guilt to the trivial charge and is sentenced by way of paying a fine. This payment usually occurs at the police station. The admission of guilt fines for trivial offences is governed by Chapter 8 of the CPA. The CPA does not contain any specific definition for the concept of payment of an admission of guilt.⁹

Prior to the enactment of the CPA,¹⁰ the legislature only recognised the payment of an admission of guilt fine for those accused persons who have not yet made an appearance in court. This was stipulated in section 57 of the CPA, where it held that, a person who has been arrested, served with a summons¹¹ or given a written notice,¹² may pay an admission of guilt fine prior to his or her appearance in court, if such a person admits guilt of that offence. The

8 Other ways in which a matter may be finalised is by mediation or a diversion programme.

9 Law, J and Martin, EA; *Dictionary of Law Oxford*, 2009 at 18 – “...in criminal proceedings, a statement by the defendant [known as an accused in South Africa] admitting an offence...”.

10 Criminal Procedure Amendment Act 86 of 1996, the amendment made provision for the payment of an admission of guilt fine after the accused had appeared in court – section 57 A.

11 Section 57(1)(a) of the CPA.

12 Section 57(1)(b) of the CPA.

amendment makes provision for the payment of an admission of guilt fine after the accused had appeared in court.¹³

The CPA does not stipulate which offences fall within the ambit of admission of guilt fine. The amount payable is published in the Government Gazette which specifically sets out, in the addendum, the amount that is payable. The amount stipulated in the Government Gazette, is determined by the Minister from time to time, and is therefore subject to change. During 2013, the then Minister of Justice, Jeffery Radebe, stated that the amount that shall be applicable to admission of fines will a maximum amount of R10 000.00.¹⁴ This has been in effect since 2013 and has not yet been changed by the Minister.

In practice however, the senior magistrates of each district court have a meeting and decide which matters should be considered for payment of admission of guilt and which matters should not be considered for same.¹⁵ One of the main reasons for this determination is to decide what is practical in each jurisdiction. As what may be prevalent in one court's jurisdiction may not necessarily be prevalent in another.

An accused who pays an admission of guilt fine at a police station assumes the same consequences as if he or she had pleaded guilty before a court of law.¹⁶ The admission thus amounts to a conviction and the fine is then considered as the sentence thereof. Consequently, the traditional rights of an accused when pleading guilty, are also assumed by

13 Section 57 A. This section will be dealt with in more detail in this study.

14 In the Government Gazette No. 36111 of Vol. 571, 2013.

15 Information was obtained from Magistrate T Marx and was confirmed by Mrs Du Toit the Senior Magistrate of Bellville Court dated on the 20 August 2018.

16 Section 112 of the CPA 51 of 1977.

the accused, that being the right to appeal the sentence or conviction¹⁷ and the right to take the matter on review.¹⁸ The problem is that the legal consequences of an admission of guilt fine are not always known and understood by the payee. The law obligates the State to ensure that the payee is made aware of his rights and the remedies available to him as a convicted person. The remedies may also be inaccessible and inappropriate for some payees.

The payment of an admission of guilt fine was introduced as a measure to finalise certain trivial or minor matters without the necessity of an accused having to appear in court. However, the type of fines could be abused by law enforcement officials who sometimes persuade or convince the accused to pay the fine, without explaining to the accused the consequences of paying such a fine. An accused may not have been informed of the charges against him and the various rights that he may be entitled to.¹⁹ Such rights include: the right to remain silent, the right to counsel and his options regarding bail. In all probability, no explanation is given regarding the consequences of paying an admission of guilt fine. Lay people are often of the mistaken opinion that the amount of money that they are paying is for bail. If the correct position is not explained to them, they mistakenly wait on a summons to appear in court or to be served on them. They are in most instances totally unaware of the fact that they have acquired a criminal record.

17 Section 309 of the CPA: "(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction...".

18 *S v Shange* 1983 (4) SA at 47.

19 *Erasmus v MEC for Transport, Eastern Cape Province* 2011 (210/08) [2011] ZAECMHC 3; 2011 (2) SACR 367 at [22].

It is usually only realised when such a person applies for new employment, a firearm license or a passport where an enquiry occurs regarding his previous convictions. At that stage a person, with a criminal record has limited options available to rectify his position. If he refrains from doing anything, he will have to accept that he is burdened for life with a criminal record. An alternative is to take the matter on review to a high court. At this hearing, the court can either confirm the conviction and sentence or set it aside.

Police officers dealing with an arrested and detained person should explain to them their rights as contained in the Constitution.²⁰ These rights include but not limited to, the right to remain silent and to be informed of the consequences should the arrested person not remain silent,²¹ the right not to be compelled to make self-incriminating statements,²² the appoint an attorney and the right to be promptly informed of the charge.²³ The determination of whether the rights as set out in Constitution was correctly explained to the accused will have to be determined on a case-to-case basis. It has to be noted that the documentation that is dealt with is either a summons or a written notice. This is thus seemingly the only document, apart from the charge sheet, that will document the administrative process supposedly took place.²⁴ In *S v Tong*²⁵ and *S v Houtzamer*²⁶ the courts critiqued the flawed system of payment of admission of guilt fines.²⁷ These decisions are dealt with in more detail later in this study.

20 Constitution of the Republic of South Africa, 1996.

21 Section 35(1)(b) of the Constitution.

22 Section 35(1)(c) of the Constitution.

23 Section 35(2)(b) of the Constitution.

24 *S v Shange* 1983 (4) SA at 48 para H.

25 *S v Tong* 2013 (1) SACR 346 (WCC).

26 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC 25.

27 The court in both cases found in favour of the appellant setting the convictions and the sentence aside.

1.4 SIGNIFICANCE OF THE PROBLEM

A criminal record hinders a person's opportunities to find employment and could influence other future endeavours that the person may want to part take in. Statistics indicate that a huge percentage of people are affected by having criminal records.²⁸ In the current economic situation, a criminal record will undoubtedly influence a person's ability to find sustainable employment. Literature on the effects of having a criminal record also confirms the difficulties persons encounter to find sustainable employment. A further significance of this problem highlighted above, is the fact that there are certain instances, a lack of awareness of the acquisition of a criminal record. The lack of knowledge also extends to being unaware of suitable remedies such as an application to expunge such a criminal record.

Another factor adding to the significance of this problem is that a person's right to know and understand the consequences of an admission of guilt fine could have been violated. It could be that the payee was not warned about his pre-trial rights, his right to remain silent, the presumption of innocence and the right or privilege against self-incrimination.²⁹ The result is that people with criminal records will not easily obtain permanent employment. With the current rate of unemployment in South Africa, it is paramount to investigate the consequences of the legal consequences of obtaining a criminal record, especially where the accused are unaware of such consequences. It may be that an accused's rights are infringed upon which is in conflict with the Constitutional values of *Ubuntu*. In instances where persons

28 Hartleb T Number of job applicants with criminal records increases available at <https://www.news24.com/SouthAfrica/News/Number-of-job-applicants-with-criminal-records-increases-20150713>.

29 Section 35 of the Constitution.

have accepted responsibility for their actions, they should not be punished for the remainder of their life for acts arising from trivial cases.

1.5 RESEARCH QUESTION

The issue that is addressed in this study is the dire consequences that flow because of the payment of an admission of guilt fine. Part of the study focuses on fines paid before the first court appearance, which results from receiving the advice and/or persuasion of police officials. The question which this dissertation attempts to address is therefore:

What are the legal effects and remedies available to persons who have paid an admission of guilt fine?

1.6 METHODOLOGY

This research is a desktop study where the information was derived mainly from South African legislation, case law, directives, journal articles, books, reports and any other law reports. The above sources were used to harmonise the study and to answer the research question.

The relevant provisions of legislation such as the Criminal Procedure Act and the Constitution of South Africa were examined. Reference was made to the available case law, reported and unreported internet sources was scrutinised as well as other available legislative sources consulted.

1.7 LITERATURE REVIEW

In South Africa, there is a plethora of literature available on the constitutional rights of an accused person. In his book *Constitutional Criminal Procedure*, Steytler³⁰ has extensively covered the rights of an accused person during pre-trial, trial and sentence proceedings. Similarly, Currie & De Waal³¹ highlights the rights of accused, arrested and detained persons.

The question of overcrowding of South African prisoners has been dealt with in the studies of people like Muntingh & Giffard.³² Muntingh has also written a doctoral thesis on the overcrowding of prisons³³ and the state of prisons after the Jali Commission.³⁴ Terblanche in his book about sentencing is part of the literature looking at harshness of sentences of imprisonment.³⁵ There is sufficient literature available on alternative sentences, such as correctional supervision.³⁶

Mujuzi wrote an article on the impact of a criminal record and the difficulties to expunge criminal records.³⁷ There is also sufficient literature on the topic that deals with the right of an accused person being informed of his right to plead not guilty, his fair trial rights and the

30 Steytler N *Constitutional Criminal Procedure* Lexis Nexis 1998.

31 Currie & De Waal *Bill of Rights Handbook* Juta 2016.

32 Muntingh & Giffard *The Effect of Sentencing on the Size of the South African Prison Population*. Civil Society Prison Reform Initiative
<https://acjr.org.za/resourcecentre/The%20impact%20of%20sentencing%20on%20the%20size%20of%20the%20prison%20population.pdf>.

33 Muntingh L *An Analytical Study of South African Prison Reform after 1994*. unpublished Doctoral thesis UWC.

34 Muntingh *The State of South Africa's Prisons - Ten Years after the Jali Commission* *South African Crime Quarterly* 2016.

35 Terblanche S A *Guide to Sentencing in South Africa* An invaluable guide for criminal defence attorneys, advocates, magistrates, judges, prosecutors and students. LexisNexis South Africa (2016).

36 Terblanche S A *Guide to Sentencing in South Africa* An invaluable guide for criminal defence attorneys, advocates, magistrates, judges, prosecutors and students. LexisNexis (2016).

37 Mujuzi JD *The Expungement of Criminal Records in South Africa: The Drafting History of the Law, the Unresolved Issues, and How They Could be Resolved* *Statute Law Review*, 2014.

rights pertaining to appeal and review.³⁸ The writers Schwikkard & Van Der Merwe and Paizes and Skeen all addressed these issues in their books on the law of evidence in South Africa. Although research has been done on the sentences of convicted person in general, the same cannot be said of the position of people who have paid admission of guilt fines.

Regarding the issue of the impact of the rights of a person required or forced to pay an admission of guilt fine, little or no research is available. Very little has been written on the subject of payment of an admission of guilt fine at all. Section 57 of the Criminal Procedure Act has not received any academic interest thus far. In as much as there is case law that could be relied upon, academics have been silent on the topic. It is seemingly a topic that has not triggered much attention, yet it has such an enormous impact on a persons' life once an admission of guilt fine is paid. The bulk of what has been written about admission of guilt fines is contained in the Commentary on Criminal Procedure Act.³⁹ This is, however not sufficient and is merely explaining what section 57 is about and refers to case law that has impacted the section.

One of the few academic pieces on this topic, thus far, are done by Curlewis.⁴⁰ It is however relatively two short articles. The articles are published in the attorneys' journal *De Rebus* and he only addresses the issue that a person must be informed about the consequences of the payment of an admission of guilt fine. This thesis endeavours to contribute to the lack of academic research in this area. This study examines the possible rights that could be infringed

38 Schwikkard & van der Merwe *Principles of Evidence* 3ed 2009 Juta, Schmidt & Rademeyer *Law of Evidence* 4th edition (2003) LexisNexis. Zeffert & Paizes *The South African Law of Evidence* 2nd (2003) edition LexisNexis.

39 Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* (loose-leaf, updated) JUTA [Practice oriented commentary on the Criminal Procedure Act.]

39 Curlewis, L 'Section 57 and 57A of the Criminal Procedure Act 51 of 1977 – use them with discretion' 2008 (Apr) Society News, no 124 and Curlewis, L 'Sugar-coating guilt - admission of guilt fines - no easy fix' 24 Jan/ Feb 2014 De Rebus, 24.

during the period before an admission of guilt fines is paid. Part of the study also addresses the issue of the unknown legal consequences that such payment has on a payee and investigates the remedies available to such a payee. The aim of this dissertation is therefore to try Curlewis, L 'Section 57 and 57A of the Criminal Procedure Act 51 of 1977 – use them with discretion' 2008 (Apr) Society News, no 124 to seek solutions that will not have the effect of a lifetime punishment on such a person.

1.8 CHAPTER OUTLINE

Chapter one introduces this study and sketches the content for the rest of the study. The unknown consequences of the payment of an admission of guilt fine are addressed and the severity of attaining a criminal record emphasised.

In chapter two, the South African legislative framework dealing with admission of guilt fines is examined with specific reference to fines paid as a result of police pressures. An examination is undertaken of the relevant provisions of the Criminal Procedure Act 51 of 1977. The possible infringement of the rights of an accused person in relation to section 35 of the Constitution of the Republic of South Africa is also addressed. A comparison regarding the procedures of an ordinary trial as opposed to when an admission of guilt fine is paid is also done.

Chapter three identifies the legal consequences of the payment of an admission of guilt fine. The effect of the payment of the fine being equivalent to a guilty plea, as well as the issue of obtaining a criminal record is discussed. The detrimental effect that a previous conviction could have on future employment, travelling and promotions is examined.

Chapter four investigates the legal remedies to mitigate/obviate the legal effects of such a payment. The investigation includes whether the accused should take the matter on review or whether an application for the expungement of the criminal record would be a viable option.

Chapter five is the concluding chapter, which highlights the shortcomings in South African legislation and includes certain recommendations.



CHAPTER TWO

The Legislative Framework and the rights of an accused

“Why go through 25 remands in order to finalise the case, when the process can be expedited”

2.1 INTRODUCTION

Legislation is one of the main sources of criminal law, which follows the principle of legality. All the rules and regulations are contained therein. The Constitution is one of the most important documents in South Africa and all pieces of legislation are subordinate to it. The Criminal Procedure Act 51 of 1977 (the CPA) governs criminal procedures and the rules regarding that payment of admission of guilt fines.¹ It takes preference over common law provisions.² Therefore, all the provisions, procedures and rules pertaining to the admission of guilt payment are contained in the CPA.³

Case law are merely supplements to the law enacted by the Legislature and is referred to later in this chapter. Although precedents may be established as a result of case law, any amendments to the process of admission of guilt fines will have to be enacted by Legislative amendments. Because the legal effects of the payment of an admission of guilt fine could be detrimental to a payee, the importance of knowing the procedure and the consequences regulating such fines cannot be emphasised enough. Questions arise whether people are aware of their rights pertaining to such a procedure and on whom does the responsibility rest

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- 1 Admission of guilt referred to here is one in criminal law. One must be mindful that civil law also has the option of an admission of guilt.
 - 2 Snyman CR, (4th Ed) *Criminal Law* Lexis Nexis, 2002 at 8.
 - 3 Section 57 and 57A.

to inform an accused about the legislative procedures of admission of guilt fine. The provisions regulating admission of guilt fines, the constitutional rights of an accused and the procedure regarding police bail are therefore examined in this chapter.

