

**THE RIGHT OF APPEAL: EXERCISING THE RIGHT OF APPEAL FROM
THE LOWER COURTS**

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ABSTRACT

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In this minithesis, I deal with the constitutionality of the provisions of the Criminal Procedure Amendment Act, 2003 (Act 42 of 2003), pertaining to the leave requirement and petition procedures in respect of appeals against conviction, sentence or orders of the lower courts. I endeavour to ascertain the constitutionality of certain sections of the Act, as well as the practical implications of the relevant provisions.

I measure the provisions of the Act against the yardstick of a fair trial and whether the provisions of the Act infringe the right of an accused person to a fair trial in general and the right of appeal or review by a higher court in particular. I attempt to determine the applicability of the rights listed under section 35 (3) of the Constitution of South Africa Act, 108 of 1996 to appeals. Specific reference is made to the leave requirement, the disposal of appeals in chambers, the absence of the appellant at appeal hearings, the lack of oral argument and factors impacting on the fairness of the trial relating to undefended appellants.

I contend that the procedures put in place by Act 42 of 2003 provide an appropriate reappraisal mechanism as envisaged by *S v Steyn* 2001 (1) SACR 25 (CC) and furthermore that adequate safeguards, eliminating a failure of justice, have been built into the Act. It is submitted that the leave requirement, the disposal of appeals in chambers and on written argument only and the exclusion of oral argument are not foreign concepts in other (also constitutional) legal systems and are consonant with the Constitution.

I submit that the relevant provisions pass constitutional muster. Alternatively I propound that even if the provisions concerned infringe upon the sentenced person's right to a fair trial or in the narrow sense the right to appeal, the limitation is justifiable.

In conclusion I submit that a screening mechanism to eliminate meritless appeals is compellingly important and that Act 42 of 2003 successfully corrects the defects of its predecessor, namely, Act 76 of 1997.

August 2005

DECLARATION

I declare that *The right of appeal: Exercising the right of appeal from the lower courts*, 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.

Willem Benjamin Tarantal

August 2005



Signed:.....

CONTENTS

Title Page		i
Keywords		ii
Abstract		iii
Declaration		iv
Chapter 1	<u>Issue and argument</u>	1
	1. The right of appeal.....	1
	2. The issues.....	4
	2.1 Limits to the right of appeal:General.....	4
	2.2 Necessity of qualifications.....	4
	2.3 Leave requirement.....	5
	2.4 Chamber judgments.....	5
	2.5 Presence of appellant.....	6
	2.6 Legal aid.....	6
	3. Importance of the issue.....	7
	4. Argument.....	7
	5. Methodology.....	8
Chapter 2	<u>Background regarding appeals from the lower courts</u>	9
	1. Position before 1994.....	9
	2. Interim Constitution.....	9
	3. Constitution.....	11
	4. The Criminal Procedure Amendment Act, 1977.....	12
	5. <i>S v Steyn</i>	13
	6. The Criminal Procedure Amendment Act, 2003.....	14
Chapter 3	<u>Constitutional Principles</u>	17
	1. Leave requirement.....	17
	2. Written argument vis-à-vis oral argument.....	19
	3. Chamber judgments and the presence of the appellant.....	20
	4. Legal aid.....	21
	5. Conclusion.....	21
Chapter 4	<u>International and foreign law</u>	22
	1. The right of appeal: General.....	22
	2. International law.....	22
	2.1 Leave to appeal.....	22
	2.2 Chamber judgments(Open Court).....	23
	2.3 Presence of appellant.....	25
	2.4 Written argument vis-à-vis oral argument.....	27
	2.5 Legal aid.....	28
	3. Foreign jurisprudence.....	30
	3.1 Leave requirement.....	30
	3.2 Chamber judgments(Open Court).....	32
	3.3 Presence of appellant.....	34
	3.4 Written argument vis-à-vis oral argument.....	35
	3.5 Legal aid.....	36
	4. Conclusion.....	38

Chapter 5	<u>Key elements of appeals</u>	39
	1. Background.....	39
	1.1 Nature of appeals.....	39
	1.2 The appeal process: In general.....	40
	1.3 Different levels.....	42
	2. Key features of the CPAA	43
	2.1 Leave requirement.....	43
	2.2 Chamber appeals.....	44
	2.3 No oral argument.....	48
	2.4 No presence of appellant.....	49
	2.5 Legal representation.....	50
	3. Practical implications.....	51
	3.1 In person appeals (<i>pro se</i> appeals)	51
	3.2 Formulating a notice of appeal.....	52
	3.3 Formulating and bringing of application for leave to appeal.....	52
	3.4 Formulating an application to lead further evidence.....	53
	3.5 Drafting a petition.....	55
	3.6 Appeal to the SCA against refusal of leave to appeal.....	56
	3.7 Drafting heads of argument.....	56
	3.8 Adequacy of information.....	60
	4. <u>Conclusion</u>	61
	4.1 Does the CPAA limit any rights?.....	61
	4.1.1 Leave requirement.....	61
	4.1.2 Public hearing or presence.....	62
	4.1.3 Oral argument.....	62
	4.1.4 Legal representation.....	63
	4.1.5 Reappraisal mechanism.....	64
	4.2 Justification.....	72
	4.2.1 Limitation clause.....	72
	4.2.2 Principles.....	72
	4.2.3 Nature of the right.....	73
	4.2.4 Importance and the purpose of the limitation.....	73
	4.2.5 Nature and extent of the infringement.....	75
	4.2.6 Relationship between the limitation and its purpose.....	76
	4.2.7 Less restrictive means to achieve the purpose.....	76
	4.3 Conclusion.....	77
Chapter 6	<u>Conclusion</u>	78
Bibliography		81

CHAPTER 1 ISSUE AND ARGUMENT

1. The right of appeal

*Vigilantibus non dormientibus iura subveniunt.*¹

The notion of criminal appeal is a relatively recent development. The right of appeal did not initially form part of the common law.² Prior to the constitutional dispensation it has however evolved to such an extent that, subject to certain restrictions, an accused had an automatic right of appeal. In terms of the Constitution of South Africa Act, 200 of 1993³, which came into effect on 27 April 1994, the right to appeal achieved constitutional protection.

Section 35 (3) (o) of the Constitution of the Republic of South Africa Act, 108 of 1996⁴ confers a right to appeal to and review by a higher court. The CPA⁵ governs the exercise of the right of appeal or review. Sections 309 to 314 of the CPA determine the modalities of criminal appeals from the Magistrates' Court.

As pointed out above, prior to the constitutional dispensation and up until 28 May 1999 an appellant in a criminal appeal, except the so-called prisoner appeals, had an

¹ The laws aid those who are vigilant, not those who sleep.

² “According to Roman-Dutch law the general rule was that neither the prosecution nor the convicted person could appeal in criminal cases. This rule was regarded as so self-evident that when William of Orange referred an application for leave to appeal to the Supreme Court of Holland the reply was that practically throughout Christendom the rule was that convicted persons could not appeal. If appeals were allowed, the missive naïvely continued, convicted criminals would only be enabled to commit further crimes while their appeals were pending (Boel ad Loen, cas. 117). The harshness of this common law rule was somewhat alleviated by statute both in the Netherlands (van der Linden, Jud. Pract. 2.24.4 and 5) and at the Cape (Wessels, History of R.D. Law, Ch. 34). But in both countries, until after the second British occupation the right to appeal in criminal cases was much more restricted than the right to appeal in civil cases. (Compare the Instructions of De Mist, 24/25 May, 1804, Kaapse Plakaatboek, Vol. 6, p. 136, with the situation in regard to criminal appeals sketched by Wessels, l.c.) To this day there are still traces of the presumption of the correctness and finality of criminal proceedings. Criminal appeals to this Court are more restricted than civil appeals and from magistrates' courts the Crown can appeal only on questions of law. To-day the right to appeal is entirely governed by statute.” Per Schreiner and Hoexter JJA in *R v Grundlingh* 1955 (2) SA 269 (A) at 272E-G.

³ The Interim Constitution, hereinafter referred to as the “IC”.

⁴ Hereinafter referred to as “the Constitution”. The Constitution came into operation on 4 February 1997.

⁵ Criminal Procedure Act, 1977 (Act 51 of 1977).

unfettered right of appeal against decisions of the lower courts.⁶ That is, bar the one exception, no leave to appeal was necessary to lodge an appeal against a decision of a lower court. The Judges' Certificate in terms of section 409(4)(a) of the CPA however suffered the fate of constitutional inconsistency and was held to be invalid by the Constitutional Court in *S v Ntuli*.⁷ Following the decision in *Ntuli*⁸ there was thus an automatic appeal against decisions of the lower courts. This unrestricted right led to an untenable situation. Court rolls became clogged with unmeritorious appeals. Appointing more judicial officers, advocates and other support personnel as well as augmenting the infrastructure could have attained alleviation of the state of affairs. These however, were not viable options. The Legislature intervened. The Criminal Procedure Amendment Act, 1997 (Act 76 of 1997)⁹ sought to control appeals. The provisions were introduced to remedy the situation by enabling the courts to provide timely justice by eliminating meritless appeals. The Act was intended to eliminate unmeritorious appeals and streamline¹⁰ the appeal procedure. By promulgating the above provisions Parliament by law regulated the procedure for the hearing of appeals by conferring powers on the High Court of South Africa (hereinafter referred to as the "High Court"). These measures were deemed to be necessary or desirable for the purpose of enabling the Court more effectively to exercise its function of administering justice. The provisions of the CPAA of 1997 pertaining to leave and petition requirements were however held to be unconstitutional and invalid by the Constitutional Court in *S v Steyn*.¹¹ The Criminal Procedure Amendment Act, 2003 (Act 42 of 2003)¹² sought to correct the defects in the CPAA of 1997. The question is whether it has succeeded in doing so.

⁶ The Magistrates' Court Act, 1944 (Act 32 of 1944) established Magistrates' Courts. The Magistrates' Courts are divided into district and regional courts. The two courts differ in the nature of the crimes prosecuted in the courts and the area of jurisdiction. Regional courts are not courts of appeal, but has greater jurisdiction regarding area and sentence and tries more serious crimes than the district court.

⁷ 1996 (1) SA 1207 (CC).

⁸ *Supra*.

⁹ Hereinafter referred to as the "CPAA of 1997".