2.2 THE POSITION PRIOR 1994

The issue of a flawed system regarding the payment of an admission of guilt fine is not a 25-year-old problem. Even before the promulgation of the South African Constitution, this issue has been challenging. When the Criminal Procedure Act was enacted in 1977, the payment of an admission of guilt fine was already a possible route to finalise matters. This could be one of the main reasons that no explanation of the rights of the accused are reflected in the summons issued to an accused or in the written notice given by a peace officer.

Dating back to 1935, the payment of admission of guilt fine was possible.⁴ An accused person could be convicted and sentenced without the appearance in court, in terms of section 323(5) of that proclamation.⁵ The type of matters that dealt with the payment of admission of guilt fines, at the time, are different from the current matters that we are dealing with. However, the same problems that existed then, still persist.

In *R v B*,⁶ the court dealt with the admission of guilt fine being paid for a *crimen injuria* matter, which the court conceived as a serious offence. Importantly the court took into account that when an indictment or charge is drafted, the prosecutor has no bearing as to

4 Section 245 Proclamation no 30 of 1935.

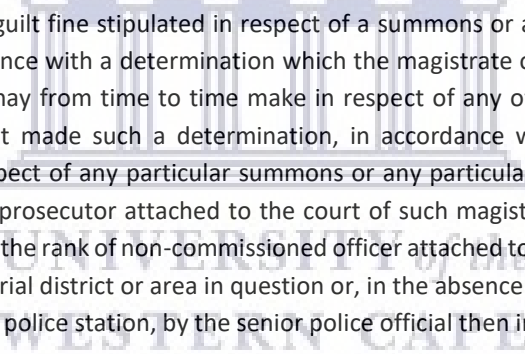
5 Proclamation no 30 of 1935. See also *R v B* 1954 (3) 431 (SWA) at 431F.

6 *R v B* 1954 (3) 431 (SWA).

the accused's version.⁷ Therefore the process is one sided, which is not entirely fair on the accused person. Thus the court already in 1954, identified that an accused person may in fact have a defence in the matter and identified the accused's right to present his version of the events.

2.3 PROVISIONS OF THE CRIMINAL PROCEDURE ACT (CPA)

The payment of an admission of guilt fine is a procedure to ensure that it serves the needs of each jurisdiction.⁸ For this reason, there are no offences listed in the CPA indicating which matter matters can be finalised by way of paying an admission of guilt fine. Section 57(5) (a) of the CPA states that:



[a]n admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of non-commissioned officer attached to a police station within the magisterial district or area in question or, in the absence of such a police official at any such police station, by the senior police official then in charge at such police station.

The senior magistrate of a district has the discretion to determine which offence may be finalised in this manner. The offences under this determination, is only limited to trivial criminal cases. The Legislature has promulgated that the fine must not be more than the

7 *R v B* 1954 (3) 431 (SWA) at 432 paragraph E.

8 See para 3.1 chapter 1.

amount that would have been set by the Magistrate, and this amount must be less than R10 000.00.⁹

These offences are made known to the various stakeholders and the fine amount is usually attached to a particular offence. In *S v Simba*¹⁰ the court relied on the determination that was made for the magisterial district of Strand, which stipulated the amounts for certain offences.

The court held that in the Strand jurisdiction:

...[f]or a contravention of ss (4)(b) of Act 140 of 1992, the fine is specified for up to 10 stops of dagga at R100 per stop. For 11 stops or more it states 'No J534 – DOCKET TO PP'. Effectively this means that no admission of guilt can be accepted where 11 or more stops of dagga are involved.

(ii) For contravention of reg 44(1)(a) to the MLRA, the determination provides for a fine of R500 per lobster for a first offence, but says 'No AOG for more than 5 lobster'.

(iii) For contravention of reg 51(1) to the same Act, the determination is R500 per lobster for a first offence, but with no limitation for a first offender in respect of the number of lobster concerned.¹¹

It must thus be noted that the above-mentioned offences and amounts are limited to the Strand jurisdiction. In effect, what this means is that a police official or prosecutor cannot contravene these determinations as it would amount to an injustice, as stipulated in section 57(7) of the CPA. The prosecutor, however, in terms of subsection four, has the discretion to reduce the amount, when it deems it fit. The discretion give to the prosecutors, however, is functional only before the admission of guilt is confirmed by the magistrate.¹² Although the

9 Government Gazette No. 36111 of Vol. 571, 2013.

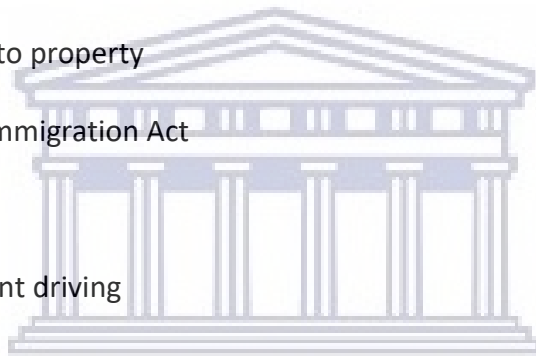
10 *S v Simba and Similar Matters* 2019 (1) SACR 90 (WCC) at [8].

11 *S v Simba And Similar Matters* 2019 (1) SACR 90 (WCC) at [8].

12 *S v Luyt* 1982 (4) SA 359 (C) at 361 para C – F.

offences that fall within the ambit of an admission of guilt fine are determined by senior magistrates, the most common offences as I have observed in most courts would include, but not limited to:

- Theft (your so called shoplifting)
- Dealing in liquor in terms of section of Liquor Act 27 of 1989
- Possession of drugs
- Crimen injuria
- Assault common
- Malicious damage to property
- Section 49 of the Immigration Act
- Public indecency
- Reckless or negligent driving



As previously mentioned the senior magistrate decides what type of matters should qualify for being accepted a payment of an admission of guilt fine. It could be that the same offences will be differently dealt with in different magisterial districts. In the determination of the offence, the sum amount of the stolen items; the quantity of the drugs and the extent of injury or damage caused is taken into account.¹³ As a result not all theft matters, for instance, will be eligible for admission of guilt fine.

The payment of an admission of guilt occurs before the accused pleads in court. Should the accused plead guilty, the normal course of pleadings will take place. Part of this study

13 *S v Simba and Similar Matters* 2019 (1) SACR 90 (WCC) at [9].

investigates the position of an accused who pays an admission of guilt before he appears in court. However, to put matters in perspective, payment of an admission of guilt fine after appearance in court will also be referred to.

Though the procedure between admission of guilt fine paid without court appearance; and one paid after court appearance may be similar and hold the same consequences, the experience of the two accused is not, at the very least, the same. Prior to court appearances the accused is not exposed to the four walls of a court and the advantage of having legal personnel explain and advise him or her as to the options available to him. The issue, importantly, will necessarily be about his or her release from custody. The difference between the two procedures will be explained below; and the differences in the two procedures, calls to the very core of an accused's Constitutional rights. In order for a person to appear in court, such a person needs to be arrested; summoned or issued with a written notice to appear.

2.3.1 Section 57(1) - Payment of Admission of guilt without appearance in court

Before 1996, an admission of guilt fine was only available to persons who have not made an appearance in court. The provisions governing this issue are entrenched in section 57(1) of the CPA which reads:

Where a summons is issued against an accused under section 54 (in this section referred to as the summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, and such public prosecutor or clerk of the court endorses the summons to the effect that the accused may admit his guilt in respect of the offence in question and that he may pay a fine stipulated on the summons in respect of such offence **without appearing in court;** or [my emphasis]

a written notice under section 56 (in this section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer, the accused may, **without appearing in court**, admit his guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority.

In essence, this means that when a person who has been served with a summons¹⁴ or given a written notice,¹⁵ may pay an admission of guilt fine prior to his or her appearance in court, if guilt is admitted.

When a summons has been issued, the discretion of the admission of guilt is done by the public prosecutor or the clerk of the court.¹⁶ This official will determine the amount that in his opinion would not be increased by the magistrate, had the accused person appeared in court. This amount will also not be in excess of the amount determined by the Minister as prescribed in the Government Gazette. Such summons may, at the time of receipt, specify the amount and due date of when the admission of guilt should be paid. In a nutshell, this means that before the summons is issued out for service, the clerk or Public prosecutor who prepares the summons will indicate on the said summons, the option to the accused person. It will contain a brief layout of the charge that the accused is facing.¹⁷ Thereafter it will stipulate the option that the accused may have in the matter. He could settle it by paying the fine. Further information will include the place and date of payment. The date of payment of the fine is

14 Section 54 of the CPA.

15 Section 56 of the CPA.

16 Section 57(1)(a) of the CPA.

17 Date, place, complainant and damage (either monetary or physical injury).

usually a date prior to his appearance in court. The payment will be made to the clerk of the court in which jurisdiction the offence occurred.

When a written notice is given to the accused, it is usually done by a police officer. A police officer could determine whether the accused may pay an admission of guilt fine for that offence.¹⁸ This is similar to the discretion that is vested in a public prosecutor. The written notice is a document completed by a police official. His/her discretion must be in line with the belief that the magistrate court will not impose a fine that would be in excess of the fine so stipulated by the Minister in the government Gazette.¹⁹ According to section 56(1)(c), the written notice will contain the proviso that the payee has the option of paying an admission of guilt fine and will also state the amount required to be paid by the accused. This fine will either have to be paid at the police station, where the written notice was issued or at the magistrate court.²⁰

Upon payment of the admission of guilt fine, the clerk of the court processes the payment and file the summons or written notice. Once the clerk has registered all the required particulars, the accused is deemed to have been convicted and sentenced.²¹ After the clerk has completed same, the documentation is sent to the presiding officer for his consideration. The presiding officer will either confirm the conviction and sentence; or set it aside. In the latter event, the matter will be sent back for the accused to be prosecuted in the normal course of the criminal justice system.

18 Section 56 (1) of the CPA.

19 Section 56 (1) of the CPA.

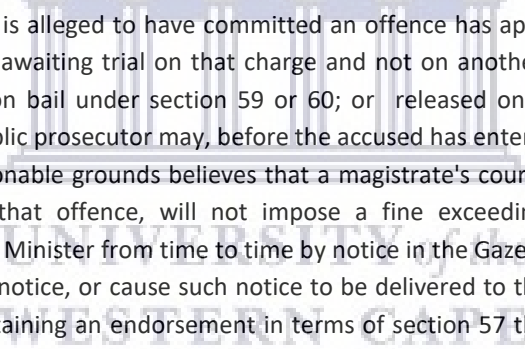
20 Section 57(1)(b) of the CPA.

21 Section 57 (6) of the CPA.

If the presiding officer is satisfied that all is in order, he will transfer the matter to the admission of guilt register for filing, confirming the conviction and sentence. However, if the presiding officer is not satisfied that the procedure was not followed, then the conviction and sentence may be set aside and have the matter referred for trial. The determination on whether to confirm the conviction and sentence is only based on the documents provided to the presiding officer.²²

2.3.2 Section 57A - Payment of Admission of guilt fine after appearance in court

After the 1996 amendment of the CPA, the Legislature has extended the option of admission of guilt fine payments to after appearances in court. Section 57A of the CPA states that:



If an accused who is alleged to have committed an offence has appeared in court and is- in custody awaiting trial on that charge and not on another more serious charge; released on bail under section 59 or 60; or released on warning under section 72, the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again.

As stipulated above, an admission of guilt fine is an option available to an accused person before a plea is tendered in terms of section 106 of the CPA.²³ In essence, this option is available to the accused person from the point of arrest to the moment shortly before the charge is put to the accused in terms of section 105 of the Act. Similarly, to section 57, section 57A is only applicable to certain offences. Under this section, the accused person is dealing

22 Section 57 (7) of the CPA.

23 Section 106 contains the different pleas available to an accused person. This is when an accused person is in court, after the charge has been put to the accused person.

with the public prosecutor, who determines the amount, which will be paid. The important difference to the previously discussed scenario is that the accused person must have appeared in court. The accused will then be informed by the court of his or her rights to a legal representative in terms of the Constitution.²⁴ An accused person will appear in court, be briefly informed of the charge against him or her, by the magistrate and thereafter his or her right to legal representation is explained. In the event where an accused person elects to speak for himself or herself, the court has the duty to explain to such an unrepresented accused the proceedings from thereon.²⁵ This is for the benefit of an unsophisticated person who most likely does not understand the proceedings. This duty cannot be delegated to another court official.²⁶ Therefore, an unrepresented accused enjoys the benefit of being informed by the magistrate about the payment of an admission of guilt and the effect thereof. In that instance, this duty does not solely fall on the lap of the prosecutor or a police official.

One of the advantages of the payment of an admission of guilt fine after the appearance in court is that the court warns and informs an accused person of his or her constitutional rights. Furthermore, the accused is informed of the consequences of paying the admission of guilt fine. The same does not apply to an accused person who pays an admission of guilt fine prior to a court appearance. The person who assumes that responsibility of informing the accused is the peace officer or police official.

24 Section 35(3)(f) and (3)(g) of the Constitution.

25 *S v Malatji and another* 1998 (2) SACR 622 at 624g.

26 *S v Malatji and another* 1998 (2) SACR 622 at 624g.

In the case of *S v Parsons*²⁷ the court stated that a police officer does not only have to inform the accused of the consequences for fairness purposes, but because the police official has a constitutional obligation to inform the accused of his rights and consequences. This position was confirmed in the leading case of *S v Tong* by Henney J:

A peace [or police] officer must warn the accused of the full consequences of paying an admission of fine. As such, the accused must be informed that he/she will be deemed to have been sentenced and convicted by the court with jurisdiction in respect of the offence in question.²⁸

2.4 THE OBJECTIVE AND PURPOSE OF AN ADMISSION OF GUILT FINE:

The criminal justice system is one that operates and that is utilised on a daily basis. As a result, in a six month period during 2018, there were about 1235 cases received, on average, by the Magistrates Court in Bellville.²⁹ The need to then finalise matters speedily is of paramount importance. Section 57 allows for that speedy finalisation of matters. In the case of *S v Tong*³⁰, Henney J stated:

[t]he system allowing the payment of admission of guilt is an indispensable and important component in our criminal justice system. It grants a person an opportunity to admit guilt for less serious offences, which lessens the burden on our already overloaded criminal justice system.

An admission of guilt fine allows a person to finalise a matter without going through the entire stages of a criminal trial and dispenses with the rules of evidence. An admission of guilt fine technically amounts to a guilty plea. However, it allows the process to be significantly lessened. In essence it expedites the whole process. The whole spirit of section 57 is to allow

27 *S v Parsons* 2013 (1) SACR 38.

28 *S v Tong* 2013 (1) SACR 346 (WCC) at para 25.

29 As calculated from the February 2018 to July 2018. Stats information for Bellville District Court received from the Ms. S. Nordien, the Control Public Prosecutor.

30 *S v Tong* 2013 (1) SACR 346 (WCC) at para 23.

a person, who is guilty to finalise a matter, without the involvement of the court in the process.³¹ The only procedure that needs to be followed to finalise the matter, is contained in section 57(6). Ultimately, an accused who pays an admission of guilt fine assumes the same consequences as if he or she had pleaded guilty before a court of law in terms of Section 112 of the CPA.

The admission thus amounts to a conviction and the fine is then considered as the sentence thereof. Consequently, the traditional rights of an accused when pleading guilty are also assumed by the accused. Inclusive of these rights is the right to appeal the sentence or the conviction in terms of section 309³² and review in terms of section 304 of the CPA.³³ However, in the case of *NGJ Trading Stores (Pty) Ltd v Guerreiro*,³⁴ it was noted that an accused person may pay the fine solely to rid himself of the foreseen projected expense and the strain it may have on the accused.³⁵ The reason may not be entirely that the accused is in fact guilty of the offence so charged. Simultaneously, the court in the above-mentioned case also stated that this fine is not a method of doing away with the duty of the state to prove its case.³⁶ It therefore stands that the objective of Section 57 is not to take away the duty of the state and to convince accused persons to plead guilty. It is therefore important that the accused knows what he is charged with; the option of pleading not guilty and that of pleading guilty.

31 *S v Shange* 1983 (4) SA 46 (N) at 49 E.

32 In terms of s309 "(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction..."

33 *S v Shange* 1983 (4) SA at 47.

34 1974 (1) SA 51 (O).

35 *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 (1) SA 51 (O) at 747A.

36 *NGJ Trading Stores (Pty) v Guerreiro (PTY) Ltd* 1974 (1) SA 51 (O).

2.5 THE ANATOMY OF A TRIAL

It is clear from the above information that a criminal case does not have to be procrastinated and can in fact be finalised much faster. Therefore, a valid question could be asked, why proceed with a trial when the matter can easily be finalised without the hustle of a lengthy trial. There is a major difference between simply paying an admission of guilt fine and proceeding with a trial. A lay person will not even know or appreciate the difference, unless informed about it.

2.5.1 Trial Proceedings

A plea of not guilty is not always indicative that an accused person is indeed not guilty. There may be instances where the accused person may in fact be of the opinion that he is guilty, but is in fact in law, not guilty. It simply means that the defence is testing the states' case and may have other issues that they are not in agreement with. An example of this is where an accused is charged with driving a motor vehicle whilst the alcohol concentration in his blood is more than the legal permissible limit.³⁷ The accused may then indicate that he was drinking prior to driving and then drove a motor vehicle.

However, it does not end there; there are technical issues that need to be attended to, i.e. the two-hour period; the correctness of chain evidence; the proper authorised practitioner drawing the blood; etc. Firstly, the accused will have to be furnished with further particulars that will assist him or her in the preparation of his or her defence.³⁸ Thereafter the accused

37 In South Africa driving under the influence of alcohol is not illegal. What has been made illegal is driving a motor vehicle whilst the alcohol concentration in the blood is more than 0.05g/100m (for a non-professional driver).

38 Section 35(3)(b) of the Constitution.

will consult his or her legal representative, if he or she had elected to have one, after he or she would have been informed of his or her constitutional right. The accused will then be in a position to proceed. The prosecutor will put the charge to the accused, after which the accused will indicate to the court that he or she understood the charge. He or she will then plead to the charge in terms of section 106 of the CPA. After pleading, the plea is usually confirmed by the legal representative who will either give a plea explanation in terms of section 115³⁹ of the CPA or make admissions in terms of section 220⁴⁰ of the CPA or simply remain silent.⁴¹

Once that has been done, the state will call its first witness. The prosecutor will lead this witness. Thereafter, the defence will have the opportunity to cross-examine the witness in length. The defence may also cross-examine the witness on the statement that made to the police by the said witness. Should there be a question regarding authenticity of the statement, a trial within a trial will be held to iron out any discrepancies. The court will also have the opportunity to question the witness on certain aspects that arose in the testimony of the witness. This process fulfils the right that an accused may challenge the evidence against him or her.⁴² Once the State is done with adducing evidence, it will close its case and the defence will have the opportunity that to adduce evidence in his or her favour. The accused may testify in his or her defence or may elect to remain silent. He or she may also call witnesses to advance his or her defence. He or she and his or her witnesses can be cross examined by the prosecutor and questioned by the court. Once that is done, the defence will close its case,

39 This lays out the basis of the accused's defence. This can be done verbally or in writing.

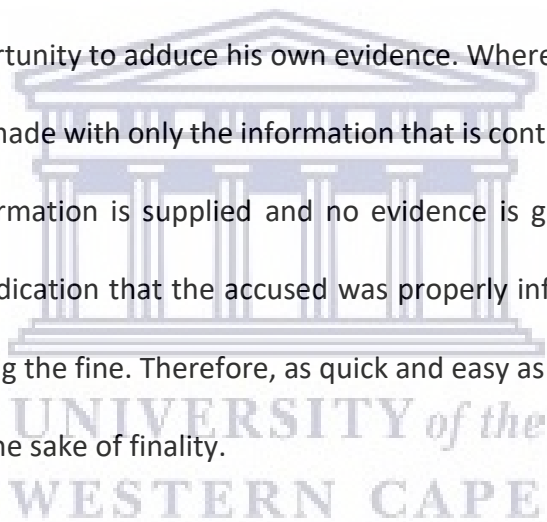
40 These are formal admissions on fact. It will simplify the length of the case, where the state will not have to prove the facts admitted to by the accused.

41 The writer hereof is in the employ of Legal Aid South Africa and this part is written and indicative of the personal experience of the writer.

42 Section 35 (3)(i).

whereby the court may wish to call its own witnesses. If not, the state will proceed with its closing arguments, followed by the defence. After consideration of all adduced evidence in court, the court will make a decision of whether the State proved its case beyond reasonable doubt or not. In which case the accused will be found guilty or not.⁴³

Indeed, a trial process could be lengthy, expensive and in all circumstances, be very intimidating. Whereas an admission of guilt is very simple and literally takes less than 30 minutes. Yet both procedures reach a final outcome. The most considerable difference is that the accused is found guilty by the court, after all the evidence has been adduced and the accused has had the opportunity to adduce his own evidence. Whereas with an admission of guilt fine, the payment is made with only the information that is contained in the J534, that is available. No further information is supplied and no evidence is given to the court to be scrutinized. There is no indication that the accused was properly informed of his rights and the consequences of paying the fine. Therefore, as quick and easy as it may seem, many vital steps are skipped, all for the sake of finality.



2.6 RIGHTS OF AN ACCUSED PERSON

The Constitution of the Republic of South Africa, due to past indecencies and oppression, recognised that an accused has the right to be presumed innocent until proven guilty. Section 35(3) of the Constitution sets out the rights of an accused person in detail. It states, among other rights, that the accused must be informed of the charge with sufficient detail to answer it,⁴⁴ to have a public trial before an ordinary court,⁴⁵ to choose and be represented by a legal

43 See note 40 above.

44 Section 35(3)(a) of the Constitution.

45 Section 35(3)(c) of the Constitution.

practitioner, and to be informed of this right promptly,⁴⁶ to adduce and challenge evidence,⁴⁷ and not be compelled to give self-incriminating evidence.⁴⁸ These rights are accompanied by other rights that are enshrined in the CPA. As will be evident later, an accused person who pays an admission of guilt fine is not always informed of his or her rights in terms of the Constitution.⁴⁹ Yet, an accused who pays the admission of guilt fine after a court appearance is in a much better position as opposed to an accused that has not had the leisure of being informed of his rights by the court. This is the situation where an accused pays the admission of guilt fine prior to any court appearance.

2.6.1 Inherent Rights Waived

There are inherent rights that an accused person has in terms of the common law, the CPA and the Constitution. The minute an accused person decides to not proceed with his or her trial and pay an admission of guilt fine, he or she forfeits certain rights. These rights forfeited include: a) challenging the information, evidence or the allegor (so called confrontation of your accuser); b) being tried in an open court; c) to be placed in possession of information that will enable you to prepare your case or defence; d) the right to have legal representation and importantly the right to a fair trial.

Section 35(1) further gives an arrested person the right to be informed of remaining silent and not making admissions that will incriminate himself. This is also covering the admission of guilt fine, as the conclusion of the admission of guilt fine is a conviction and sentence. The

46 Section 35(3)(f) of the Constitution.

47 Section 35(3)(i) of the Constitution.

48 Section 35(3)(j) of the Constitution.

49 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 24.

importance, therefore, of being informed of your rights promptly cannot be emphasised enough. It ought to be second nature for police officials who deal with accused persons on a daily basis. Dlodlo J stated that the then J534, as it read when the judgement was delivered in 2012, “may not pass the constitutional muster.”⁵⁰ By informing the accused of his rights, i.e. the right to not give self-incriminating evidence etc., the accused person would be able to make an informed decision pertaining to whether he will pay the fine or not.

A number of issues remain unanswered when dealing with the payment of an admission of guilt fine. Who is the person responsible for informing the accused of his or her rights? At which stage must he or she be informed of these rights? On the summons served on the accused, the rights of the accused are not cited. Nor are these rights cited in the written notice given by a police official to the accused. It is therefore the duty of a peace officer or police official, normally at the police station, to inform the accused of his constitutional rights. The duty of the officer is not limited only to inform the accused person of his rights, but he should also inform him of the consequences of paying the admission of guilt fine. Similarly, when an accused pleads guilty in court, the accused is or should be informed prior to the payment of the fine, of his rights and the legal consequences flowing from such a payment. This is obviously the administrative part of the law, which needs to be adhered to in order for justice to prevail. When the prescribed procedures are not followed, then the fairness of the whole process is tainted and unjust.

50 *S v Parsons (1)* SACR 38 (WCC) at para 6f.

The part of informing the accused is of paramount importance to ensure that the accused does not make a mistake or that incorrect inferences are drawn. In *S v Price*⁵¹, the accused who was an 18-year-old male person at the time, was summoned on a charge of assault. It was alleged that he had shot the complainant with a plastic gun. An official at the police station advised the accused that this was a trivial offence and that he could pay an admission of guilt fine to finalise the matter.⁵² No other detail is available or whether the accused had been informed of the charges that he faced; what his rights were; or that he was made aware of any other dispute resolutions available to him and the consequences that flowed from his decision. As a result, the accused paid an admission of guilt fine.

Though the procedure is simple and is designed to expedite the procedure, justice still needs to be served and the accused still needs to know that he still has certain rights. When an accused person decides to pay the admission of guilt, he waives certain rights as stated above. Furthermore, the accused still retains the right to be represented from the moment that he is arrested, summoned or served with a written notice.⁵³ The Legislature, gave a period of service for the summons and the written notice. Furthermore, it has made included subsection 2 paragraph (a) and (b)⁵⁴ in order to allow the accused person to make an informed decision pertaining to the payment of the fine. The presiding officer receiving the papers in terms of subsection 7 of the Act regulates it. It is not only the constitutional rights that are waived by the accused once the decision to pay an admission fine is made. Other alternative

51 2001 (1) SACR 110.

52 *S v Price* 2001 (1) SACR at 110 para g – h.

53 Section 73 of the CPA.

54 Section 57 of the CPA.

dispute resolutions available to the accused also fall away with such payment. These measures will be briefly referred to.

2.6.2 Alternative Dispute Resolution

An accused also has other options of finalising the case with less serious consequences as those accompanying the payment of an admission of guilt. These other options are known as alternative dispute resolutions. These are informal proceedings, which is a preferred way of solving matters, which is in accordance of *Ubuntu*. It avoids the need for lengthy trials. There is no obligation on the state to first attempt these options. It could be beneficial to both the defence and the state. The options are available as provided for in the Prosecution Policy Directive and include representations; diversions and informal mediation.⁵⁵

2.6.2.1 Representations

Representations could be an informal or formal document addressed to the prosecutor, without prejudice, to consider the withdrawal of the criminal matter against the accused. The representations could be based on either the merits of the case or it could be on humanitarian grounds. It may also be for the consideration of diversion, a lighter sentence or even to request the State to embark on section 105A plea negotiations. Part 6 of the Prosecution Policy Directives, gives the State the discretion whether to withdraw or proceed with prosecution, after assessing the details in the documentation supplied. The effect thereof, is

55 Prosecution Policy Directive issued by Director of Public Prosecution on the 01 June 2015.

that the matter is withdrawn and the accused does not get a previous conviction as contemplated in section 271 of the Act.

An example of a successful representation is contained in *S v Loff*.⁵⁶ In this matter, the court held that representations could be made to the Senior Public Prosecutor and the matter could be sent to a suitable diversion programme, if the representations are successful. Consequently, the conviction and sentence that resulted from the payment of an admission of guilt fine was set aside on condition that representations would be made. This evaluation is very important in that it emphasises the seriousness of the consequences of paying an admission of guilt fine. The payment of such fine should be discouraged, when there are other less disruptive measures available.