¹⁰ Cf the caveat in *Australian Law Reform Commission, Report No.89-Managing Justice –A Review of the Federal Civil Justice System*, par.1.85 that reads: "Justice 'resists easy definition but is usually equated with fair, open, dignified and careful process ... a justice system that over emphasises matters of cost, speed and 'efficiency' may not succeed in delivering 'true justice'".

¹¹ 2001 (1) SACR 25 (CC); 2001 (1) BCLR 52 (CC); 2001 (1) SA 1146 (CC).

¹² Hereinafter referred to as the "CPAA of 2003".

In order to establish the constitutionality of the provisions of the CPAA of 2003 it is imperative to direct attention to, (1) the nature of the South African appeal process, (2) the particular roles of the participants¹³, (3) the nature of the written argument and the necessity for oral argument and (4) chamber judgments. The peculiarities of the South African appeal system must be appreciated. The South African appeal system does not ordinarily, for example, involve a rehearing¹⁴ in the court of appeal, as is the case in some foreign legal systems.

This paper analyzes the constitutionality of the provisions of the CPAA of 2003. In particular the question whether the novel procedure, namely, the disposal of appeals in chambers (chamber judgments) and on written argument only, accords with the notion of a fair trial,¹⁵ will be explored.



¹³ The accused and the officers of the court.

¹⁴ In the sense that witnesses are called or recalled.

¹⁵ Fairness of a trial has come largely to be associated with fairness exclusive to the accused. However, to satisfy the requirements of a fair trial a proper balance must be struck between the interests of both the accused and the prosecution. It is trite that a trial must be fair to both the accused and the prosecution.

2. The issues

*S v Steyn*¹⁶ invalidated the provisions of the CPAA of 1997. The CPAA of 2003 sought to remedy the situation. The vexed question is whether it has done so successfully.

2.1 Limits to the right of appeal (General)

Section 309(1)(a) of the CPA bars, with certain exceptions, a convicted person from bringing an appeal to the High Court, unless leave to appeal has been granted by the lower court.¹⁷

Should an unfettered or automatic right to appeal accrue to a convicted and/or sentenced person or should the right of appeal, in the South African context, be subject to qualification? If curtailment measures were inevitable in order for the proper functioning of the law courts, what form of constraint would be constitutionally tolerable? When considering the constitutionality of any constraints in this regard the following aspects will be considered:



1. Why are qualifications necessary?
2. What are the qualifications?
3. What are the nature and extent of the curtailment measures?
4. Do the curtailment measures amount to limitations of the convicted person's right to appeal?
5. If so, do the limitations meet the requirement of proportionality between the purpose and the nature of the right or are the limitations unnecessary invasive?

2.2 Necessity of qualifications

Some form of sifting mechanism is needed to eliminate meritless appeals. It is contended that compelling reasons exist for the introduction of a filtering mechanism

¹⁶ *Supra.*

¹⁷ Section 309(1)(a) of the CPA provides the following: "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:..."

at the first level, that is, at the Magistrates' Court level otherwise the High Courts will be flooded with unmeritorious appeals.¹⁸

2.3 Leave Requirement

The predecessor to the CPAA of 2003 heralded a new era. Persons intending to appeal are now required by the CPAA of 2003 to apply for leave to appeal. The view is held that, if indeed a restriction, the requirement of leave to appeal does not constitute an excessive restriction of an accused's right of access to a court and, therefore, of his right to a fair trial.

2.4 Chamber Judgments

In terms of section 309(3A)¹⁹ of the CPA a High Court must, in appropriate cases, dispose of an appeal in chambers on written argument only (that is, oral argument is excluded). However, this is subject to the Court's opinion whether the interests of justice demand that oral argument be heard.



In terms of section 35(3)(3) of the Constitution an accused person has the right to a fair trial that includes the right "to a public trial before an ordinary court." The question that arises is whether the preemptory provisions of the CPAA of 2003, regarding chamber judgments, violate the right. That is, does the obligatory disposal of appeals in chambers and on written argument only, breach the appellant's right to a

¹⁸ See the minutes of the meeting of the Security and Constitutional Affairs Select Committee of 6 October 2003. Available <http://www.pmg.org.za/docs/2003/viewminute.php?id=3334> [2005, February 05]. The Ntuli decision, declaring the requirement of the so-called Judge's Certificates unconstitutional, resulted in a "flood of appeals" from the lower courts to the High Courts.

¹⁹ The section concerned reads as follows: "(a) An appeal under this section must be disposed of by a High Court in chambers on the written argument of the parties or their legal representatives, unless the Court is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the Court regarding the appeal. (b) If the Court is of the opinion that oral argument must be submitted regarding the appeal as contemplated in paragraph (a) the appeal may nevertheless be disposed of by that Court in chambers on the written argument of the parties or their legal representatives, if the parties or their legal representatives so request and the Judge President so agrees and directs in an appropriate case."

fair trial and in particular, does the right to be tried in open court extend to the appeal process.

2.5 Presence of the appellant

An accused person has a right “to be present when being tried.”²⁰ The operative word is “tried”. The Constitution is silent on whether an appellant has a right to be present at appeal proceedings. It is propounded that considerations of the possibility of prejudice to the appellant and the protection of the appellant’s interests by the presence of his or her legal representative are important. The dispositive issue is whether this secondary right of presence applies to appeal proceedings.

2.6 Legal aid

The Constitution secures access to the courts of law to all individuals regardless of their financial means. To this end the establishment of adequate machinery for the provision of legal aid to persons who otherwise would not be able to afford to exercise their constitutional rights in a court of law is imperative. The Supreme Court of Appeal of South Africa (hereinafter referred to as the “Supreme Court of Appeal”) points out in *S v Halgryn*²¹, referring to *R v Speid* (1983) 7 CRR 39 at 41, that the right to choose a legal representative is not an absolute right and is subject to reasonable limitations. The Court stated that section 35(3)(f), that is the right to choose a legal representative, is predicated on the assumption that the accused person has the financial means to engage the services of the chosen legal representative. The accused person cannot demand that a legal representative of his choice be appointed. The Court notes that section 35(3)(g), that is the right to have a legal representative assigned by the State and at State expense, kicks in if a substantial injustice would otherwise result. The Court, with reference to *S v Majola*²², reiterated that the right to legal representation must be real and not illusory and an accused has the right to a proper, effective or competent defence.²³

²⁰ See section 35(3)(e) of the Constitution which reads: “Every accused person has a right to a fair trial, which includes the right- ... (e) to be present when being tried.”

²¹ 2002 (2) SACR 211 (SCA) at 215H-216H.

²² 1982 (1) SA 125 (A) at 133D – E.

²³ Cf. *S v Mofokeng* 2004 (1) SACR 349 (W).

In view of the concerns of the Constitutional Court expressed in *S v Steyn*²⁴, pertaining to the number of possible insuperable obstacles which may be encountered by an appellant in prosecuting his appeal in a meaningful way, the question that begs for an answer is whether the CPAA of 2003 satisfactorily addresses these concerns.

3. **Importance of the issue**

These issues affect an accused person's entrenched right to a fair trial. For the law courts to properly administer justice speedily it is imperative that they not be hamstrung by appeals from the lower courts that are manifestly doomed to failure. Deliberative speed is required.²⁵ It is clear that serious steps had to be taken to stem the flood of unmeritorious appeals from the lower courts. The CPAA of 2003 provides a quicker procedure for dealing with appeals where further elucidation of the issues by oral argument is unnecessary. In this way delays in disposing of cases are curtailed. There can be no doubt that the burden on the higher courts will be eased by the implementation of the provisions of the CPAA of 2003 without Government having to commit significantly extra resources and without violating the accused's right to a fair trial.

4. **Argument**

It will be argued that the provisions of the CPAA of 2003, in particular the issues set out above, accord with the principles of the Constitution and adequately address the concerns raised in *S v Steyn* (*supra*) regarding the defects in the CPAA of 1997. It will further be propounded that presiding officers, lawyers, prosecutors and other court officers have a special contribution to make in the administration of justice in fostering and ensuring respect for fundamental rights and freedoms of an accused or appellant.

²⁴ *Supra*.

²⁵ *Cf First Iowa Coop v Power Commission* 328 US 152 (1946) at 188 where it was said: "mere speed is not a test of justice, deliberative speed is. Deliberative speed takes time. But it is time well spent."

5. **Methodology**

The paramount question which is evoked is whether the relevant measures curtail, violate or constitute a hurdle to the enforcement of the constituent right (or minimum guarantee²⁶), that is, the right to appeal to or review by a higher court. To establish whether the provisions of the CPAA of 2003 pass constitutional muster, the exact nature and content of the right of appeal to or review by a higher court on the one hand, and the modalities of an appeal or review on the other hand, need to be ascertained. To this end it is essential to have regard to the background regarding appeals from the lower courts²⁷ and comparing and extracting principles from Constitutional Court cases dealing with similar provisions pertaining to appeals from the High Court to the Supreme Court of Appeal. Attention will also be paid to international and foreign law relevant to the issues. The CPAA of 2003 will be measured for constitutional compliance against the above principles and the relevant Constitutional provisions. Further aspects that will be dealt with are the duties and competence of magistrates and the role of the prosecutor in ensuring fair trials, and practical problems that may emanate from the operation of the provisions of the CPAA of 2003.



²⁶ Vide Article 14 (3) of the International Covenant on Civil and political Rights (Adopted 1948)

²⁷ In the context of this dissertation, the Magistrates' Court comprising of what is commonly known as the district and the regional courts.

CHAPTER 2 BACKGROUND REGARDING APPEALS FROM THE LOWER COURTS

1. Position before 1994

As indicated above, in the past there was, with one exception, an unconditional right to appeal from the lower courts. Unrepresented appellants who were convicted and sentenced in the lower courts to a term of imprisonment were, in terms of section 309(4)(a) read with section 305 of the CPA²⁸, only allowed to prosecute an appeal in person if a Judge's Certificate had been obtained. A judge granted such a certificate only if there were reasonable grounds for success on appeal²⁹ or if the appeal was arguable. The purpose of the section concerned was to prevent a person who was serving a sentence of imprisonment, to be released from prison temporarily, to argue his or her appeal in person unless a judge had certified that he or she had good grounds for appeal. The aim of the section was to prevent a prisoner who was serving a sentence of imprisonment from further burdening the prison authorities with the task of releasing prisoners under guard and at State expense to a court of appeal to argue unmeritorious or frivolous appeals. The exception was justified on the basis that a screening mechanism was necessary to exclude meritless appeals from reaching the hearing (appeal) stage, prevent prisoners from abusing the appeal process and prevent clogging of the appeal rolls. It must however be borne in mind that prior to 1994 what was regarded as fair, was determined without reference to a Bill of Rights or was not measured against the "notions of basic fairness and justice".³⁰

2. Interim Constitution

The IC conferred a right to a fair trial, which included the right to appeal and review by a higher court. The relevant provision in the interim Constitution was phrased somewhat differently to the comparable provision in the Constitution.

²⁸ See also section 103(6) of the Magistrates' Court Act, 1944 (Act 32 of 1944).

²⁹ See *S v Thos en 'n Ander* 1976 (2) SA 408 (O) to 410H-411B and the cases cited therein.

³⁰ Cf. *S v Rudman and Another; S v Mithwana* 1992 (1) SA 343 (A) where Nicholas AJA confined the accused right to a fair trial to "... formalities, rules and principles of procedure which the law requires." (at 387A-B).

Section 25(3)(h) in the Interim Constitution provided as follows:

“(3) Every accused person shall have the right to a fair trial, which shall include the right - . . .

(h) to have recourse by way of appeal or review to a higher court than the court of first instance;”

This provision received the attention of the Constitutional Court in *S v Ntuli*³¹. Preceding the decision in *S v Ntuli* a prisoner had to obtain leave to appeal, the so-called prisoner appeals. The Constitutional Court in *S v Ntuli* rejected the so-called Judge’s Certificate in terms of the now repealed section 309(4)(a) read with s 305 of the CPA as being invalid and unconstitutional. After reviewing the relevant case law and the ratio for the existence of a Judge’s Certificate, the Court concluded that the procedure is “unsystematic and works in a haphazard way.” The Court considered it a real risk that the requirement of a Judge’s Certificate may prevent a substantial number of worthy appeals from being heard. The fact that, according to the Constitutional Court, the process was not regulated and that this may result in worthy appeals being stifled, prevailed upon the Court.

The Court referred to the paucity of the information³² placed before the Judge considering the application for a Judge’s Certificate, the lack of legal representation, the fact that no prescribed procedure for the application for Judge’s Certificates was in place and the fact that no provision was made for any further appeal once a Judge’s Certificate had been refused.

In reaching the conclusion of constitutional invalidity the Court also took into account the differentiation, amounting to unequal treatment³³ in violation of the constitutionally entrenched right to equality³⁴, between the two sets of prospective appellants. Firstly, those in prison who have no legal representatives acting on their

³¹ 1996 (1) SACR 94 (CC) (1996 (1) SA 1207; 1996 (1) BCLR 141).

³² Para.15.

³³ The Court, however, emphasised that “differentiation does not *per se* amount to unequal treatment in the constitutional sense.” [See paras.19 and 20].

³⁴ In terms of sections 8(1) and (2) of the IC every person had a right to equality before the law and not to be unfairly discriminated against.

behalf and those in prison who do have legal representation on the one hand and, secondly, convicted persons who for some or other reason are not imprisoned.³⁵

Although the Constitutional Court found the provision requiring Judge's Certificates to be inconsistent with the IC, the Court acknowledged the purpose and need for the elimination of appeals "that were devoid of discernible merit"³⁶ and the prevention of the clogging of the appeal roll by meritless appeals. Thence the court provided Parliament with the opportunity to remedy the defect by 30 April 1997³⁷ by suspending the declaration of invalidity until the said date or until the Parliament brought the then section 309(4) of the CPA into line with the Constitution, whichever event occurred first.³⁸ No legislation was however forthcoming. On 25 April 1997 an application for the extension of the suspension period was lodged with the Constitutional Court. The Minister of Justice requested an extension of the suspension period until Parliament remedied the defect or 28 November 1998, whichever occurred first. The application for a further suspension of the order of invalidity was however dismissed by the Constitutional Court and the provisions of section 309(4) of the CPA thus became invalid and of no force and effect.³⁹



According to the Court the right in terms of section 25(3)(h)⁴⁰ calls for an "adequate reappraisal of every case and an informed decision on it". The Constitutional Court alluded to the appellant's lack of legal representation, but did not rule upon it. The Court merely referred to its decision in *S v Vermaas; S v Du Plessis*.⁴¹

3. Constitution

Section 35(3) of the Constitution guarantees an accused person the right to a fair trial that includes the right "of appeal to, or review by, a higher court". In consequence of the above-mentioned listed right a series of cases, attempting to define the right,

³⁵ For example: Those sentenced to a fine or suspended sentence or who were on bail pending appeal.

³⁶ Para.24.

³⁷ A period of 17 months and 22 days.

³⁸ Note the declaration of invalidity does not invalidate the law. *Cf. De Kock NO v Van Rooyen* 2004 (2) SACR 137 (SCA) and *S v Zulu* 2003 (2) SACR 22 (SCA).

³⁹ *Cf. Minister of Justice v Ntuli* 1997 (2) SACR 19 (CC).

⁴⁰ Of the IC.

⁴¹ 1995 (3) SA 922 (CC).

followed. The courts interpreted section 35(3)(o) of the Constitution on the basis of the construction of the comparable provision in the IC. The South African jurisprudence that developed as a consequence of the IC and the Constitution respectively, will be examined against the background of the observation of the Yacoob J in *S v Twala (South African Human Rights Commission Intervening)*⁴² that “There is no material difference between s 25(3)(h) of the IC and s 35(3)(o) of 1996 Constitution”⁴³

4. Criminal Procedure Amendment Act, 1997

On 28 May 1999 the CPAA of 1997 introduced the leave requirement in respect of all appeals from the Magistrates’ Court to the High Court, petition procedure and chamber judgments. The motive for the amendments was to reverse the effects of the *Ntuli*⁴⁴ decision, that is, to prevent appeal rolls being overburdened by meritless appeals. The main purpose of the said provisions was to provide a screening mechanism. In terms of the provisions of the above Act leave to appeal against decisions of the lower courts were required in all cases. Provision was made for unsuccessful applicants to petition to the Judge President.

Interestingly the applicability of the leave requirement to bail appeals did not attract the attention of the Constitutional Court. With the advent of the CPAA of 1997 the Courts were faced with the question of whether leave was required to appeal against a lower court’s refusal of bail. Some divisions of the High Court held that the provision does not apply to bail proceedings. In *S v Mohammed*⁴⁵ the Court held that leave to appeal⁴⁶ is not required for appeal against the refusal of bail, since section 65 of the CPA does not provide as such. The Court stated that if it was the intention of the Legislature that the leave requirement should extend to bail proceedings, it could have clearly expressed such intention by amending section 65. The Court concluded that the decision relating to bail is not a “decision or order” resultant upon or resulting

⁴² 1999 (2) SACR 622 (CC).

⁴³ *S v Twala (South African Human Rights Commission Intervening)* (*supra*) at 630E para 17.

⁴⁴ *Supra*.

⁴⁵ 1999 (2) SACR 507 (C). See also *S v Maseko and Others* 2000 (1) SACR 251 (E) and *S v Potgieter* 2000 (1) SACR 578 (W).

⁴⁶ Section 309B of the CPA (As introduced by the CPAA of 1997).

from conviction and/or sentence.⁴⁷ It was decided that the leave requirement in terms of section 309B⁴⁸ was not applicable to bail proceedings before or after conviction.

5. S v Steyn

The Constitutional Court in *S v Steyn*⁴⁹, declared the then sections 309B⁵⁰, i e, the application for leave to appeal requirement, and 309C⁵¹, i e, the petition procedure, unconstitutional and invalid. The Court considered the difference in functioning and standing of the lower and higher courts of decisive importance. The court deemed the requirement in respect of the lower courts to be inconsistent with the right of appeal as a component of the right to a fair trial in terms of section 35(3) of the Constitution.

In declaring the provisions of the then sections 309B⁵², inconsistent with the Constitution and invalid the Constitutional Court expressed a number of concerns regarding the concept of “qualitative justice.”⁵³

The Constitutional Court delineated factors that might negatively impact on the adequacy and reasonableness of the reassessment mechanism. It was intimated that the procedure for correcting errors must satisfy the constitutional requirement of fairness or must be justifiable in terms of the Constitution. The reappraisal mechanism should not have attributes that might lead to a miscarriage of justice.

Factors that might impact on the adequacy and reasonableness of the reassessment mechanism are: (1) the ability of an unrepresented, convicted person to present “a properly formulated application to the trial court for leave under section 309B”⁵⁴; (2) the ability of an unrepresented sentenced person to draft a “petition to the High Court for leave to appeal”; (3) “the fact that the petition may ...be considered in the absence of the record...” and (4) the possibility that appeals deserving to be heard

⁴⁷

At 690E-F.

⁴⁸

Of the CPAA of 1997.

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2001 (1) SACR 25 (CC) (Judgment delivered on 29 November 2000).

⁵⁰

Of the CPA.

⁵¹

Of the CPA.

⁵²

Of the CPA.

⁵³

At para.19.

⁵⁴

At para.12.

may be stifled. These factors are, however, equally applicable to *pro se* appellants in the case of trials conducted in the High Court. Nevertheless, the Constitutional Court found the leave and petition requirements in respect of *pro se* appellants with regard to High Court trials, to be in conformity with the Constitution. The Court justified the different treatment of appeals in respect of High Court trials on the basis of: (1) the difference in “standing and functioning”; (2) the availability of “human and material resources; (3) participation by legal representatives; (4) other considerations relating to applications for leave to appeal between the lower courts and the High Court⁵⁵; and (5) the “degree of confidence in the regularity” of the proceedings in the lower courts⁵⁶ and consequently a greater “risk of an error leading to an injustice” in the lower courts.⁵⁷

The order invalidating⁵⁸ the mentioned sections was suspended⁵⁹ for a period of six months from the date of the order, that is, 29 May 2001.⁶⁰ The Legislature was afforded an opportunity to amend the Act. This period of suspension was subsequently extended, but no amendments were effected. The relevant sections then became invalid.