2.6.2.2 Diversion

Diversion is a process that could be followed to avoid litigation in part or in whole.⁵⁷ The word divert is self-explanatory and have the effect that a criminal matter is dealt with in another manner. There are certain requirements before an accused will be allowed to go the diversion route. The accused must take responsibility for the criminal offence; there must be a *prima facie* case against the accused and the accused must not have any criminal record.⁵⁸ The case of *S v Houtzamer*⁵⁹ is one of the possible cases that could have been sent for a diversion programme. The court mentioned that the accused had thrown the dagga/marijuana on the

56 *S v Loff* unreported matter heard in the Western Cape High Court under case number 18132/2018 (WCC).

57 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE *Criminal Procedure Handbook* Juta, 2009 at 70.

58 Section 52 of the Child Justice Act 75 of 2008.

59 *S v Houtzamer* 2015 (B7968969/08) [2015].

ground, before being searched by the police officer. This could be indicative that the accused was willing to take responsibility of the dagga/marijuana and would thus be suitable candidate for diversion.

Chapter 6 of the Child Justice Act, for instance, deals with provisions for diversion of minor matters.⁶⁰ The chapter is limited to child offenders, however, in practise, adult diversion is largely used, using the same principles as those outlined in the Child Justice Act. Adult diversion is dealt with under Part 7 of the Prosecution Policy Directives.⁶¹ When dealing with the diversion of minors certain provisions specify the type of programme that a child must attend. The type of programme will depend on the level the child offender falls under. Importantly, section 59 sets out the effect of diversion.⁶² In a nutshell, it states that the child offender, if diversion is successful, will not have a criminal record and the state will not prosecute again under the same facts.

The only thing that is required is for the programme to be complied with. The programme that referred to is a programme that has been selected by the social worker, which will be suitable to the accused and the offence so committed. The programme may be, but not limited to, community service; anger management classes; drug and alcohol abuse classes and committal to a rehabilitation centre. If, however a matter is diverted in terms of section 77 or 78 of the CPA, then the diversion is temporary, until such an accused is declared sane.

60 Child Justice Act 75 of 2008.

61 Child Justice Act 75 of 2008.

62 Child Justice Act 75 of 2008.

2.6.2.3 Informal Mediation

Informal diversion is contemplated in Part 7 paragraph f of the Prosecution Policy Directives, June 2015.⁶³ Mediation is defined as:

[a] form of alternative dispute resolution in which an independent third party (mediator) assists the parties involved in a dispute or negotiation to achieve a mutually acceptable resolution of the points of conflict. The mediator, who may be a lawyer or a specially trained non-lawyer, has no decision making powers and cannot force the parties to accept a settlement.⁶⁴

The main purpose of mediation is reconciliation and compromise. The parties must therefore be willing parties. In the case of *S v Price*⁶⁵, the accused was willing to accept responsibility of shooting the pellet gun. Though the accused may have had a reasonably possibly true defence, the matter could also have been finalised by way of an informal mediation. This option is available to third parties and not to state entities. For instance, if an accused is arrested for possession of drugs or driving with excessive alcohol in his blood or breath, the complainant in that matter is the state. Such a matter where the state is involved the matter cannot be mediated. There are however, other options, as those listed above. Though the law enforcement officer is the complainant, he or she acts in his or her capacity as a law enforcement officer. Therefore, as a government representative he or she cannot be part of an informal mediation process.

2.7 PAYMENT OF AN ADMISSION OF GUILT FINE - NOT PAYMENT OF BAIL

“Everyone is equal before the law and has the right to equal protection and benefit of the law”⁶⁶. This is a very important right in law, especially criminal law, as it expands its horizon

63 Prosecution Policy Directive issued by Director of Public Prosecution on the 01 June 2015.

64 Martin EA (5th Edition) A Dictionary of Law Oxford, 2003 at 311.

65 *S v Price* 2001 (1) SACR.

66 Section 9(1) of the Constitution.

to benefits of the law and alternative measures available to an accused person. In substantiation of the above is section 35(3)(1) of the Constitution which states that

[e]very accused person has a right to a fair trial, which includes [among] other rights] the right to be informed of the charge with sufficient detail to answer it.

Consequently, the right to a fair trial commences the moment the person is arrested and is accused of the alleged offence. Yekiso J also points out that the right to a fair trial is not a right that is only restricted to the actual trial, but is also a right that is enjoyed by every arrested person.⁶⁷ The court held that:

[t]he right to fair trial is extended to an accused person from the inception of the criminal justice process, which would mean on arrest, until its culmination up to and including the trial itself: as it is often said from the gatehouses of the criminal justice system (that is in the interrogation stage) as well as in the mansions (that is in the trial court).⁶⁸

Part of the fair trial rights of an accused is his right to apply for bail.⁶⁹ However part of the problem with the payment of an admission of guilt fine is that the accused are under the impression the payment is for bail. It should be made abundantly clear to accused that the payment of the fine is not a payment for bail. Public prosecutors are vested with the duty to prosecute an accused person for the alleged crime.⁷⁰ The process by which legal proceedings in respect to criminal matters are dealt with is known as prosecution.⁷¹ This prosecution commences the moment the accused is arrested, summoned or issued with a written notice.

67 *S v Esposito* [2006] ZAWCHC 52 (31 October 2006).

68 Snyman CR, (4th Ed) *Criminal Law* Lexis Nexis, 2002 at para 17.

69 Section 35 of the Constitution, See also Steytler.

70 Section 179 (2) of the Constitution.

71 Martin EA (5th Edition) *A Dictionary of Law* Oxford, 2003 at 390.

This then means that, police officials must inform the accused of this vital right regarding bail.⁷²

A police official is in terms of section 57(1)(b) of the CPA, confirmed by section 56(1), the first State official that an accused will deal with.⁷³ He or she assumes all the responsibility of informing the accused of the offence, his right and the consequences of such an offence.

2.8 BAIL

It is common cause that police officials have the power to set bail for an accused person in terms of section 59 of the CPA. Section 59 is applicable to all offences, except for those offences listed in Part II and Part III of schedule 2.⁷⁴ Under this section, the police official determines the amount, and without consultation with the public prosecutor, sets an appropriate amount. Once this payment is made, in cash, the accused is given a receipt with an appearance date and the court in which he needs to appear.⁷⁵ In essence; the accused will attend court whilst he or she is not in the confines of jail or prison. The case has not been finalised. The accused may even be issued with a notice to appear, where in terms of section 56(2) he or she will have to be released from custody immediately. There is no mention that the accused person will first have to make any payment when given a section 56(1) notice.⁷⁶ In fact, the intention of the Legislature is clear in this instance: that when you are issued with

72 See section 35 of the Constitution.

73 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE *Criminal Procedure Handbook* Juta, 2009 at 102.

74 Section 59(1)(a) of the CPA.

75 Section 59(1)(b) of the CPA.

76 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 27.

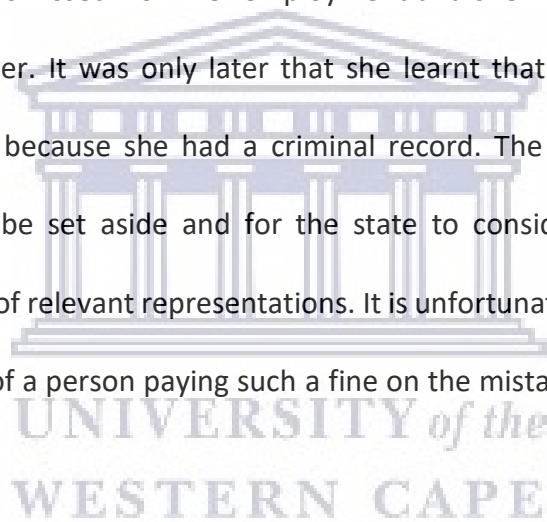
a section 56 notice, the effect is that you are warned to appear in court. Something that is commonly known as “free bail”.

Conversely, when an admission of payment is made, the accused is released and given a receipt that shows that payment was made. However, the effect thereof is different, in the sense that the matter has now been finalised. He at all times deals with a police official who practically has his life and liberty in his hand. The option of paying a fine and being released is not determined on whether the accused pays the fine on the day to be released. The notice is issued having both the option to pay for admission of guilt fine, on or before court appearance. In addition, it has the court appearance date. So theoretically, a police official should not wait for the accused person to pay the admission of guilt fine before releasing him or her.

A lay person, will not know the difference between the two. The majority of the people who pay or have paid an admission of guilt fine are under the mistaken belief that they have paid bail. The error that the amount paid was for bail could be attributed to the fact that the accused is released from custody when the payment was made.⁷⁷ This will be further discussed in Chapter three paragraph 3.3, where it will be indicated that it is a common trend with police officers to first accept the fine before releasing an accused person. This is concerning as the effect of paying an admission of guilt is very harsh. Especially to someone who has a defence and who is under the mistaken impression that he or she was paying bail.

77 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 25.

In an affidavit of the unreported case *S v Loff*⁷⁸, the applicant sets out clearly how she had been treated on the 16 February 2011 at the Parow police station. The applicant stated that she had been arrested on a charge of theft, a first offender, and that she found herself in the lowest point in her life.⁷⁹ Saldanah J, in para 4, further mentions that the accused was informed by a police official that she can pay a fine of R300.00 and will be immediately released; which she paid without any hesitation. There is no indication that the accused person's rights had been explained, nor is there an indication that the consequences of the fine had been explained. The consequences of her paying the admission of guilt become a setback, in that she was dismissed from her employment and she had difficulty in obtaining any employment thereafter. It was only later that she learnt that the reason for her not getting employment was because she had a criminal record. The court ordered that the conviction and sentence be set aside and for the state to consider a suitable diversion programme, after receipt of relevant representations. It is unfortunate that the court also did not expand on the rights of a person paying such a fine on the mistaken belief that payment was for bail.

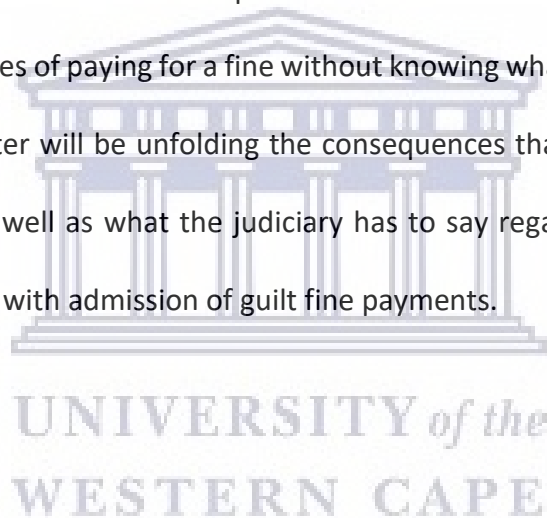


The one thing that is a highlight in this case that a persons' mental state plays a big role in the payment of the admission of guilt fine. It is therefore important that the police official explains the effects properly. It further is an indication that police officers just want to expedite matters.

78 *S v Loff* unreported matter heard in the Western Cape High Court under case number 18132/2018 (WCC).

79 *S v Loff* unreported matter heard in the Western Cape High Court under case number 18132/2018 (WCC).

Furthermore, it is evident a lay person is unable to make a distinction between the payment of an admission of guilt fine and police bail. It could be difficult to comprehend the difference as was in the case of *S v Gilgannon*.⁸⁰ The accused paid a sum of R300.00, at the police station thinking that it was for bail purposes, thereafter still appointed an attorney to appear for him at court on the return date that was stipulated in the written notice. It only transpired in court, on the “return date” that the matter was finalised on the day the R300.00 had been paid. That amount was in fact for a fine and not bail. Concluding that the police officials blurred the two distinct procedures and that neither constitutional rights nor the consequences of paying the fine had been explained to the accused.⁸¹ This is not the only case that deals with the injustices of paying for a fine without knowing what the consequences will be. In fact, the next chapter will be unfolding the consequences that result from paying an admission of guilt fine as well as what the judiciary has to say regarding the role of police officers upon proceedings with admission of guilt fine payments.



80 *S v Gilgannon* [2013] ZAGPJHC 226.

81 *S v Gilgannon* [2013] ZAGPJHC 226 at para 9.

CHAPTER THREE:

The legal consequences of the payment of an admission of guilt fine

“Stress / trauma/ criminal record/ rape/ reputation/ safety/ release me!”

3.1 INTRODUCTION:

“For every action there is a... reaction”.¹ This statement may be a *cliché*, but it is true. As in criminal law, the phrase *nullum crimen, nulla poena sine lege*² means that there is no crime without punishment. There is a consequence for every criminal act. The punishment faced by an accused will vary depending on the prevailing circumstances and the facts of each case. It can be accepted that the payment of an admission of guilt fine is part of a process in order to finalise trivial cases quickly.

The consequence of the payment of an admission of guilt fine are similar to any other case that would have been finalised by ordinary trial proceedings. The consequences for cases are almost the same as they are dealt with in the normal course of the criminal justice system. Yet an accused who pays an admission of guilt fine, prior to a court appearance is in a disadvantaged position compared to an accused who pleaded in court. A person who appears in court, has the sentencing options explained to him, as well as the effects of pleading guilty. It could be done either by his or her legal representative or the presiding officer.

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- 1 Newtons Third Law. <https://www.physicsclassroom.com/class/newtlaws/Lesson-4/Newton-s-Third-Law>.
 - 2 There is no crime without law; there is no punishment without law: direct translation of the Latin principle.

This chapter examines the consequences of paying such a fine. It further assesses whether our South African courts are protecting the rights of people paying admission of guilt fines in the same manner as other accused are protected.

3.2 THE RESULT OF PAYING AN ADMISSION OF GUILT FINE:

The purpose of section 57 of the CPA is to expedite criminal cases, which are trivial in nature. It is indeed a good procedure, for accused persons who truly are guilty, have no defence and who do not wish to go through lengthy trials with numerous court appearances. It is preferable that such matters are being finalised by the payment of an admission of guilt fine. The accused is convicted and sentence immediately, when the fine is paid. In the process, the accused eludes the payment of an attorney and unnecessary travelling costs to and from court. Such an accused is also relieved from the financial stresses caused by a lengthy trial and the on-going mental stress of a trial. This position is recognised by our courts and the legislature.

In *S v Parsons*³ the court stated that when an accused person is informed that the payment of a fine would be easier than attending court, it becomes an attractive option to an unsophisticated accused. No person prefers being in court and there could be a number of reasons for this. Where a person is aware of the consequences of such a payment and has undoubtedly consoled himself with the outcome, it could be a good thing. An admission of guilt fine payment was not enacted to be used in a malicious manner and definitely not to induce an accused to be released from custody. It is wrong to create the impression that such a payment is for bail, as discussed in the previous chapter.