6. **Criminal Procedure Amendment Act, 2003**

The CPAA of 2003, which came into effect on 1 January 2004, amended and substituted the provisions regulating the appeal procedure from the lower courts.⁶¹ At the same time the Legislature reintroduced a differently worded section 309(3A), compelling the High Court to, save in cases where the Court is of the opinion that the

⁵⁵ At para 14.

⁵⁶ At para 20.

⁵⁷ At para 22.

⁵⁸ There is a distinction between invalidating a law and declaring a law invalid. See in this regard *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) 1996(1) BCLR; *S v Zulu* 2003 (2) SACR 22 (SCA) and *De Kock NO and Others v Van Rooyen* 2004 (2) SACR 137 (SCA) at 148a-b.

⁵⁹ The judgment of the Constitutional Court reads as follows: “The declarations of invalidity in paras 1 and 2 of this order are suspended for a period of six months from the date of the order.” *S v Steyn (supra)* at 48.

⁶⁰ Cf. Krieger Kruger *Hiemstra Suid-Afrikaanse Strafproses* (6th ed) at 815.

⁶¹ The following sections of the CPA, for the present purposes, have been amended or substituted: sections 302(1)(b), 309(1)(a), 309(3A)[Powers of the High Court and the procedures concerning the disposal of appeals], 309B [Application for leave to appeal], 309C [Petition procedure], and 309D.

interests of justice otherwise require, to dispose of appeals in chambers and on written argument only.

Briefly, the legislation, amounts to the following:

1. The abrogation, save in the case of minors and on specific conditions, of the automatic right of appeal from lower courts. In this respect the requirement of leave to appeal and petition procedures have been re-introduced;
2. Curtailment of open court proceedings by the introduction of a procedure whereby the court is obliged to dispose of appeals in chambers (chamber judgments);
3. Allowing the courts to proceed with the “trial”, at the appeal stage, in the absence of the accused (appellant) and on written argument only; and
4. Ensuring legal representation - the indigent accused must be afforded the opportunity to obtain legal representation at State expense⁶²- for all accused for purposes of the application for leave to appeal⁶³.

Will the CPAA of 2003 suffer the same fate as the CPAA of 1997? To answer this question regard must be had to the differences between the Acts. The CPAA of 1997 was introduced to give effect to the judgment of the Constitutional Court in *S v Ntuli*⁶⁴. The CPAA of 2003 is a consequence of the ruling in *S v Steyn*⁶⁵ and attempts to correct the faults in the CPAA of 1997. In essence, the main differences between the CPAA of 1997 and the CPAA of 2003 can be summarized as follows: (1) certain categories of accused are exempted from the leave requirement by the CPAA of 2003; (2) the CPAA of 2003 obliges⁶⁶ the Court to, unless the interests of justice demand otherwise, dispose of an appeal in chambers⁶⁷; (3) provision is made in the CPAA of

⁶² Legal aid.

⁶³ Or application to lead further evidence or petitions.

⁶⁴ *Supra*.

⁶⁵ *Supra*.

⁶⁶ The peremptory term “must” is used in the CPAA of 2003.

⁶⁷ Section 309(3A) of the CPA, as inserted by section 2(c) of the CPAA of 1997, read: “An appeal under this section **may** be disposed of by a High Court in chambers on the written

2003, in the event of an application for leave to appeal being heard by a magistrate, other than the trial magistrate, for adequate information to be placed before such magistrate⁶⁸; (4) the transmission, by agreement between the accused and the DPP⁶⁹, of a truncated record to the High Court⁷⁰ if leave to appeal is granted by the Magistrates' Court; (5) the CPAA of 2003 also introduced a provision⁷¹ compelling the magistrate, if leave to appeal is refused, to immediately record his or her reasons for such refusal; (6) with regard to petitions to the Judge President, the CPAA of 2003 provides⁷² for a more comprehensive record to be transmitted to the High Court by the Clerk of the Court; (7) in terms of the CPAA of 2003 the judges considering the petition may direct that the petition, or part thereof, be argued before them⁷³; and (8) the content of the explanations by the magistrate to an unrepresented accused is set out *in extenso* in the CPAA of 2003⁷⁴.

Are these provisions consistent with the constitutional principle? Constitutional Court⁷⁵ and comparative international and foreign jurisprudence will answer the question on the basis of the way the comparable provisions pertaining to appeals from the High Court to the Supreme Court of Appeal have been dealt with.



argument of the parties or their legal representatives. If the parties agree thereto and the Judge President so directs in an appropriate case.”[Emphasis added].

⁶⁸ Section 309B(2)(b) of the CPA.

⁶⁹ Director of Public Prosecutions.

⁷⁰ Section 309B(4)(a) of the CPA.

⁷¹ Section 309B(4)(b) of the CPA.

⁷² Section 309C(4) of the CPA.

⁷³ Section 309(C)(6)(b) of the CPA.

⁷⁴ Section 309D of the CPA.

⁷⁵ *S v Rens* 1996 (1) SACR 105 (CC) [Leave to appeal against judgments of the High Court; s 316(1)(b)]; *S v Twala* (South African Human Rights Commission Intervening) 1999 (2) SACR 622 (CC) [Leave to Appeal to the Supreme Court of Appeal; s 316 read with s 315(4)] *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC); 1999 (2) SACR 329 (CC), [Applications for leave to appeal] at 1093A-1094D.

CHAPTER 3 CONSTITUTIONAL PRINCIPLES

Some of the issues have been dealt with by the Constitutional court in cases pertaining to appeals from the High Court to the Supreme Court of Appeal. It is appropriate to seek guidance in the case law and ascertain how the issues regarding such appeals have been dealt with.

1. Leave Requirement

The judgment in *S v Rens*⁷⁶ was delivered on 19 May 1995. At that stage the IC was still in operation. The Constitutional Court was called upon to decide on the constitutional validity of the then section 316(1)(b) of the CPA barring an appeal except by leave of the court of first instance. It was contended that the said section infringed the right to a fair trial and violated the right to equality before the law.

The Court found the purpose⁷⁷ of the leave requirement to be the protection of the court of appeal “against the burden of having to deal with appeals in which there are no prospects of success.”⁷⁸ The Court held that it was not in the interests of justice and fairness to allow the court rolls to be clogged by unmeritorious and vexatious issues and delaying worthy appeals.⁷⁹

The Court held that the IC did not confer an absolute right of appeal. As long as the leave to appeal procedure meets the demands of fairness, the leave requirement is in compliance with the Constitution.⁸⁰

The issue of the requirement of leave to appeal was again raised in *S v Twala (South African Human Rights Commission Intervening)*⁸¹, but on this occasion it focussed on the right of appeal to or review by a higher court in terms of the provisions of section 35(3)(o) of the Constitution. Since the words “recourse by way of appeal or review”

⁷⁶ 1996 (1) SACR 105 (CC).

⁷⁷ Para.7.

⁷⁸ The court referred to *S v N* 1991 (2) SACR 10 (A).

⁷⁹ Para.25.

⁸⁰ Para.22.

⁸¹ 1999 (2) SACR 622 (CC). Judgment was delivered on 2 December 1999.

were omitted from the right to a fair trial as contained in section 25(3)(h) of the IC and no equivalent to section 102(11)⁸² appeared in the Constitution, the issue was revisited.⁸³ The Court concluded that there was “no material difference” between section 25(3)(h) of the IC and section 35(3)(o) of the Constitution.⁸⁴

The Court in *S v Twala*⁸⁵ expounded on the content of the right in terms of section 35(3)(o) of the Constitution. According to the Court section 35(3)(o) requires some form of appeal or review. The Court dealt with the ambit of the right in terms of section 35(3)(o). The Court was faced with the question as to whether section 35(3)(o) confers an unqualified right to a full rehearing before a higher court on a complete record or whether a truncated form of appeal or review procedure pertaining to the points in issue only and what is fair in the circumstance, would suffice. The Court remarked that the scope of the right conferred by section 35(3)(o) must be determined by having regard to the context in which it appears and the purpose for which it is intended. The Court remarked that the right of appeal to or review by a higher Court is not a self-standing right, but an incidence or component of the right to a fair trial contained in section 35(3). The Court held that section 35(3)(o) demands an appropriate reassessment mechanism⁸⁶ of the findings of law and fact of courts of first instance, that is, a reconsideration mechanism, based on an informed decision, that will minimise the risk of a wrong conviction and/or inappropriate sentence and the consequent failure of justice. It is submitted that if section 35(3)(o) was intended to involve a full rehearing, the Constitution could clearly have provided as such.⁸⁷ The Constitutional Court concluded that section 35(3)(o) provides a broad framework. Within this framework the Legislature is afforded some flexibility in order to establish a reassessment mechanism that is appropriate and fair. The Court concluded that the nature of the appropriate reassessment mechanism in terms of section 35(3)(o) depends on the prevailing circumstances. This means that section 35(3)(o) does not

⁸² The section read: “Appeals to the Appellate Division and the Constitutional Court shall be regulated by law, including the Rules of such Courts, which may provide that leave of the Court from which the appeal is brought, or to which appeal is noted, shall be required as a condition for such appeal.”

⁸³ Cf. section 173 of the Constitution.

⁸⁴ See para 18.

⁸⁵ *Supra*.

⁸⁶ See also the remarks by the Honourable Judge Didcott in *S v Ntuli* 1996 (1) SACR 94 (CC) (1996 (1) SA 1207; 1996 (1) BCLR 141) at [para 17].

⁸⁷ Not ignoring the fact that the Constitution is couched in broad terms.

prescribe the nature of the reassessment that will always be appropriate. The purpose of section 35(3)(o) is to ensure that any decision of a court of first instance convicting and sentencing a person is subject to reassessment by a higher court. In essence, according to the Court, section 35(3)(o) demands that the reassessment procedure prescribed by the Legislature must be fair as demanded by the broader concept of a fair trial as envisaged by section 35(3).⁸⁸

The Court confirmed the decision in *S v Rens*⁸⁹ that it cannot be in the interests of justice and fairness, firstly, to allow meritless and vexatious issues to be heard by the Supreme Court of Appeal and secondly, to clog the roll with hopeless cases. An important consideration is the fact that the procedure involves a reassessment of the disputed issues by two judges and that provision is made for a framework for that reassessment, thereby ensuring an informed decision as to the prospects of success.

2. Written argument vis-à-vis oral argument

In *S v Rens (supra)*⁹⁰ the Constitutional Court, in analysing the phrase "... to have recourse by way of ...", concluded that for the reassessment of the issues to comply with the provisions of the IC does not mean that full oral argument is required.