3 *S v Parsons* 2013 (1) SACR at 40 (para 4 h and 5 i).

3.3 CONSEQUENCES OF PAYMENT OF AN ADMISSION OF GUILT FINE

The consequences of paying an admission of guilt fine are that a person is deemed to be convicted and sentenced as per normal criminal proceedings. The accused then attains a criminal record against his or her name. Moreover, several inherent rights are waived as a result of the payment of an admission of guilt fine. However, what is more shocking and disturbing, is that a person who pays an admission of guilt fine, could be unaware of the consequences. It could be that such a person is waiting on for a trial date because he or she had assumed that it was a payment for bail. Only to be unpleasantly confronted with the consequences of having a criminal record because of the payment.

3.3.1 Conviction and sentence

In criminal proceedings, the rule of law is clear and the state is *dominus litus*.⁴ The prosecutor decides which cases he intends to prosecute and once that decision is made, the prosecutor has the duty to prove its case beyond a reasonable doubt.⁵ Therefore, it is only after this burden of proof has been discharged that an accused is found guilty and convicted. It is the court that decides whether the accused is guilty or not, based on the evidence that has been presented. In *S v V*⁶ the court emphasised that “[i]t is trite that there is no obligation upon an accused person, where the State bears the onus, to convince the court”.⁷ Similarly, when an accused person pleads guilty,⁸ the court still has the discretion to either accept or reject the plea. The court in terms of S112 (1)(b) is obligated to explain the elements of the offence so

4 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE Criminal Procedure Handbook Juta, 2009 at 64.

5 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE Criminal Procedure Handbook Juta, 2009 at 66.

6 *2000 (1) SACR 453 (SCA)*.

7 *S v V 2000 (1) SACR 453 (SCA) at 455*.

8 Section 112 of the CPA.

that the accused is aware of what he is pleading on. In support of this obligation the court in *S v Baron*⁹ held that “*ń sorgvuldige verduideliking ann die beskuuldigde van die bestanddele van die misdaad waarop hey skuldig gepleit het is dus noodsaaklik*”.¹⁰ When payment of an admission of guilt fine is made, the accused does not have the benefit of having his or her case being assessed in open court and no evidence is being delivered. The accused is found guilty based on the allegation in the notice and his signature acknowledging the true events as per the state allegation contained in the J534 form.

Once the accused signs and the fine is paid, the matter is finalised. Consequently, through this process, the accused is deemed to have been convicted and sentenced, as if it were done at the court with the necessary jurisdiction.¹¹ The case of *S v Zinn*¹² is the leading case which states that three main factors ought to be taken into account when the court considers an appropriate sentence. The factors are; the crime, the criminal and the interests of society. Snyman further explains that the court meant that the “crime” refers to the seriousness of the offence; “the criminal” refers to the personal circumstances of the accused and the “interest of society” whether society needs to be protected from the accused or whether the accused could be rehabilitated back into society.¹³ The court takes certain aspects into account to determine an appropriate sentence. In terms of section 57 of the CPA, the fine amount must not be more than the amount determined in the Government Gazette and the amount that might have been decided by a court. In *R v B*¹⁴ a matter was sent on review. This

9 *1978 (2) SA 510 (C)*.

10 *S v Baron 1978 (2) SA 510 (C) 512 G at 512 (para G)*.

11 Section 57(6) of the CPA.

12 *S v Zinn 1969 2 SA 537 (A) at 540*.

13 Snyman CR, (4th Ed) *Criminal Law* Lexis Nexis, 2002 at 23.

14 *R v B 1954 (3) SA 431 (SWA)*.

was because of the seriousness of the matter and the fine amount that was suggested by the prosecutor. The court held:

In the present case, too the magistrate was unable from the charge sheet to assess correctly, what punishment should have been imposed. He could not have known why the accused behaved [that way or]... above all could he have known the intelligence, mental outlook, education or background of the accused...¹⁵

Already in 1954, the court recognised that the circumstances of the accused in such matters must be considered. It is unclear whether this was a decision made by the police or the prosecutor. Before a court can consider the three factors noted above, the defence or accused has the opportunity to adduce evidence in court, to place before court any mitigating factors that the court ought to take into account when sentencing. The personal circumstances of the accused could influence the court. He may even call witnesses in order to testify in his favour for a lighter sentence. This opportunity is not given to an accused when paying an admission of guilt fine. No consideration is given about the affordability of an accused by the police official. The fine must be paid in whole and cannot be deferred.

Furthermore, and most importantly, during an ordinary trial, once sentence proceedings are complete, the court is obligated to inform the accused of his right to appeal or review.¹⁶ One can accept that this surely is not being done by the police official who wants to convince the accused just to pay and get the matter finalised. Ultimately, this emphasises the number of occasions an accused person, in court is informed of his rights. These numbers of occasions are not available to the payee of an admission of guilt fine.

It is therefore very clear from the above that the benefit of having your case decided in court, by someone who has a little more experience than yourself, is much more preferable than

15 *R v B* 1954 (3) SA 431 (SWA) at 432.

16 Section 35(3)(o) of the Constitution.

taking the so-called “quick fix” of paying an admission of guilt fine. The rights that are waived by the accused once the decision to pay admission guilt is made, are enormous.

3.3 2 Criminal record

Once a conviction is noted, it is the inevitable that a person will get a criminal record. To define it:

[a] criminal record is an unavoidable consequence of a criminal conviction. Once convicted, whether after paying an admission of guilt fine or by a court in the ordinary conduct of its proceedings, an accused has no choice of avoiding a record of the criminal conviction.¹⁷

The CPA does not have a specific section dealing with a criminal record, or when a person gets a criminal record. It merely has a provision dealing with previous convictions, stipulated in section 271. This section states that:

- (1) The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.
- (2) The court shall ask the accused whether he admits or denies any previous conviction referred to in subsection (1).
- (3) If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted.
- (4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

The payment of an admission of guilt fine will thus form part of the previous conviction of an accused.¹⁸ A record is kept for various reasons, which include, but are not limited to employment purposes, travelling and any other purpose. In criminal cases, it assists the court

17 *S v Rademeyer* (unreported case, GP case no A186/2017, (delivered on 12 April 2017) at para 45.
18 Section 271 of the CPA.

to determine which sentence should be imposed when the assessment of fairness and justness is done. A previous conviction is of particular importance when the court must consider an appropriate sentence for a second or subsequent offender. In *S v Miller*,¹⁹ when it came to sentencing the court considered the accused's four previous convictions. One of the previous convictions in 1996 was an admission of guilt fine that was paid.²⁰ The conviction was however, not relevant as it was an assault case. It proves that an admission of guilt fine was taken into consideration and the accused was not regarded as a first offender.

A subsequent sentence will therefore be more severe because of the previous conviction. A previous conviction could therefore be the difference between imprisonment and any other alternative sentence as listed in section 276 of the CPA.

3.4 INFORMATION ABOUT A PREVIOUS CONVICTION OR A CRIMINAL RECORD

Upon arrest, a person's fingerprints are taken by the police²¹ These prints are kept in a database as an indication that the accused has a pending matter. Once the matter is finalised, by way of a conviction, the accused's fingerprints are taken once again. In terms of section 36B(2)(b) a police official is given the power to have fingerprints:

... taken of a person deemed under section 57 (6) to have been convicted in respect of any offence, which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subsection.

These fingerprints are then stored in terms of Chapter 5A of the South African Police Service Act,²² and is maintained by the National Commissioner of the South African Police Services under the responsible Division or Department of the Service.²³ The stored details are then

19 2018 JDR 0416 (WCC).

20 *S v Miller* 2018 JDR 0416 (WCC) at para [126].

21 Section 36B (1) of the CPA.

22 Act 68 of 1995.

23 Section 36B (3) of the CPA.

proof of the previous conviction against the accused. Currently the division that is responsible for the storage, maintenance and administration of this information is the Criminal Record Centre and Crime Scene Management situated in Pretoria.²⁴ The database is known as the Automated Fingerprint Information System (AFIS), where the prints are entered into.

These records can only be given to persons of interest in relation to certain instances mentioned in subsection 4 of the SAPS Act. The fingerprints may be used to detect of crime, identify human remains or missing persons and to further investigate criminal offences and for prosecution purposes.²⁵ A company may request this type of information. They must however provide reasons why they are required the said information. This will for obvious reasons be to detect if a prospective employee has a criminal past or not. This information is also readily available to the Department of Home Affairs for purposes of visas. As stated above, the purpose of keeping record of a person's criminal record or previous conviction, is to indicate whether the person frequently commits offences or whether he is merely a first offender. The record remains entered against a person's name until it is either expunged or a presidential pardon is received. There is no automatic removal once a criminal record is entered against a person's name. Thus a person, who has paid an admission of guilt fine, has a criminal record against his name.

3.5 IMPEDIMENTS AS A RESULT OF A CRIMINAL RECORD

3.5.1 Travel

24 Police clearance Certificates: Applying for a Police Clearance Certificate
https://www.saps.gov.za/services/applying_clearance_certificate.php
(accessed on the 14 April 2019)

25 Also emphasised in section 36B (6)(b) of the CPA.

A criminal record may be an impediment to one's travelling aspirations. Certain countries require a security clearance certificate from the local police station. The police will then furnish that country with the criminal profile. South Africa, for instance, is one of those countries that require such clearance.²⁶ Furthermore, when it comes to immigrants, a foreigner may be declared an undesirable person if such a person has been publicly charged or is likely to be publicly charged; and if the person has a previous conviction, where imprisonment was imposed without the option of a fine.²⁷ He is then regarded as an undesirable person and will in all likelihood not qualify to enter the country. Having been declared an undesirable person, an immigrant will not be in a position to apply for a visa; permit or admission into South Africa.²⁸

In terms of South African law, citizens must obtain a police clearance certificate when such a person intends working abroad or migrate to another country.²⁹ It could be quite an inconvenience and great impediment if a person is unaware that when he paid an admission of guilt fine he attained a criminal record. This was experienced by Mr Tong³⁰, where he was unable to travel to South Korea for work purposes due to the criminal record.

3.5.2 Driving:

Another category of people that could be adversely affected is those who wish to become professional drivers. If someone intends or aspires to be one, a professional Drivers permit in

26 Police clearance Certificates: Applying for a Police Clearance Certificate
https://www.saps.gov.za/services/applying_clearance_certificate.php
(accessed on the 14 April 2019)

27 Section 30 (1)(a) of the Immigration Act 13 of 2002 (as amended in 2004).

28 Section 30 (1) of the Immigration Act 13 of 2002 (as amended in 2004).

29 Applying for a Police Clearance Certificate

<https://www.gov.za/services/trave-outside-sa/how-apply-police-clearance-certificate-pcc>

30 *S v Tong* 2013 (1) SACR 346 (WCC) at para 4.

terms of chapter 5 of the National Road Traffic Regulations³¹ is required. However, in terms of regulation 117 (c) of that Act, a person shall be disqualified from obtaining or applying for a professional drivers' permit

if the applicant has, within a period of five years prior to the date of application, been convicted of or has paid an admission of guilt on—
driving a motor vehicle while under the influence of intoxicating liquor or a drug
having a narcotic effect; driving a motor vehicle while the concentration of alcohol in his or her blood or breath exceeded a statutory limitation; reckless driving; or in the case of an application for a category "P" and "D" permit, an offence of which violence was an element

A person's ability to become a professional driver could be severely hampered if he has a previous conviction. Thus, a person who mistakenly paid an admission of guilt fine could be precluded from entering this profession.

3.5.3. Dealing in liquor

A criminal record will also affect would be entrepreneurs who wish to embark on trading in liquor. It is undisputed that employment is a problem. As such, people find ways of being entrepreneurs. The application of obtaining a liquor licence could be a frustrating process on its own. An additional requirement is that an applicant should not have a criminal record. A lay person will in all probability not be aware that such requirement exists. One can assume that in informal settlements where trading takes place without licences, this requirement and other pre-requisites are only made known once that person has been arrested. More often than not, the offences of trading and liquor without the required licence, is usually finalised by way of an admission of guilt payment.

31 National Road Traffic Act 93 Of 1996.

In *S v Tengana*,³² the accused paid an admission of guilt fine on the charge of dealing in liquor without a licence.³³ Though this case dealt with the confiscation of the liquor, it indicates that it is possible for a person to pay an admission of guilt fine for dealing in liquor. However, one of the core pre-requisites of obtaining a liquor licence is that one should not have been convicted of the same offence.³⁴ More importantly, section 25(1)(b) specifies that a 10 year period must have lapsed before the person can actually make an application for a liquor licence. A period of 10 years has to expire, before such an application can be made. Even if a person knew the effects of such a transgression, this period on its own, is ridiculous.

3.5.4 Employment

Unemployment in South Africa is a huge problem and in a competitive country, a person with a tainted criminal record is at the back of the queue behind the rest of the competition. It is correct that not all job opportunities or job promotions consider a persons' criminal record. The requirements of a particular job will be listed on the vacancy advert and will be in the policy documents of that employer. However, one cannot shy away from the fact that many jobs consider that factor. A clear criminal record is a cardinal requirement similar to a certain level of education or length of experience. For instance, a person who has a previous conviction of theft or fraud may give an impression that he or she has a tendency of being dishonest; an assault conviction may be indicative that he or she has anger problems and a drug related convictions are indicative that the person may be an addict or a user.

32 *S v Tengana* 2003 (1) SACR 138.

33 Section 154 (1)(a) of the Liquor Act 27 of 1989.

34 Section 25 of the Liquor Act 27 of 1989.

An employer will most likely not appoint such a person based on that past conduct indicated on the SAP69s, which reflects his or her previous convictions. If a person applies to be a police official, it is a specific requirement that such a person must not have been convicted of any offence.³⁵ The chance of finding a permanent position is therefore severely compromised. Furthermore, the promotional opportunities will also be significantly reduced despite the fact that a promotion may be due to an individual. In terms of the appointment of the National Forensic Oversight and Ethics Board, the Minister will disqualify, remove or not appoint a person who has been convicted of any offence.³⁶ This illustrates that a person is unfit to hold a certain office if in possession of a criminal record, irrespective of being aware or unaware of having a criminal record entered against your name. The sad part is that one cannot even rely on discrimination based on a criminal record, because, this discrimination will probably pass the limitation test as set out in the Constitution.³⁷ Therefore, the only remedies available to persons with a criminal record are those mentioned and discussed in Chapter Four.