The court favoured a broad construction of the words 'appeal or review' and held that section 25(3)(c) demands that "provision be made either for an appeal in the conventional manner, or for a review in the sense of a re-assessment of the issues by a court higher than that in which the accused was convicted" Such an interpretation, according to the Court harmonises section 25(3)(c) and section 102(11) of the IC.⁹¹

⁸⁸ Compare article 14(5) of the International Covenant on Civil and Political Rights, which South Africa has ratified. The article reads: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

⁸⁹ *Supra*.

⁹⁰ At 110D-F para 21.

⁹¹ Section 102(11) reads: "Appeals to the Appellate Division and the Constitutional Court shall be regulated by law, including the rules of such Courts, which may provide that leave of the Court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such appeal."

It was held that although the reappraisal mechanism does not include full oral argument or a full rehearing of the matter, it does not follow that it is procedurally unfair or that it falls short of the right conferred by sections 25(3)(h) of the IC.⁹²

In *S v Twala*⁹³ the Court echoed, with approval, the sentiments expressed in *S v Rens*,⁹⁴ that the absence of full oral argument or a complete re-hearing does not mean that the procedure is unfair.

3. **Chamber Judgments and the presence of the appellant**

In *S v Pennington*⁹⁵ the Constitutional Court was faced with, *inter alia*, the questions as to whether, firstly, section 35(3)(c) of the Constitution demands that appeals be heard in open court and, secondly, section 35(3)(e) confers a right to be present at an appeal hearing to an appellant.

In construing section 35(3)(c) and (e) of the Constitution the Court observed that section 35(3)(o) which deals with appeals only, provides for the right of appeal to or review by a higher court. It is clear that a distinction is drawn between appeal proceedings and trial proceedings⁹⁶ and that paragraphs (c) and (e) of subsection (3) of section 35 find application only in respect of trial proceedings. The Court stated that in terms of section 35(3)(o) of the Constitution there is “no express requirement that the appeal be in open court or that the accused person be entitled to be present at the appeal” hearing.

The Court pointed to the terminology of section 35(3)(o) of the Constitution, namely, the right to a public trial and the terminology of the European Convention for Human Rights, which affords an accused a public hearing in the determination of a criminal charge. The Constitutional Court stated that the right to a public trial is narrower than the right under the Convention. According to the Court the language of the Convention, in contrast with section 35(3)(o), is wide enough to include appeals.

⁹² Reliance was placed on the decision of the European Court of Human Rights in *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205 at 220-5.

⁹³ *Supra.*

⁹⁴ *Supra.*

⁹⁵ 1999 (2) SACR 329 (CC). Judgment delivered on 21 August 1997.

⁹⁶ Testimony is presented and evidence is led.

4. **Legal Aid**

The Court, in *S v Twala*⁹⁷ considered an argument advanced on behalf of the appellant that the leave requirement impacts unequally and unfairly on indigent persons who are incapable of surmounting the procedural hurdles. The Court observed that accused persons who are tried in the High Court are almost always, unless they choose not to, represented by counsel, be it at their own expense or at State expense. An appellant's right in terms of section 35(3)(0) may be infringed if he or she is not "afforded legal representation."⁹⁸

5. **Conclusion**

From the case law it is clear that the Constitutional Court has, with respect to appeals following trials in the High Court, accepted that: (1) the leave requirement as a screening mechanism is necessary and in conformity with the Constitution; (2) full oral argument is not required; (3) the Constitution does neither confer a right to open court appeal proceedings nor entitle the appellant to be present at appeal proceedings; and (4) an appellant's right to a fair trial may be infringed if he or she is denied legal representation.

⁹⁷ *Supra.*
⁹⁸ Para.21.

CHAPTER 4 INTERNATIONAL AND FOREIGN LAW

1. **The right of appeal: General**

Criminal laws must be assessed against the standards of international human rights law. The South African adjective law needs to be measured against those criteria. The South African Constitution guarantees the right of appeal or review to a higher court, as a secondary right to the right to a fair trial. Except for India, no similar guarantee is contained in the constitutions of other constitutional states.

2. **International law**

2.1 **Leave to appeal**

No explicit right of appeal is contained in the Convention for the Protection of Human Rights and Fundamental Freedoms [CPHRFF], but decisions are taken on appeal under the general right to a fair trial. Article 6 of the CPHRFF guarantees the right to a fair trial. Likewise, Article 10 of the *Universal Declaration of Human Rights*⁹⁹ entitles everyone to a fair and public hearing. Some international instruments contain provisions pertaining to the right of appeal (or review) by a higher court. In terms of article 14.5 of the *International Covenant on Civil and Political Rights* [ICCPR]¹⁰⁰ a convicted person has the right to have his or her conviction and/or sentence being reviewed by a higher tribunal. Article 8(2)(h) of the *American Convention on Human Rights* [ACHR] bestows a right to appeal to a higher court on every accused. Article 81 of the *Statute of the International Criminal Court* [SICC] Court allows a convicted person to appeal on certain grounds¹⁰¹ and a sentenced person to appeal against a sentence if the imposed sentence is disproportionate to the offence.¹⁰²

⁹⁹ Article 10 reads: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

¹⁰⁰ The ICCPR entered into force on 23 March 1976.

¹⁰¹ Article 81(1)(b).

¹⁰² Article 81(2)(a).

The right to appeal is not absolute. Restrictions on it must however not impair the essence of the right. When considering whether an infringement of a right has occurred, the whole trial process needs to be considered.

It has been acknowledged by the European Court of Human Rights (ECtHR)¹⁰³ that certain persons may be restricted from bringing cases, for example, litigants bringing cases without merit and those who are not within a time limit for bringing a case.

Steytler, referring to the procedures of the ECtHR, comments as follows:

“The application of all the principles of a fair trial to appeal proceedings has proved difficult and the Court has adopted a flexible approach.”¹⁰⁴

It has been argued that Article 6 of the European Convention of Human Rights (ECHR) does not guarantee a right to appeal and that some of the secondary rights, i.e., the right to an oral and/or public hearing “may not apply in full to an appeal.”¹⁰⁵



2.2 Chamber judgments (Open court)

The right to a public hearing means that the public and the media have access to a court hearing. This right can be subject to certain restrictions depending on the demands of morality, public order, national security, the interests of minors or the privacy of the parties. The judgment of the court must however be pronounced in public, whether read out in court or delivered in written form.¹⁰⁶ All judgments are in any event public documents to which the public has access.

With regard to appeal proceedings in the International Criminal Court (ICC), subsections (4) and (5) of Article 83 of the Statute of the International Criminal

¹⁰³ It is important to bear in mind that all final judgments of the ECtHR are binding on the member, i.e., the State involved is expected to change the law to accommodate the ruling.

¹⁰⁴ *Constitutional Criminal Procedure A Commentary on the Constitution of the Republic of South Africa*, 1996, at 392.

¹⁰⁵ Study Guide(2ed) Human Rights Act 1998.

Available: <http://www.dca.gov.uk/hract/studyguide/> [2005, February 10].

¹⁰⁶ See footnote 107.

Court¹⁰⁷ provides that judgments must be delivered in open court.¹⁰⁸ The Appeals Chamber may, however, deliver its judgment in the absence of the appellant.

The ECtHR¹⁰⁹ deals with the issue with reference to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF). In *Botten v Norway*¹¹⁰ the appellant contended that his right to a fair trial had been infringed because the Court of Cassation based its decision on a reassessment of the oral evidence given before the District Court, without having heard either the witnesses or the accused. The ECtHR considered whether the appellant's right to a fair trial had been infringed.

The Court held that the manner of the application of Article 6, regarding proceedings before courts of appeal, depends on the special features of the proceedings concerned.¹¹¹ The proceedings in the domestic legal system and the role of the appellate court therein, must be taken into account in its entirety. The absence of a public hearing at the appeal stage may be justified by a public hearing in the court *a quo*. The manner in which the appellant's interests were actually presented and protected before the court of appeal is also an important consideration.¹¹²

The Court drew a distinction between proceedings involving only questions of law and proceedings involving questions of fact. According to the judgment the former form of proceedings and proceedings pertaining to leave to appeal meet with the requirements of Article 6, even if the appellant was not present in the court of

¹⁰⁷ <http://www.un.org/law/icc/statute/romefra.htm> [2005, February 10].

¹⁰⁸ Subsection 4.

¹⁰⁹ The primary focus of the European Court of Human Rights is to decide whether an applicant's rights have or have not been violated in a particular case before it.

¹¹⁰ [judgment of 19 February 1996, *Reports of Judgments and Decisions*, 1996-I, § 49]. See also *Fontaine and Berlin v France* (Case no.s 38410/97 and 40373/98; judgment of 8 July 2003); *Duriez-Costes v France* (Case no. 50638/99; judgment of 7 October 2003) where it was held that the lack of oral submissions to the Court of Cassation does not constitute a breach of the right enshrined in art 6 of the CPHRFF.

¹¹¹ Para.30.

¹¹² The Court referred with approval to the *Fejde v. Sweden* judgment of 29 October 1991, Series A no. 212-C, pp. 67-69, paras. 27 and 31; and the *Kremzow v. Austria* judgment of 21 September 1993, Series A no. 268-B, p. 43, paras. 58-59.

appeal.¹¹³ The Court reiterated¹¹⁴ that Article 6 does not always require a right to a public hearing or, if a hearing takes place, a right of presence.¹¹⁵

Further support for the notion of chamber appeals is found in the fact that exceptions to the publicity principle is allowed even during trial proceedings. Depending on the nature of the domestic appeal process, it can thus be safely assumed that the publicity requirement should find less strict application with regard to appeal proceedings that do not include retrials.

It is a prerequisite, bar certain exceptions, that any judgment rendered in a criminal case or in a suit at law shall be made public.¹¹⁶

2.3 Presence of appellant

In *Hill v Spain*¹¹⁷ the United Nations Committee on Human Rights [UNCHR] considered the right of a convicted person to defend himself in criminal proceedings. *In casu* legal aid had been granted to the appellants, but as a result of disputes between the appellants and their legal representatives, the appellants wished to argue their appeals in the domestic court in person. However, the court of appeal insisted that only a lawyer have a right of appearance before it. The UNCHR concluded that the denial of the right to argue an appeal in person is a breach of Article 14(3)(d) of the ICCPR.¹¹⁸

¹¹³ The case of *Axen v. Germany*, judgment of 8 December 1983, Series A no. 72, pp. 12-13, paras.27-28 and the abovementioned *Kremzow* decision were cited.