The above-mentioned is an indication of how immense the effect of attaining a criminal record could be. Especially when a person is unaware that they acquired a criminal record because of the payment of an admission of guilt fine. A person's rights are in this instance clearly violated and life as he or she knows it could be disrupted severely. It is correct that there are remedies available to a convicted, such as the expungement of a criminal record and referring the matter for review. However, these options are not as quick as the payment of an admission of guilt fine is. In fact, it could be a frustrating and expensive process. A person

35 How to become a reservist <http://www.saps.gov.za/services/reservist.php>
(Accessed on the 14 April 2019)

36 Section 15W of the SAPS Act.

37 Section 36 of the constitution.

is caught off guard by the knowledge of the existence of a criminal record. Then, not to have at your disposal the funds or the time, to proceed with either an expungement or review, is even more of a hindrance. This study will further assess the remedies available to a convicted and sentenced by way of section 57(6) in Chapter 4.

3.6 THE COURTS AND ADMISSION OF GUILT FINES

Courts are in favour of the payment of an admission of guilt fine by means of finalising a criminal case.³⁸ However, the criticism is mainly focused in the manner in which an admission of guilt fines is processed. This includes the process from the commencement of prosecution up to the way in which the matter is finalised. There is dissatisfaction in the constitutionality of it all.

In *S v Tong*,³⁹ a matter which was taken on review, the court addressed some of the shortcomings of this system. The applicant had been arrested on a charge of possession of drugs on the 1 November 2008. The police official informed his father, that R300.00 may be paid for the applicant to be released from custody. An amount of R200.00 was paid. Certain unexplained documentation was signed by the accused and he was asked to provide a fixed address, after which he was released. The fine was paid by the father, who was unaware that what he was in fact paying a fine. He was under the impression that he was securing the release of his son pending a trial date. At that stage, he had assumed that he would be informed of his court date at a later stage.⁴⁰ Similarity, in the case of *Erasmus v MEC for*

38 *S v Shange* 1983 (4) 46 SA at 49D-E.

39 *S v Tong* 2013 (1) SACR 346 (WCC).

40 *S v Tong* 2013 (1) SACR 346 (WCC) at [2].

Transport Eastern Cape Province,⁴¹ a friend of the Plaintiff paid R300.00 on behalf of and in the absence of the Plaintiff, unaware that it he was paying an admission of guilt fine.⁴²

It only transpired in 2011, when the applicant applied for a job, that he realised that he had a previous conviction and that the R200.00 paid was in fact a payment for a fine and not bail. The matter was taken on review as the applicant alleged that nothing regarding an admission of fine was ever explained to him. He stated that he had a defence and had he known that the R200.00 was payment for a fine, he would not have made it.⁴³

The paying of the admission of guilt fine, affected immensely on his employment opportunities. Even though he had received an offer to work in South Korea as a teacher, he required a visa to travel and could not obtain one, because of his criminal record.⁴⁴ This meant that the position was given to another candidate. His criminal record reduced his teaching opportunities to literally zero. Furthermore, his choice of his profession in the film industry, which he thought would bring about opportunities to travel abroad, was no longer a possibility. He was restricted in his movement and in his choice of trade, because of his criminal record.

The matter went on review as the Applicant averred that his rights and the consequences of the payment of an admission of guilt fine were never explained to him. The court requested from the Director of Public Prosecutions' (DPP) representative to supply certain information that would contradict the allegations as averred to by the Applicant. However, evidence

41 2011 (210/08) [2011] ZAECMHC 3; 2011 (2) SACR 367. This case was dealt with in the civil court as the plaintiff sued the State for unlawful arrest and detention.

42 *Erasmus v MEC for Transport, Eastern Cape Province* 2011 (210/08) [2011] ZAECMHC 3; 2011 (2) SACR 367 at [8].

43 *S v Tong* 2013 (1) SACR 346 (WCC) at para 3.

44 *S v Tong* 2013 (1) SACR 346 (WCC) at para 5.

showing that the correct procedure was followed and that the Applicant had been informed of his rights was not made furnished to the court. The court, relying on the case of *S v Mans*⁴⁵ and the case of *S v Parsons*,⁴⁶ stated that the basic and essential rights of the accused are prejudiced once an accused mistakenly makes a payment of an admission of guilt fine.⁴⁷

The court held that the dire consequences of paying an admission of guilt fine should not be taken likely. Most disturbing is the fact that it was alleged that the release of the accused was the essential component used to effect the payment of the fine. The police coerced the accused in paying the fine, making him believe that he was paying for bail instead of a fine. This was a catalyst for the decision to pay the fine without any questions being asked. It could be argued why the accused or his father failed to ask the officer what they were paying for and when will the accused person be informed of his court appearance. One will have to understand first that the accused and his family, or any other related person, suffers from immediate psychological trauma once a person is arrested and thought process is not the same.⁴⁸ However, more importantly, they do not have the duty to ask all that information. The duty is on the police officer to inform the accused of all his rights and the consequences of such a payment.⁴⁹ This conduct of the police is in direct conflict with the presumption of innocence.

After considering all the evidence, the conviction and sentence was set aside by the High Court. The court outlined that the conviction itself was not in line with the principles of justice.

45 1990 (1) SACLR 75 (T).

46 Case number 111202 delivered on the 15 June 2012 (unreported case).

47 *S v Tong* 2013 (1) SACR 346 (WCC) at para 18.

48 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 13.

49 Section 35 of the Constitution.

The court stated that an accused person must be informed that when he elects to pay an admission of guilt fine, that he waives certain rights.⁵⁰ He must therefore be informed of the charge, what the payment of an admission of guilt fine is, what the consequences to paying such a fine are, the right to have a legal representative and the right to examine the evidence against him.⁵¹ It was further stated that all the above must be contained in the J534 form issued by the police officer. Prior to this judgement, it did not contain any space for officials to explain or indicate that the rights of the accused and the consequences of payment of such a fine have been explained to him.

It could have been difficult to amend the J534, as it is a formal document by the Department of Justice and Constitutional Development. The Department had to be involved in the amendment of the said document. According to Curlewis,⁵² consultations between the department and the South African Police had been taking place, following the decision made by the court.⁵³ It seems as though there was some progress as a result of the consultations that took place. Following the decision taken in *S v Tong*, on the 28 September 2012 a letter was issued by the Provisional Commissioner of the South African Police Services, requiring that all police stations in the Western Cape have an annexure attached to the J534 indicating the accused's rights.⁵⁴ This was to ensure that the police officers keep in line with the decision taken in the above-mentioned case. The effect of this change was therefore applicable to cases that were heard after the letter was issued. Thus far, from the available research, no matter was concluded by way of section 57(6) after the September 2012 has surfaced for

50 *S v Tong* 2013 (1) SACR 346 (WCC) at para 15.

51 *S v Tong* 2013 (1) SACR 346 (WCC) at para 25.

52 Curlewis L 'Sugar-coating guilt - admission of guilt fines - no easy fix' Feb 2014 *De Rebus* at 28.

53 Curlewis L 'Sugar-coating guilt - admission of guilt fines - no easy fix' Feb 2014 *De Rebus* at 28.

54 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 20.

review. One can only draw an inference that possibly the police are making use of the amended version of the J534. However, that does not negate the obvious emphasis by the Rogers J in *S v Houtzamer*⁵⁵, who indicates the improbability of a police officer recalling an incident that took place a few years back, thus accountability being a problem on its own.

S v Houtzamer is a review matter that was finalised after the case of *S v Tong*, but which arose before the decision taken in the latter case.⁵⁶ The applicant had been arrested for possession of dagga.⁵⁷ He was issued with a J534 wherein it contained an appearance date and the option of paying an admission of guilt fine.⁵⁸ He was then informed by the officer that he will have to pay R200.00 in order for him to be released. It was at this point that he concluded that the officer was referring to bail and not an admission of guilt fine.⁵⁹ Moreover, the applicant had been in custody and his father, paid the R200.00 without conversing with the applicant, after he too had been told that the R200.00 was a way of securing his release.⁶⁰ Six years later, this matter was taken on review to the High Court. The applicant averred that he had no intention at the time of paying an admission of guilt and attaining a criminal record.

Rogers J, who delivered the judgment, first made enquires to the Magistrate and the DPPs Office, to answer three questions. The first was about the delay in the prosecution of this matter, referring to the time it took the applicant to make the application for review, that it may prejudice the interests of justice and referring to the value of the evidence at this late

55 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 23.

56 *S v Tong* date of offence was 01 November 2008 and in *S v Houtzamer* date of offence is 30 June 2008. The former case was the first, of the two cases, to be brought before court for review in September 2012 and the later was before court in March 2015.

57 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 4.

58 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 3.

59 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 4.

60 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 4.

stage.⁶¹ The second dealt with the error or omission by the peace officer. Whether such an error or omission should render the conviction null and void.⁶² Lastly the court referred to the case of *S v Cedras*,⁶³ that the applicant must actually have a defence and the same must be seen in the presented papers in court.

In the said affidavit the court remarked that the applicant did not state whether he was in possession of the said dagga or, not. It is submitted that the defence of the accused or applicant at that stage of the proceedings was irrelevant, especially if he did not have any previous convictions. There are other alternative dispute resolutions that are afforded to an accused person, under the normal court system such as a diversion programme,⁶⁴ should he take responsibility of his actions. This option is mainly exercised for child offenders, in an attempt to avoid exposure to criminal system as much as possible.⁶⁵

It is evident from the queries posed by the judge to the magistrate and the DPPs office that the court needed further information regarding what transpired when the accused paid the admission of guilt fine. The court queried whether the lack of appreciation of the accused of his rights, if proved, would be sufficient to set the conviction aside.⁶⁶ It is submitted that the court failed in this respect to consider one of the most cardinal rules of criminal law – that an accused must have appreciation of his act and he must act in accordance with such

61 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 6.

62 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 6.

63 *S v Cedras* 1992 (2) SACR 530 (C).

64 A diversion programme is a procedure used in criminal matters to attempt to avoid a criminal trial in whole or in part. It is a method that is available to persons who have no criminal record and to allow them to maintain that status. Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE *Criminal Procedure Handbook* Juta, 2009 at 70.

65 See Section 51 of Child Justice Act 75 of 2008.

66 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 7.

appreciation.⁶⁷ Therefore, there is a shift from the physical element to the mental element of the person. This too involves the psychological aspect of a first offender when he is arrested, charged and informed of such foreign concepts. Why should a person who never intended to plead guilty, be saddled with a criminal record, which will hinder him from doing and attaining certain things. However, court relied on the part of the annexure in the J534, which states that the accused is aware that he is guilty of the offence, which he has signed for. No matter the guilt of an accused, he is entitled in terms of the Constitution to bring challenges to the evidence of his accuser. Nowhere in the queries of the court does it seem that the court sympathises with the applicant. In fact, the main concern was the possibility abuse of Section 304 of the Act when it comes to matters stemming from section 57 of the Act. One shocking revelation, which came as a result of the court's queries, is the response of the Magistrate stating that:

...in all the cases he has handled over the years, accused persons complaining about the deemed conviction say that they were merely ordered to sign the form without being told the reason or consequences.⁶⁸

Theoretically, the mere signature by the accused is normally conclusively indicative that what the accused is signing has been explained to him or her. However, the magistrate emphasised that this is not always the case. That in fact in practice, this is not explained, an accused is merely told to sign. Therefore, on face value, one cannot merely assume that what the accused has signed was indeed acknowledged by the accused. Adversely this means that, even after the amendment of J534, a signature of an accused appearing on that form cannot be taken as an indication that the police have explained the rights of the accused and the possible consequences applicable. It would seem that the ignorance and the psychological

67 Snyman, CR *Criminal Law* Lexis Nexis, 2014 at 32.

68 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 12.

effect of being incarcerated, of a first offender is something that is preyed upon by police officers. They dangle “freedom” with the condition of having to pay a fine first.⁶⁹ Thus making it easy for a person to sign the J534 without making any enquiries.

Regardless of the picture painted by the paper trail from the Police with regard to the issuing of the summons, it never happens in practice. Accused persons are never released to pay the admission of guilt later. The paying of the admission is being used to finalise the matter.⁷⁰

This is not the procedure that was envisaged by section 57 and 56 of the CPA. According to section 56, an accused should not confuse a payment of an admission of guilt fine with bail, but this is happening. A Magistrate, who deals with the matters first-hand, confirms this. Therefore, it is not difficult to believe, that this is the actual practice in our police stations.

In *S v Madhinha* (discussed in detail in chapter 4) the accused was arrested on the 29 October 2010. He was taken to Bothasig police station where he was detained and was given a J534, which he subsequently paid the R500.00 for the fine.⁷¹ Thulare J emphasised that practice of incarcerating an accused and then issue him with a J534 form was contrary to section 56 and South African Police Services Standing Order (G) 341 issued under Consolidation Notice 15/1999 in proviso 3(3)(b).⁷² To curb this continuous ill-practice by police officers, the judge suggested another form of accountability by officers who detain persons and thereafter hand them a J534 by having the view that:

...the time has arrived for the National Commissioner of Police (Commissioner) in the interests of the citizens and residents of this country, the integrity of the committed members of the SAPS, the reputation of the section 57 procedure and that of the administration of justice in general, to require a member of the SAPS who detains an accused in a matter where a written notice (J534) would have been appropriate and is in fact used after an initial detention, in writing to record such detention and their reasons, and to submit such monthly returns to the

69 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 13.

70 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 13.

71 *S v Madhinha* 2019 (1) SACR 297 (WCC) at para [7] –[8].

72 *S v Madhinha* 2019 (1) SACR 297 (WCC) at para [40] –[42].

Commissioner for his consideration and intervention. The reasons must show why such arrest was necessary and unavoidable before the written notice was handed to an accused.⁷³

3.7 EXPEDIENT SYSTEM: OPEN TO ABUSE?

The common thread in the above-mentioned cases is the persistent abuse of power from the police officers. The officials have the duty to inform and deal with the accused. It is at this time that an accused, particularly a first offender, could be easily coerced into signing a J534 form and paying an admission of guilt fine. This practise is not in the interest of just, no, it is for the sake of finalising matters speedily. One may assume that this is done merely for statistical purposes, to show that that particular jurisdiction has finalised a large number of matters.

However, this is to the detriment of the accused's rights, more importantly, the whole spirit of the criminal justice system, which has at its core, the fair rules for an accused's trial. The abuse is unfortunately not limited to when the police officer omits to explain rights and consequences to an accused. The costs of this are much bigger. It has the lasting effect, especially on an accused who is unaware of the criminal record. Nevertheless, it is conceded that not all things are well formulated and function to perfection. A court should conduct an enquiry when it entertains such matters and reviews. Chapter four addresses the methods that could remedy the detrimental position that an accused finds himself in after paying such an admission of guilt fine.

73 *S v Madhina* 2019 (1) SACR 297 (WCC) at para [43].

CHAPTER FOUR

REMEDIES

“I did not know... what now?”

4.1 INTRODUCTION

In the previous chapter, the devastating consequences of attaining a criminal record were analysed. This chapter contains the avenues that are available to such an aggrieved accused. Although an accused, when paying the fine, maybe unaware of the dire consequences, one must accept that as soon as he realises the consequences of making the payment, he must be made aware of his options. It is the responsibility of the police to make these options known to the accused before payment. However, as previous case law confirms, this is not done. Therefore, regardless of when the accused finds out about the existence of a criminal record, there are remedies available to assist him.

In this chapter, the various options available to such persons will be explored. It includes taking the matter on appeal or review, the bringing of an expungement application or simply doing nothing.

4.2 PAYMENT NOT A PREVIOUS CONVICTION?

In *S v Madhina*¹ the court held that criminal offences finalised by way of section 57(6) are not considered previous convictions in terms of section 271 of the CPA.² This decision has not yet been confirmed by the Supreme Court of Appeal. However, it is the only case thus far that has addressed this issue. The court relied on other authorities,³ stating that a conviction only

1 *S v Madhina* (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018).

2 At paragraph 44.

3 *Director of Public Prosecutions, Limpopo v Mokgotho* (068/2017) [2017] ZASCA 159 (24 November

follows after the state has proved beyond reasonable doubt that the accused person is guilty. The court held further that the accused must have appeared, convicted and sentenced in court.⁴ It further stated the seriousness of a previous conviction and the aggravating factor it brings to sentencing proceedings is that it shows past criminal conduct or tendencies.⁵

In as much as an interpretation that an admission of guilt fine payment is not or should not be a criminal record, is welcomed, one cannot ignore the obvious previously cited decisions where it was held that an accused person attained a criminal record for paying an admission of guilt fine. For instance, the court referred to the case of *S v Parsons* and *S v Tong*, which dealt with similar matters, yet the court found that the fine payment was not a criminal record. The court indeed critiqued the previous court decisions, and suggested that the issue of a criminal record emanating from section 57(6) of the CPA is incorrect.

The decision of the court is definitely not agreed with. The court is placing a literal meaning to the appearance in court before conviction. The court did not invalidate all the criminal records attained by way of an admission of guilt fine; only those, which was made prior to a court appearance. When the court refers to section 57A, it recognises that a person may get a criminal record. The major difference between these two procedures is the forum in which the payment is made, i.e. if the accused made an appearance in court. The Court substantiates its reasoning that the accused has the advantages of having a legal representative, being properly informed of his rights and the conviction being recorded in the J546.⁶ It is submitted

2017) S v Madhina (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018) at para 26.

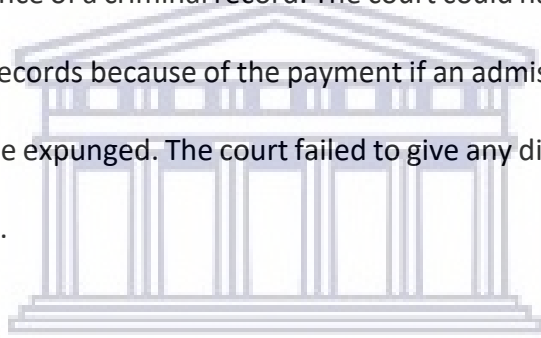
4 *S v Smullion* (Sullivan) 1977 (3) SA 1001 at 1004D-E.

5 *S v Madhina* (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018) at para 29.

6 *S v Madhina* (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018) at para 36.

that the court further erred to when it relied for a characterization of conviction on the case of *Director of Public Prosecutions, Limpopo v Mokgotho*.⁷ This matter dealt with whether the State had discharged its onus to prove that the accused was guilty beyond reasonable doubt in a murder case. Where evidence was led in front of a presiding officer. However, this judgment does not negate that a payment of an admission of guilt fine is in fact a conviction. The Legislature is very clear in section 57(6) that an accused is deemed to have been convicted and sentenced, as if he had been guilty by a court.

It was also confirmed in *S v Rademeyer*⁸ that an admission of guilt fine is also a conviction that has the inherent consequence of a criminal record. The court could have used the opportunity directing that all criminal records because of the payment of an admission of guilt fine prior to court appearance should be expunged. The court failed to give any direction to the legislature to effect any amendments.



4.3 THE RIGHT TO APPEAL OR REVIEW

‘Every accused has a right to a fair trial, which includes the right ... of appeal to, or review by, a higher court.’⁹ The criminal justice system is a mechanism that functions on checks and balances. A convicted person who is not satisfied with the judgment or sentence is not without recourse. A number of questions arise when a person was convicted by signing a section 56 notice and paying a fine without appearance in court. Is Section 35(3)(o) applicable? Are there any other resources available to such persons? What about a person who is in actual fact guilty, but who was unaware that paying an admission of guilt fine prior

7 *Director of Public Prosecutions, Limpopo v Mokgotho* (068/2017) [2017] ZASCA 159 (24 November 2017).

8 *S v Rademeyer* (unreported case, GP case no A186/2017, delivered on 12 April 2017) at paragraph 45,

9 Section 35(3)(o) of the Constitution.

to court appearance would result in a conviction and a criminal record? It is submitted that section 35 (3)(o) is a remedy that is available to all accused persons, including convicted persons, irrespective of the procedure used to finalise the matter and for the offence he or she was convicted of.

4.3.1 Section 57(7) Review

Once an admission of guilt fine is paid, the section 56 notice is sent to the clerk of the court who will proceed with the administration of recording the acknowledgement and the payment to the said offence.¹⁰ It is at this point that the accused person is deemed to have been convicted and sentenced. However, once the recording has been dealt with, the matter is forwarded to the local magistrate or judicial officer to examine and decide to confirm the conviction and sentence or not. This is done in terms of section 57(7) of the CPA and is purely an administrative process. Therefore, for every admission of guilt fine paid, the matter is sent to the magistrate for examination. The assessment done by this officer is only limited to the information provided to him. No other evidence is adduced. Ultimately, the role of the judicial officer is not to make a decision on fact, but to review the process, confirm or set it aside.

Section 57(7) reads as follows:

The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said

10 Section 57(6) of the Criminal Procedure Act 57 of 1977.

admission of guilt fine exceeds the said determination be refunded to the accused concerned.

Once the presiding officer is of the opinion that justice was not carried out, the matter will start *de novo* and the normal course of prosecution will proceed. The conviction will be set aside and the money paid will be refunded to the accused. This serves as a review process and could assist an accused who has made a mistaken payment and incorrectly acknowledged guilt. In certain instances, the magistrate will review a matter if he received an affidavit to that effect prior to confirming the decision. Otherwise, the magistrate only has the documents, and the information contained therein to decide. This process takes place in the absence of the accused. It is possible that the recording of the payment of admission of guilt fine and the review by the magistrate, does not take place on the same day that the accused made the payment. There is no stipulated time-period when the review must take place.

A recent case of *S v Simba and Similar Matters*¹¹ shows how the magistrate exercised its discretion as envisaged in section 57(7) and set the conviction and sentence aside. The matter was referred to the High Court for special review by request of the state. The state argued that the decision that was taken by the magistrate was incorrect and that he had no powers to make that decision to set the conviction and sentence aside. Engers AJ, concluded that the magistrate was well within his powers to set the conviction aside. It further held that the amounts set by the prosecutor had not been on par with the determination in that jurisdiction, and the overriding discretion of the prosecutor, as set out in section 57(4)¹² of the CPA, was not applicable.¹³

11 *S v Simba and Similar Matters* 2019 (1) SACR 90 (WCC) para [4].

12 No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing an admission of guilt fine on good cause shown.

13 *S v Simba and Similar Matters* 2019 (1) SACR 90 (WCC) at para [15] - [16].

The judicial officers' role in this whole process is at the moment somewhat problematic and unclear. After the confirmation of the conviction and sentence, there is no other function bestowed unto a presiding officer by the legislature. Which ultimately means that, the matter can only be referred to a higher court for review in terms of section 304 of the CPA. There are, however, two contradictory schools of thought on the function of the lower court when it comes to vested functionary powers of section 57(7).

The first school of thought states that the court is not *functus officio*. The court should be able to amend its own decision without the referral of the matter to a higher court. The second school of thought is that the presiding officer is *functus officio* and that the court is then unable to entertain the same matter. This is despite the availability of new facts being introduced, which may result in a different outcome. Ultimately, according to this view, the magistrate can only review the matter once. The moment the magistrate confirms the deemed conviction and sentence, then his role in terms of section 57(7) ends and cannot be revisited.

*S v Shange*¹⁴ supports the first point of view. The process of section 57 is an administrative one. The higher court need not be involved should new facts arise, as the function that was performed by the presiding officer was not a judicial function but merely an administrative one.¹⁵ Importantly it stated that the presiding officer is not *functus officio*. The court further held that there is no time frame placed as to when the review by the magistrate should take place. There is also no limitation of the number of documents that may be reviewed by the

14 1983 (4) SA 46 (N).

15 *S v Shange* 1983 (4) SA 46 (N) at 48 a-d and 49e.

court. Therefore, the magistrate may review new facts and need not send the matter to a higher court.¹⁶

The second view was expressed in *S v Van Wyk*.¹⁷ The Mmagistrate in this case had confirmed the conviction and sentence for an assault common charge.¹⁸ After the confirmation, a letter from the attorney of the victim or complainant stating that the victim had sustained serious injuries was received. The attorney requested the conviction to be set aside and that the accused face serious charges of assault with intent to do grievous bodily harm.¹⁹ The Court stated that when a presiding officer in a *court a quo* confirms the conviction and the sentence, after assessment of the documents before it, then that presiding officer is *functus officio*.²⁰ The role of the magistrate is only limited to the documents it has examined and the process of review is only done once by that magistrate. Once that magistrate has confirmed the decision, it cannot reverse it. Prior to this case, *S v Hanekom* also stated that the magistrate is *functus officio*.²¹ Confirming a decision made in *S v Hoema*²² that a magistrate is *functus officio* and therefore cannot consider representations after its initial decision to either confirm or dismiss the conviction and sentence.²³

16 *S v Shange* 1983 (4) SA 46 (N) also see *S v Mahabeer* 1980 (4) SA 491 (N).

17 *S v Van Wyk* 2000 (1) SACR 590 (T).

18 *S v Van Wyk* 2000 (1) SACR 590 (T) at 591 para b.

19 *S v Van Wyk* 2000 (1) SACR 590 (T) at 591 para b.

20 *S v Van Wyk* 2000 (1) SACR 590 (T) at 591 para d.

21 *S v Hanekom* 1984 (4) 108. The court in this case dealt with the confirmation of the wrong amount by the magistrate. The accused paid R50 as a fine, while the prosecutor had already reduced the fine to R30. The accused made a request for the R20 to be paid back. The court referred the matter to the High Court in terms of Section 304(4) as the court was now *functus officio*. The sentence was thus amended.

22 1978 (2) SA 703 (T).

23 *S v Hoema* 1978 (2) SA 703 (T) at 704 para G.

4.4. THE PRESIDING OFFICER IS *FUNCTUS OFFICIO*?

The role of the magistrate, during a payment of an acknowledgement of guilt fine, is not the same as in court when adjudicating over a trial. The presiding officer is in chambers and only makes a decision after he or she has examined the documents. There is no judicial function exercised per se, but it is more administrative.²⁴ The criminal conviction is recorded in a different book from what is usually used by a court during trial proceedings. In terms of Department of Justice and Constitutional Development, Justice Codified Instructions: Code: Clerks of the Criminal Court. Paragraph,²⁵ an admission of guilt registry is used and is known as a J117. Whereas, once the court finds an accused guilty, that is recorded in the J546.²⁶

In *S v Marion*²⁷ the court was faced with two preceding judgments, *S v Mahabeer*²⁸ and *S v Harley*²⁹, which held that the presiding officer was not *functus officio*. The accused in this case had paid an admission of guilt fine, and later submitted an affidavit stating that he had been incorrectly charged.³⁰ The magistrate was unsure whether he had the power to deal with this matter, despite the two judgements stating that the presiding officer was not *functus officio*; and consequently the matter was sent to the high court for decision.³¹

The court stated that:

...when the magistrate concerned in the present case decided not to interfere with the deemed conviction and sentence of the accused he became *functus officio*. Thereafter it is only this court, which has the power to set the conviction aside.³²

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- 24 *S v Madhina (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018) at para 22.*
25 Department of Justice and Constitutional Development, Justice Codified Instructions: Code: Clerks of the Criminal Court paragraph 72.
26 Part IV of the
27 *1981(1) SA 1216 (T).*
28 *1980 (4) 491 (SA).*
29 *S v Harley 1979 an unreported case in the Transvaal Provisional Division.*
30 *S v Marion 1981(1) SA 1216 (T) at 1217a.*
31 *S v Marion 1981(1) SA 1216 (T) at 1217b-d.*
32 *S v Marion 1981(1) SA 1216 (T) at 1219a.*

The effect is that the review function of the *court a quo* stops once the confirmation is made. There is no second bite at the cherry by the court. It has made its decision and only a higher court can amend that decision. It therefore stands that should the accused or the State have any dispute, then an application must be made to a high court in terms of Section 304 of the CPA. A Eastern Cape court, *S v Mthiya 1991(1) SACR 615 (E)*, relied on *S v Vermaak*³³ which stated that

“...once the judicial officer has exercised his function in terms of s 57(7) of Act 51 of 1977, i.e decided to interfere with, or decided not to interfere with the conviction and/or sentence and [does] so in terms of the subsection... his functions have been exhausted.”³⁴

There are other recent cases such as the case of *S v Tengana*³⁵ that relied on the case of *S v Louw*³⁶, stating that a court cannot review a matter on new facts, after it has made a decision.³⁷ It made this decision by noting that the section is clear and limits the presiding officer only to the documents that have been submitted to the clerk that no other information ought to be considered.³⁸ The most recent case of *S v Madhinha*³⁹ does not even question the functionary powers of the *court a quo* when it comes to section 57(7). It held that the court is simply *functus officio* and review proceedings must be done in terms of section 304 of the CPA.⁴⁰

This ultimately entails that the first part of reviewing a matter is limited to the first decision made by the magistrate. This view is not agreed with. Such a remedy is ineffective. Most of the documents will be looked at only once by a magistrate and if found to be in order, the

33 1991 (1) SACR 336 (E).