¹¹⁴ Para.39.

¹¹⁵ Quoted in *Arnarsson v Iceland* (Judgment adopted on 15 October 2003).

¹¹⁶ Compare *Weinberger v Uruguay* (R.7/28) HRC 36, 114; *Touron v Uruguay* (R.7/32) HRC 36, 120; *Pietrarroia v Uruguay* (R. 10.44) HRC 36, 153. In these cases the United Nations Human Rights Committee held that there is no public hearing where the proceedings are conducted in writing, and the judgment is not made public.

¹¹⁷ Case no.526/1993.

¹¹⁸ Art.14(3)(d) of the ICCPR reads: “3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;...”.

What is meant by the role of the appeal court of the Member State is clearly illustrated in *Botten v Norway*¹¹⁹. In that case the Supreme Court in Norway set aside an acquittal, based on both issues of fact and law, of the lower court. The Supreme Court, without summoning the appellant and despite the absence of any special features to justify such a step convicted and sentenced the appellant. The ECtHR held that in that case the Supreme Court was under a duty to summon and take evidence directly from the appellant in person. The ratio of the ECtHR was that the Supreme Court could not have properly overturned the acquittal without having assessed the evidence of the appellant in person.¹²⁰

An important consideration is whether the domestic law allows appeals on both issues of fact and law or just on issues of law. When the domestic law allows appeals only on issues of law there is no violation of an appellant's Article 14(3)(d)¹²¹ right to be present. The UNCHR found no violation of Article 14(3)(d) in the case of *Henry v Jamaica*,¹²² because the domestic law allows only issues of law on appeal. The appellant was represented by counsel at the appeal hearing.

The right to be present thus turns on the nature¹²³ of the appeal proceedings and the manner in which the appellant's interests are presented and protected. It must however be borne in mind that the appointment of a legal representative does not mean that from that moment the accused or appellant does not have the right to participate in the proceedings himself.¹²⁴

The right of presence was also raised before the ECtHR in the case of *Tripoli v Italy*.¹²⁵ In that instance the ECtHR held that there was no violation of the European Convention where the accused was not represented at a hearing before the Court of Cassation. In that matter before the Court of Cassation of Italy the appellant's lawyer failed to appear, did not appoint a substitute lawyer and did not arrange for the appellant to be present. The ECtHR had regard to the fact that the Court of Cassation,

¹¹⁹ *Supra*.

¹²⁰ *Cf. Kremzow v Austria*, (29/1992/374/448), 21 September 1993, at 16.

¹²¹ Of the ICCPR.

¹²² (230/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992 at 225.

¹²³ For instance, whether the appeal proceedings involve a retrial in the sense of calling of witnesses and whether both issues of fact and law are at stake on appeal.

¹²⁴ *F.C.B. v Italy*, 28 August 1991, Series A 208.

¹²⁵ (4/1993/399/477), 22 February 1994.

firstly, considers only issues of law, secondly, its proceedings are mainly written and, thirdly, at the hearings arguments are limited to those issues raised in the appeal and written arguments.

The ECtHR in the case of *Monnell and Morris v UK* considered whether the principle of equality of arms applies to appeal proceedings.¹²⁶ The ECtHR held that there was no infringement of the right to be present when neither the prosecution nor the appellant or their legal representatives were present at the hearing to decide leave to appeal. The reasoning behind this decision was that the issues were not of such a nature that the accused's presence was essential and that the accused had not been placed at a disadvantage vis-à-vis the prosecution.

2.4 Written vis-à-vis oral argument

There is a measure of overlapping between the issues concerning chamber judgments, presence of the appellant and written or oral argument, but it is more convenient to deal with them separately. The contraposition used herein is important since the unrepresented appellant's ability to effectively commit his argument to writing impacts on the fairness of the proceedings. Oral argument may be necessary in the case of an unrepresented appellant. This must however be distinguished from the question of the presence of the appellant at appeal proceedings. The need for oral argument does not necessarily mean that the appellant has a right to be present. A lawyer on his or her behalf may present oral argument, in the appellant's absence.

There appears to be no consistent pattern regarding oral argument during appeal proceedings. No general right to oral argument during the appeal hearing exists. Whether the accused's right to a fair trial (or fair hearing) is infringed, depends on the proceedings in its entirety and the role of the appellate court. Important considerations are the orality of proceedings in the court of first instance and the value of oral presentations on appeal. The ECtHR held in *Nesme v France*¹²⁷ that the applicant's right to a fair hearing, as enunciated in Article 6 of the ECHR, had not been violated by the applicant not being able to present his case orally in the Court of

¹²⁶ 2 March 1987, 115 Series A No.115. Available at http://www.amnesty.org/ailib/themes/indxftm_b.htm#26 [2005, February 10].

¹²⁷ Case no. 72783/01.

Cassation. The applicant was neither summoned nor did he partake in the proceedings in the Court of Cassation. In reaching the conclusion the ECtHR had regard to the proceedings in their entirety and the role of the Court of Cassation. In *Pause v France*¹²⁸ the applicant was not summoned to the appeal hearing in the Criminal Division of the Court of Cassation, nor was he furnished with a copy of the submission of the Advocate-General. The applicant was thus not able to present his case orally before the Court of Cassation. In the ECtHR the applicant relied on the right to a fair hearing as provided for by Article 6 of the ECHR. In this instance the Court held the failure to supply the applicant with a copy of the Advocate-General's submissions to be an infringement of the applicant's right to a fair hearing.

2.5. Legal aid

Article 6(3)(c) of the ECHR provides that an accused must have access to legal representation. Should the accused not have the necessary means to pay for a legal representative of his choice, he is entitled to be provided with a legal representative free of charge. In *Pakelth v Germany*¹²⁹ the ECtHR interpreted this provision to mean that the right is subject to the demands of the interests of justice. The ECHR does not prescribe the measures to be implemented by the parties to the Convention to secure the protection of this right. It is, however, required that the measures to guarantee the effective protection of the right adopted by the Member States must be compatible with the requirements of a fair trial. Whether the interests of justice demand that legal assistance is provided for the accused depends on the practice of the Member State concerned. The circumstances of a particular case are also a consideration. As set out in the case of *Quaranta v Switzerland*¹³⁰ the nature of prejudice to the accused, for example, a possible period of imprisonment, may warrant the provision of legal aid. Other factors are the complexity and importance of the case. The position differs however in the case of a convicted person. In the case of a convicted person who intends appealing, the likelihood of success on appeal is the determining factor in

¹²⁸ Case no. 61092/00. Available at <http://www.echr.coe.int> [2005, February 10].

¹²⁹ Judgment of April 25, 1983, Series A No. 64, para. 31. The Court stated "a person charged with a criminal offence' who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interest of justice so requires."

¹³⁰ (12744/87) [1991] ECHR 33 (24 May 1991).

deciding whether the interests of justice require that legal aid be provided. Legal aid may be withheld in the case of a convicted person provided that the trial in the court *a quo* was in accordance with the prescripts of Article 6 of the ECHR.¹³¹ In *Granger v United Kingdom*¹³² the appellant was granted legal aid for purposes of the pre-appeal stages.¹³³ In the ECtHR it was argued that the appeal was “wholly without substance” and that there was “no reasonable prospect of success”. The ECtHR held that taking into account all the circumstances, *inter alia*, the appellant’s inability to fully understand the arguments and the complicated or very technical¹³⁴ nature of the legal issues involved, the interests of justice demanded that legal aid be provided.¹³⁵ It would be in the interests of justice to provide legal aid if grounds of appeal can be established.¹³⁶ Whether an appellant’s right to a fair trial has been infringed by the refusal of legal aid during the appeal process must be assessed in the light of the entirety of the proceedings.

The ECtHR held in *Artico v Italy*¹³⁷ that, firstly, whether the absence of a legal representative prejudiced the proceedings is irrelevant when considering whether the right in terms of Article 6(3)(2) had been breached and, secondly, that Member States must take steps to ensure that accused persons right to free legal assistance is protected.

In *Goddi v Italy*,¹³⁸ the ECtHR held that the State is obligated to provide enough time and facilities for the appointed lawyer to prepare for the case. Failure to do so violates the Article 6(3)(c) right.

To summarize, in terms of the ECHR an accused person is entitled to free legal assistance on appeal in terms of the following principles: If the accused does have the means to pay for a lawyer, he or she is not entitled to free legal assistance. Such a requirement is necessary because of fiscal constraints. Free legal aid must be

¹³¹ *Monnell and Morris v. UK*, judgment of March 2, 1987, Series A. No. 115 para.67.

¹³² (11932/86) [1990] ECHR 6 (28 May 1990).

¹³³ Including the trial.

¹³⁴ *Cf. Druelle v. France*, decision of February 26, 1997, Appl. No. 24552/94 and *Roa Nieto v. France*, decision of February 26, 1997, Appl. No. 23989/94.

¹³⁵ See also *Boner v. United Kingdom*, Judgment of October 18, 1994, Series A No. 300-13; *Maxwell v. United Kingdom*, Judgment of October 28, 1994, Series A No. 300-C; and *Pham Hoang v. France*, Judgment of September 25, 1992, Series A No. 243.

¹³⁶ See *Altieri v. France*, decision of July 2, 1997, Appl. No 28140/95, not published.

¹³⁷ Decision of 13 May 1980, Series A no.37.

¹³⁸ Decision of 9 April 1983, Series A no.76.

provided if the interests of justice demand the assistance of a lawyer.¹³⁹ The appointment of a lawyer at State expense will be in the interests of justice if the absence of a legal representative might lead to an injustice. Factors taken into consideration for determining when the interests of justice require the appointment of lawyer free of charge are *inter alia*, the severity of the potential sentence, the complexity of the case, the age of the accused, the mental capacity¹⁴⁰ of the accused, the accused's inability to speak the language of the court, and whether it is a trial *in absentia*.

3. Foreign jurisprudence

A constitutional right to appeal is not found in any foreign jurisdictions, except India.