34 *S Vermaak 1991 (1) SACR 336 (E)* at 338(para a- b).

35 *S v Tengana 2007(1) SACR 138 (C)*.

36 *S v Louw 1982 (4) SA 556 (C)*.

37 *S v Tengana 2007(1) SACR 138 (C)* 141h.

38 *S v Louw 1982 (4) 556 (C)* at 561A.

39 (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018).

40 (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018 at para 39).

conviction and sentence confirmed. However, as seen from the numerous cases cited in this study, many accused were unaware of the consequences and came with the so-called new facts. If accused are allowed to introduce new facts on affidavit it could shorten the whole process drastically. By declaring the magistrate *functus officio* after one review, leaves an aggrieved accused with no other choice but to take the matter on review to the higher courts. Although the leading school of thought is that the presiding officer is *functus officio*, from the material that I engaged with, I respectfully submit that the presiding officer should not be *functus officio*. This will appeal beneficially to court time, financial expenditures that would have been incurred by taking the review to a higher court and speedy result or outcome of the review. The question that does arise is at which point will the court stop reviewing the new facts arising from a particular matter. However, even this can be easily remedied as per bail application on new facts.⁴¹

4.5 REVIEW IN TERMS OF SECTION 304 OF THE CPA

This is a post sentence remedy available to an accused or convicted person. This right is entrenched in the Constitution.⁴² The legislature recognised the need for accused and convicted persons to have the option to challenge the decision that was taken by a *court a quo*. This section refers to appeal and review. The only remedy that is available to the persons convicted and sentenced under section 57 is a review. The court *a quo* that dealt with the matter has no authority to review the deemed conviction and sentence and the matter must be referred to a High Court.⁴³ An appeal is brought by an accused based on merits of the case

41 Section 65(2) of the CPA.

42 Section 35(3)(o) of the Constitution.

43 Section 304 of the CPA *S v Cedras* 1992 (2) SACR 530 (C) at 531g.

and the finding by the court. A review on the other hand is brought against procedural irregularities.⁴⁴ Therefore, since no evidence is led under oath, the only procedural remedy available to the accused is a review. Section 304 of the CPA states that:

(1) If, upon considering the proceedings referred to in section 303 and any further information or evidence which may, by direction of the judge, be supplied or taken by the magistrate's court in question, it appears to the judge that the proceedings are in accordance with justice, he shall endorse his certificate to that effect upon the record thereof, and the registrar concerned shall then return the record to the magistrate's court in question.'

The accused or his representative will submit an affidavit setting out the reasons why the conviction and sentence should be interfered with. The affidavit is usually submitted to a high court accompanied by a covering letter from the Senior Magistrate of the court where the section 57 had been confirmed. The documents are received by a judge who may then proceed with enquires to the court in order to get to a reasonable and justified decision. It may even call for oral evidence to be lead. There is no period that has been set for a person to take a matter on review. As gleaned from previous cases discussed in this study, there has been a 3 to 5-year gap between the time an accused person paid the fine and when the matter was considered on review. Yet the courts are prepared to entertain and pronounce on such matters. In *S v Houtzamer*, the payment was made in June 2008 and the matter was only sent on review in September 2015.

When a case is sent for review, the court makes an assessment regarding the procedures. This assessment includes submitting queries to the magistrate, the police station commander and the office director of public prosecutions. In addition, it may request an affidavit to be filed

44 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE (10th Edition) Criminal Procedure Handbook Juta, 2011 at 360.

by the accused and if necessary, may hear oral evidence before making a finding. The High Court, therefore gathers all the necessary evidence from the persons that were involved in order to reach a proper finding.

In *S v Cedras*⁴⁵ the court specified the prerequisites before a court can make a finding for reviews emanating from the payment of an admission of guilt fine. The court held: '...there are considerations of equity and fair dealing which compel the Court to intervene to prevent a probable failure of justice.'⁴⁶ The court stated further that the accused must show good cause as to why he or she paid the admission of guilt erroneously; this could include the aversion of a probable defence.⁴⁷

On review, a court may set aside the conviction and sentence obtained because of the payment of a fine. As mentioned previously, the effect will be the removal of the criminal record and the refund of the payment. The review court could also confirm the conviction and sentence or could set the conviction and sentence aside subject to certain conditions. In the case of the latter, the matter will have to start *de novo* in the lower court or the accused be given time to make representations for diversion purposes.⁴⁸

There are many successful cases where the review procedure was beneficial to the accused person, (see the cases referred to in Chapter 3). This, however, is not a cheap process. It, involves applications to the court, which requires money to be spent and legal fees to be paid. Unless assisted *pro bono* or *pro amico*, the services of a private attorney or advocate is

45 *S v Cedras* 1992 (2) SACR 530 (C).

46 *S v Cedras* 1992 (2) SACR 530 (C) at 531j.

47 *S v Cedras* 1992 (2) SACR 530 (C) at 532a-b.

48 *S v Loff* 2018 High Court reference number 18132/2018 (WCC) at 4.

required. Legal Aid South Africa has indicated that their practitioners cannot assist with review application in terms of section 304 for admission of guilt fine convictions.

4.6 EXPUNGEMENT

As stated in Chapter 3, the result of a payment of an admission of guilt fine is the attainment of a criminal record. This criminal record is entered as a previous conviction. In terms of section 271A, a previous conviction falls away, is only applicable to certain offences. and only takes effect after a 10-year term. In terms of this section –

Where a court has convicted a person of-

(a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but-

(i) has postponed the passing of sentence in terms of section 297 (1)(a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297 (3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or

(b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.

A person has to wait a period of 10 years in order to have the previous conviction fall away.

The meaning of fall away does not necessarily mean that the criminal record will cease to exist; it merely means that that particular conviction may not be taken into account by a court during sentencing.⁴⁹ A conviction and sentence in terms of section 57(6) does not fall within

49 *S v Zondi* 1995 (1) SACR18 (A).

this section. Section 271A is not a remedy that could be used by a person who finalised a matter by paying an admission of guilt fine. The requirements as set out in section 271A are not met. In the Criminal Procedure Amendment Act 65 of 2008, the Legislature inserted a provision to expunge a criminal record.⁵⁰

Persons not convicted under offences other than those listed in section 271A (1) are not without recourse. Section 271B further lists offences where the legislature directs that after a 10-year period has lapsed and on application by the convicted person, a criminal record must be expunged. Section 57(6) offences will fall within subsection (1)(a)(iii) which states –

Where a court has imposed any of the following sentences on, or has made any of the following orders in respect of, a person convicted of an offence, the criminal record of that person, containing the conviction and sentence or order in question, must, subject to paragraph (b) and subsection (2) and section 271D, on the person's written application, be expunged after a period of 10 years has elapsed after the date of conviction for that offence, unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine:

(iii) a sentence in the form of a fine only, not exceeding R20 000;

Three issues regarding this section requires elaboration. Firstly, the consideration of expunging a criminal record is done when the conviction is more than 10 years old. Which implies that between day one and the last day of year ten, a person is held hostage by a criminal record that was attained erroneously. A decade is a huge part of person's life and in during that time, a person could lose out on a lot. These include employment, promotion, and travelling opportunities. A person is also prohibited from applying for certain licences. Secondly, the expungement does not happen automatically. The convicted person must bring application to have the record expunged. If not, the record remains. Though there is an

50 Section 271 B to 271 E of the CPA.

obligation to remove or to expunge the criminal record, there is no directive or system that will recognise that the 10-year period has lapsed, unless an application is brought.

If unaware of a record, it will remain entered against a layperson's name even after the 10 years has lapsed. A person could be so ignorant to the existence of the criminal record and will only be notified thereof when a police clearance certificate will be required. Thirdly, the two requirements are just the tip of the ice berg. Section 271D includes a further procedure to expunge criminal record. The expungement will only take effect the person, has received a certificate authorising the expungement.⁵¹ This certificate is ONLY issued after a request for the expungement is made.⁵² The application MUST be completed on a J744(E) form which sets out all the requirements for expungement. It is important to note that the Director General is a discretion to either grant or to deny the application. This is clearly contrary to what the legislature directs in subsection 2. The intent of the legislature is clear, that there are only requirements and both need to be satisfied. There should be no other discretion reserved for the Director General. Consequently, even expungement is no "quick fix".

A person would either have to proceed with an expungement application on his or her own (which is not advisable) or get a private attorney to assist. The legal fees for the whole process may cost up to R10 000.00. The convicted person must spend money to ensure that the record is expunged. Either way an accused who pays an admission of guilt fine, has no easy way of relieving herself or himself of the strenuous legal effects of paying an admission of guilt fine. It is therefore against this background that the legislature needs to look at the time

51 This certificate is issued by the Director General of Justice and Constitutional Development.

52 Section 271B2 of the CPA.

period for expungement of a criminal record. Therefore, as opposed to the prescribed 10-year period, have the record expunged after a shorter period; for example, after two years. In addition to that, the legislature should consider that expungement be automatic.

It is suggested that a simpler procedure should be adopted. An applicant should be able to approach the clerk of the court for such a certificate of expungement. Such a process will simplify and improve the lives of many. The next Chapter will deal with my opinion regarding the process of admission of guilt fine and importantly an avenue that ought to be considered for curbing the legal effects of a criminal record through an admission of guilt fine.



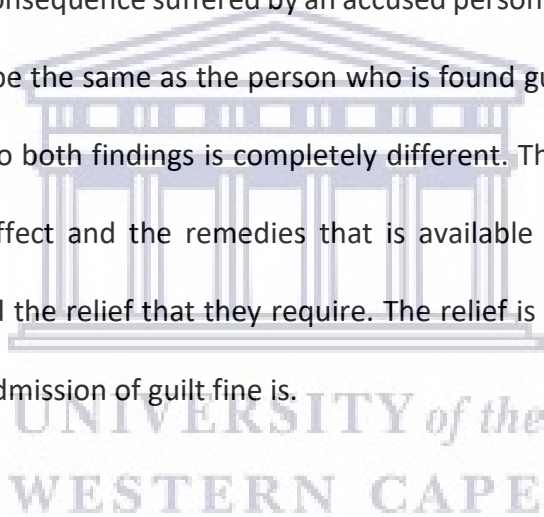
CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

“It does not have to be a life time punishment”

5.1 INTRODUCTION

As discussed in this study the payment of an admission of guilt fine is inexpensive. It is unlike a trial, which is far more expensive and is more exhausting on a person. The main reason for section 57 was to accelerate criminal proceedings. Unfortunately, the same principle does not apply to one major consequences of paying an admission of guilt fine, which is the attainment of a criminal record. The consequence suffered by an accused person who pays a fine in terms of section 57, should not be the same as the person who is found guilty by a judicial officer. The proceedings leading to both findings is completely different. This study delved into the roots of section 57, its effect and the remedies that is available thereto. None of those remedies gives an accused the relief that they require. The relief is definitely not as easy as what the payment of an admission of guilt fine is.



5.2 THE PROCESS OF REVIEW

This process is all-good and well for persons who were unaware of that they are in fact being convicted and thus getting a criminal record. However, this process is only available after the accused has become aware of the consequences. It could be that the accused have been blocked from either attaining a visa or getting employment. By then, the accused has already lost opportunities of getting a promotion, employment or travelling. It would be fantastic if an admission of guilt fine were not considered a criminal conviction.

Holistically this research has shown light in admission of guilt fine payments. A procedure which is being overlooked, yet has the same consequences as those of a traditional trial matter. A fine when paid results in lifetime punishment, especially for lay persons and indigent persons. In a Democratic society it cannot be emphasis enough the core value of being informed of your rights; to allow you to make a decision fully informed of the rights waived; opportunities passed and the anticipated consequences. As discussed above, the consequences are not felt immediately, they remain and last as long as the criminal record exists, which in this instance is a minimum of 10 years, to people who are aware of the criminal record. As a result, thereof, the following recommendations ought to be considered by the Legislature.



5.3 RECOMMENDATIONS

5.3.1 Payment of an admission of guilt fine prior to court appearance does not amount to a criminal record

The legal effects of payment of an admission of guilt fine, especially by persons who were unaware that it was a conviction and consequently a criminal record, is a life-time sentence on a person. What has been introduced by Judge Thulare in the *Madhinha* case is much needed change in our criminal justice system. The effect that an admission of guilt fine payment would be equivalent to an admission of guilt fine for traffic fines, where no criminal record is attained as a consequence for paying ones' traffic fines. The effect of this is that a bitter taste will still remain with the accused, as the person would've paid a sum of money for

his or her actions. The effect being the same as one of the ADR options. This is therefore the first recommendation to curb the effects of payment of admission of guilt fine.

5.3.2 Automatic expungement of criminal record

To have a criminal record for a matter that was finalised in a matter of minutes is unjustified and unreasonable. It will be of no benefit to anyone or the criminal justice system. For that reason, an automatic expungement of a criminal record attained through section 57 or section 57A ought to be applicable. Ultimately, it would mean that after a certain period of time, not exceeding a term of two years, if the accused has not been convicted of an offence where imprisonment with or without the option of a fine was applicable, the accused criminal record will be automatically expunged. The effect of this will be to take away the process of having to make an application for expunging the record. Such a provision would enable the person to regain his or her freedom once again and be able to move forward without being hindered by a criminal record.

One may find it hard to reconcile with this automatic expungement of criminal records, and may have questions pertaining to the practical implementation of the process. Change comes in dialogue and codification. This will then be followed with procedure as to how these rules will be implemented. Fortunately, in South Africa the Legislature in section 271C of the Act offers automatic expungement of a criminal record with offences relating to laws that were enacted in the Apartheid era. How then can it not be practical to proceed with the making of automatic expungement for such offences.

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