3.1 Leave Requirement

The requirement for leave to appeal is a characteristic of most foreign judicial systems. It seems that important considerations in granting leave or not, are (1) whether “the case is a proper case for appeal”, (2) whether there is “sufficient ground of appeal”, and (3) whether the case is “fit for appeal.”

In the UK accused persons who feel that they have been wrongly convicted or have been given too harsh a sentence can appeal against the conviction and/or sentence. In general, a person convicted by a Magistrates' Court¹⁴¹ may appeal against sentence. A person may appeal against conviction provided he did not plead guilty.¹⁴² An appeal against a Magistrates' Court decision is heard by the Crown Court, and if the appeal is against a decision of a Crown Court¹⁴³ it is heard by the Court of Appeal. With regard to appeals against conviction and sentence from the Crown Court to the Court of Appeal, the law is largely contained in the Criminal Appeal Act 1968, the

¹³⁹ Paragraph 3(c) of Article 6 reads: “Everyone charged with a criminal offence has the following minimum rights:...(c) to defend himself in person or through legal assistance of his choosing or, if he has not sufficient means to pay for legal assistance, to be given it for free when the interests of justice so require.”

¹⁴⁰ The accused's ability to conduct his or her defence personally.

¹⁴¹ The Magistrates' Court deals with less serious crimes, whereas the Crown Court deals with more serious crimes.

¹⁴² See Section 108 Magistrates' Court Act 1980.

¹⁴³ The Magistrates' Court and the Crown Court represent the lower courts.

Criminal Appeal Rules 1968 and the Criminal Appeal Act 1995. Leave to appeal from the Crown Court to the Court of Appeal is required in all cases, except where a certificate has been issued by the trial judge that the case is fit for appeal. The Court's supervisory role includes regulation of the mode in which the court process is utilised; hence the court is empowered to prevent litigants¹⁴⁴ wasting the time of court staff by obsessively attempting litigation that has no merit.

In the United States of America there is no constitutional right of appeal as was pointed out in *McKane v. Durston*, 153 U.S.684 (1894). Indeed, for a century after the United States Supreme Court was established, no appeal as of right existed in criminal cases. Appeals as of right in criminal cases were first permitted in 1989 and only in the case of crimes for which the death penalty could have been imposed. A general right of appeal in criminal matters was only introduced in 1911.¹⁴⁵ In *Reetz v Michigan*, 188 U.S. 505 (1903) the Court stated that the right of appeal is a creature of statute. The applicable statute, i e, 28 U.S.C. 1291 grants the federal courts of appeal jurisdiction to review decisions of the district courts.



In terms of section 321¹⁴⁶ of the Norwegian Criminal Procedure Act the Court of Appeal may disallow an appeal to proceed if the Court deems it obvious that the appeal will not succeed. This screening mechanism was introduced to prevent the

¹⁴⁴ For example, the vexatious litigant.

¹⁴⁵ Per Act of Mar. 3, 1911, 36 Stat. 1133.

¹⁴⁶ The section provides as follows: “An appeal to the Court of Appeal concerning matters in regard to which the prosecuting authority has not proposed and there has not been imposed any sanction other than a fine or confiscation may not proceed without the consent of the court. Such consent shall only be given when there are special reasons for doing so. Consent is not, however, necessary if the person charged is a business enterprise, cf. chapter 3a of the Penal Code. An appeal to the Court of Appeal may otherwise be disallowed if the court finds it obvious that the appeal will not succeed. An appeal by the prosecuting authority that is not in favour of the person charged may also be disallowed if the court finds that the appeal concerns questions of minor importance, or that there is otherwise no reason for the appeal to be heard. An appeal concerning a felony punishable pursuant to statute with imprisonment for a term exceeding six years may only be disallowed in the cases referred to in the second sentence of the second paragraph. An increase of the maximum penalty because of repeated offences, concurrence of felonies, or the application of section 232 of the Penal Code shall not be taken into account. A decision to refuse consent or to disallow an appeal must be unanimous. A refusal may be reversed in favour of the person charged if there are special reasons for doing so. Decisions pursuant to this section shall be made by a court decision and may be limited to part of the case. An interlocutory appeal concerning any refusal pursuant to this section or any rejection of an application for the reversal of such a refusal may be brought on the basis of procedural error. Otherwise decisions pursuant to this section may not be challenged by an interlocutory appeal or serve as a ground of appeal.”

overburdening of the Court of Appeal. It has been argued that an automatic right of appeal could easily be subject to abuse and result in courts being burdened with unreasonable cases that would unnecessarily lead to a heavier workload of the courts with a resultant delay in breach of Article 14(3)(c) of the ICCPR.¹⁴⁷

3.2 Chamber judgments (Open court)

Chamber judgments on appeal are not unfamiliar in other legal systems. Summary disposal of an appeal is possible under the Rules of the Supreme Court of the United States of America, which was adopted 27 January 2003 and came into effect on 1 May 2003. In terms of Rule 18(12) “After considering the documents distributed under this Rule, the Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits...”

Limits on public trial rights have been recognized by the Canadian Courts. (A similar limitation is provided for in Article 6(1) of the ECHR). The Canadian Criminal Code,¹⁴⁸ dealing with appeals in respect of indictable offences, also makes provision for summary disposal of appeals. Where the Registrar, after perusal of a notice of appeal involving a question of law only, is of the opinion that the notice does not show a substantial ground of appeal, he or she may refer the matter to the court of appeal for summary disposal. In such an instance the court of appeal may, if it deems the appeal to be frivolous or vexatious and can be determined without postponing for a full hearing, dismiss the appeal summarily, without calling on any person to attend the hearing or to appear for the respondent at the hearing.¹⁴⁹

¹⁴⁷ Views of the United Nations Human Rights Committee in Norway–Communication No.(CCPR/C/67/D/789/1997 [1999] UNHRC 44 (2 November 1999). Available: <http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.doc> at para. 4.5 [2005, February 10].

¹⁴⁸ (R.S.1985,c C-46), Part XX1).

¹⁴⁹ See section 685 of the Criminal Code. Available: <http://laws.justice.gc.ca/en/C-46/44351.html#rid-44385> [2005, February 10].

In terms of Rule 3 of the Newfoundland Trial Division of the Supreme Court Criminal Appeal Rules a judge in chambers may dismiss an abandoned appeal without attendance of legal representatives.¹⁵⁰

A similar rule is found in English Law. In terms of section 20 of the Criminal Appeal Act, 1995 the Registrar of the Court of Appeal may refer an appeal, which involves a question of law alone for summary determination if the notice of appeal does not show any substantial ground of appeal. The Court may, under the same circumstances as mentioned in the Canadian law above, dismiss an appeal without calling on the parties to attend.¹⁵¹

Section 324¹⁵² of the Norwegian Criminal Procedure Act enables the Court of Appeal to decide applications for leave (“consent”) to appeal, in the absence of the parties. The Court of Appeal may however allow the parties to make written submissions. Appeals against judgments of the District Court or City Court may be disposed of without an appeal hearing. In terms of section 322 of the Norwegian Criminal Procedure Act the Court of Appeal may give judgment on appeal without an appeal hearing when the Court of Appeal “unanimously finds it clear” that the decision should be set aside, or, that the accused/appellant should be acquitted, or that altering the judgment would be prejudicial to the appellant.¹⁵³

¹⁵⁰ Available <http://www.canlii.org/ca/regu/si87-28/part81996.html> [2005, February 10].

¹⁵¹ *ARCHBOLD Criminal Pleading Evidence & Practice (41ed)*(Sweet & Maxwell) at 785-786.

¹⁵² The section reads: “Decisions pursuant to sections 318 to 323 shall be made without party proceedings. The court may, however, allow the parties to express their views in writing. If one of the parties has in a statement relating to the appeal pleaded new facts that are not obviously without significance, the court shall inform the opposite party of the statement.”

¹⁵³ Section 322 reads: “An appeal against a judgement of the District Court or the City Court may be decided without an appeal hearing when the Court of Appeal unanimously finds it clear: 1) that the judgement should be set aside, 2) that the person charged must be acquitted because the matter prosecuted is not criminal or criminal liability has lapsed, or 3) that the judgement should, in accordance with the appeal, be altered in favour of the person charged and the evidence in relation to the question of guilt is not in issue. The Court of Appeal may also set aside the judgement when the court unanimously finds it clear that the judgement would be altered to the detriment of the person charged, because the statutory provisions relating to the determination of a penalty or other sanction have been wrongly applied or because information of essential significance for such determination was lacking. If an appeal is brought concerning the assessment of evidence in relation to the issue of guilt and the prosecution is dropped, the court shall pronounce a judgement of acquittal without an appeal hearing.”

3.3 Presence of the appellant

In most jurisdictions an accused does not have a right to self-representation on appeal. An accused is however not debarred from self-representation.

In the case of a defended appeal¹⁵⁴ in Canada, an appellant who is in custody does not usually attend the appeal hearing. However, in the case of an unrepresented appellant,¹⁵⁵ the appellant usually attends the appeal hearing and argues his or her own appeal.

In this regard reference should be made to the Canadian Criminal Code.¹⁵⁶ It appears that in terms of the Criminal Code¹⁵⁷ an appellant, who is in custody, is in general entitled (it is not a requirement that the appellant be present) to be present at the appeal hearing. However, even if the appellant is in custody but is legally represented, he or she is not entitled to attend if the appeal involves (1) only a question of law, or (2) an application for leave to appeal or (3) if the proceedings are preliminary or incidental to the appeal, unless the appellant is entitled to be present (1) by virtue of the rules of court or (2) a judge rules that he or she is entitled to be present or grants leave to that effect. If an appellant elects to present his argument only in writing the court is compelled to decide the matter on that basis.¹⁵⁸ Furthermore a court of appeal may impose sentence in the absence of an appellant.¹⁵⁹

¹⁵⁴ The so-called solicitor appeals.

¹⁵⁵ Such appeals are referred to as “inmate appeals”.

¹⁵⁶ It is important to take into account that there are differences in the appeal procedure in South Africa and that of Canada. It must however, be kept in mind that in terms the Criminal Code a court of appeal may: (i) “order the production of any writing, exhibit or other thing connected with the proceedings, (ii) order witnesses to attend and be examined before the court of appeal,” and (iii) receive further evidence. The parties are also entitled to adduce and challenge evidence before the court of appeal.

¹⁵⁷ Section 688 of the Criminal Code reads: “(1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.(2) An appellant who is in custody and who is represented by counsel is not entitled to be present: (a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone; (b) on an application for leave to appeal, or (c) on any proceedings that are preliminary or incidental to an appeal unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives leave to be present. ... (4).”

¹⁵⁸ See subsection (3) of section 688 of the Canadian Criminal Code which reads: “An appellant may present his case on appeal and his argument in writing instead of orally, and the court of appeal shall consider any case of argument so presented.

¹⁵⁹ See subsection (4) of section 688 of the Canadian Criminal Code which provides as follows: “A court of appeal may exercise its powers to impose sentence notwithstanding that the appellant is not present.”

In the United States not all appeals are set for oral argument. Some appeals are decided on only written argument (written briefs).¹⁶⁰ This procedure is usually followed in cases where the issues are simple and which involve clearly established law.¹⁶¹ The court determines whether oral argument is necessary. Oral argument is not necessary if: (1) the appeal is frivolous; (2) the set of issues has recently been authoritatively decided; (3) the facts and legal arguments are adequately set out in the record and written argument; and (4) oral argument to elucidate the issues on appeal is not necessary.

In *United States v. Veatch*¹⁶² the Court held that although the right to presence is well-established, it is not absolute. The right to presence is dependent on a conclusion that absence could be detrimental to the accused. It was stated that due process does not guarantee “the privilege of presence when presence would be useless, or the benefit but a shadow.”

Whether the proceedings involve the taking of evidence or only involve a question of law is a deciding factor when considering the question of an accused’s presence. Where the proceedings do not involve testimony or other evidence, but only principles of law the accused’s right to presence is not violated since he or she is not prejudiced because of his or her absence.

3.4 Written vis-à-vis oral argument

In *R v Chaulk*¹⁶³ the Supreme Court of Canada dismissed an application for an oral hearing as of right for leave to appeal. The Court held that section 45 of the Supreme Court Act enhanced the capacity of the Supreme Court to manage its roll by conferring jurisdiction to decide leave applications on written material only.

¹⁶⁰ Available <http://www.abanet.org/publiced/courts/appeals.html> [2005, February 10].

¹⁶¹ Available <http://www.alanellis.com/html/pub/pub19.html> [2005, February 10].

¹⁶² 674 F.2d 1217, 1225(9th Cir.1981). *cert denied*, 456 U.S. 946, 102 S.Ct.2013, 72 L.Ed. 2d 469(1982). The Court cited *Badger v. Cardwell*, 587 F.2d 968, 970 (9th Cir.1978).

¹⁶³ (Application), [1989] 1 S.C.R.369, 1989 CanLII 124 (S.C.C).

In *Mulberry v Soares*¹⁶⁴ the United States Supreme Court, after perusal of the appeal record and written argument, held that the appeal could be decided on the “briefs without oral argument.” The Court concluded that oral argument would not materially assist in the determination of the appeal.

In Norway the position is the following: When an appeal is not against conviction or if the sentence for a statutory offence does not exceed a term of imprisonment of six years, the Court of Appeal may by agreement of the parties dispose of the appeal on written argument only. The Court of Appeal may nevertheless still order oral argument. Section 333 enables the Court of Appeal to dispose of the matter on written briefs only.¹⁶⁵

Opponents of the notion of chamber appeals may argue that such a procedure will increase the pressure on judges. Pressure on judges, it is argued by some, militate against the disposal of appeals on written argument only, because written material necessitates the assimilation of a substantial amount of information.¹⁶⁶ This argument cannot hold since the judges have in any event to assimilate all the written material unless, the parties (be it in written briefs or orally) indicate that certain portions of the record may be ignored.

3.5 Legal Aid

The position in the United States of America is discussed in *Martinez v. Court of Appeals of Cal., Fourth Appellate Dist.* 528 U.S.152 (2000). The appellant was

¹⁶⁴ 1999 10CIR 1148 189 F.3d 478.

¹⁶⁵ The section reads: “If an appeal to the Court of Appeal does not concern the assessment of evidence in relation to the issue of guilt or the assessment of sentence for a felony punishable pursuant to statute with imprisonment for a term exceeding six years, the court may with the consent of the parties decide that the case shall be dealt with in writing. Section 321, third paragraph, second sentence, shall apply correspondingly. The written proceedings shall be conducted by the judge appointed by the senior judge president. Each party shall be allowed to submit two pleadings. The court may reverse the decision to deal with the case in writing. A decision to have written proceedings may not be challenged by interlocutory appeal or serve as a ground of appeal.”

¹⁶⁶ The Chief Justice of Australia, delivering a speech at the Judicial Conference of Australia on 7 April 2001, commented as follows: “The decreasing orality of the court process, and the increasing reliance on written material, both for evidence and argument, has also increased the pressure on judges.” Available: <http://www.australianpolitics.com/news/2001/01-0407b.sthtml> [2005, February 10].

convicted of embezzlement. The appellant filed a motion to represent himself on appeal. The motion to represent himself was denied by the California Court of Appeal. The Court noted that the rights established by the Sixth Amendment¹⁶⁷ "are presented strictly as rights that are available in preparation for trial and at the trial itself" and that the Amendment "does not include any right of appeal. The Court held that the right to counsel on appeal stems from the Fourteenth Amendment.¹⁶⁸ In *Abney v. United States*¹⁶⁹ the Court also held that the Sixth Amendment deals strictly with trial rights and does not include any right of appeal.

In the U. S. Supreme Court in *Ross v. Moffitt*¹⁷⁰ the Court concluded that at the trial stage an accused who does not have the means to pay for an attorney "cannot be assured of a fair trial unless counsel is provided." The Court distinguished the trial stage from the appeal stage and held that at appeal stage "the defendant needs an attorney not as a shield to protect him but as a sword to upset the prior determination of guilt." The Court held that "the fact that an appeal has been provided does not mean that a State acts unfairly by refusing to provide counsel at every stage of the way."



In Germany approval of assistance with court costs does not automatically cover appeals. The cover ends when the accused person is convicted, i e, when the final decision is made. A fresh application for legal aid for purposes of an appeal may however be made. The Appeal Court determines whether the accused is still in need. Further considerations are whether the appeal is not wilful or malicious and whether it has a chance of success. If these conditions are satisfied, the party is entitled to legal aid.¹⁷¹

¹⁶⁷ The Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

¹⁶⁸ Section 1 of the Fourteenth Amendment reads: "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

¹⁶⁹ 431 U.S. 651 (1977).

¹⁷⁰ 417 U.S. at 604, 94 S.Ct. at 2440-2441, 41 L.Ed2d at 347 (1974).

¹⁷¹ See http://europa.eu.int/comm/justice_home/ejn/legal_aid/legal_aid_ger_en.htm [2005, February 11].

4. Conclusion

It is evident from the above that the leave requirement is universally accepted. The presence of an appellant is not always required¹⁷² and hence oral argument may, under certain circumstances, be dispensed with.

Similarly, open court proceedings are not always required. Exceptions are allowed and have been long-established practice. Some other procedure may be adopted as long as such procedure is fair and due guarantees have been built into the system to prevent a failure of justice. The right to a fair and public hearing figures in most jurisdictions. International and foreign law, however, contemplate exceptions to the tenet of personal participation.



¹⁷²

For example, where his or her rights are adequately protected by counsel.

CHAPTER 5 KEY ELEMENTS OF APPEALS

1. **Background**

1.1 Nature of appeals

Generally, appeals have the following characteristics: firstly, on appeal the decision of the trial court, be it against conviction and/or sentence, is attacked as factually and/or legally incorrect; secondly, an appeal is argued on the record as it stands; thirdly, appeals are subject to time constraints; and, fourthly, once an appeal is dismissed, the matter is brought to finality, unless a right to a further appeal exists.

Until now the adjudication of criminal appeals from the lower courts to the High Court involved, firstly, the full record of the proceedings in the trial court (including the notice of appeal), secondly, heads of argument¹⁷³ from both the appellant and the respondent,¹⁷⁴ oral argument and judgment in open court. The appellant has no right to be present and his or her presence has not been necessary. However in the Cape Provincial Division there have been instances where the Court required the appellant's presence.¹⁷⁵

¹⁷³ The contents and purpose of heads of argument must be borne in mind.

¹⁷⁴ On the rare occasions of the appellant appearing in person, no heads of argument were filed.

¹⁷⁵ The appellant was not present during the appeal hearing. The appellant's legal representative submitted that the appeal was without merit. The Court postponed the appeal to give the appellant an opportunity to argue his appeal in person.

1.2 The appeal process: In general

A convicted and sentenced person¹⁷⁶ intending to avail himself to the right of appeal must initiate the appeal procedure by filing a notice of appeal¹⁷⁷ and applying for leave to appeal, which may be granted or refused.¹⁷⁸ This application is brought in

¹⁷⁶ In accordance with section 309 (1) an appeal only lies after a person had been convicted. The Courts, regarding the ripeness of an appeal, interpreted the section to mean that an appeal lies only after conviction and sentence, any attempted appeal prior to that stage will, except in "rare cases where grave injustice might otherwise result or where justice might not by other means be attained" be ruled premature. The general rule is that proceedings in the lower courts not be brought on appeal or review on a piecemeal basis (*cf. Walhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A)). However, this general rule is subject to exception. The court's power to interfere at an early stage of the proceedings in a lower court, must nevertheless be exercised sparingly. An example, is the plea of *autrefois acquit*. In *S v Singh* 1986 (4) SA 263 (C) an appeal, before any evidence was led, against the rejection of the *autrefois acquit* plea was entertained by an appeal court. Courts of appeal are not prepared to entertain appeals piecemeal." Compare *S v Attorney-General of the Western Cape; S v The Magistrate, Wynberg and Another* 1999 (2) SACR 13 (C) at 21C-22F and the cases cited therein. Section 309 (1) (a) of the CPA reads: "Any person convicted of any offence by any lower court ... may, ... appeal against such conviction and against any resultant sentence. See also the decision of Van Reenen J in *In die Petisie van Cyster: In Re S v Cyster* 1999 (2) SACR 522 (C) at 527B-528A: "White R het dan ook in *S v Nhantsi* 1994 (1) SACR 26 (Tk) op 28i dit as gesag beskou vir die volgende stelling: 'The courts have construed this section as meaning that no appeal against any order made during a criminal trial can be brought before the accused has been convicted and sentenced - *Walhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119; *S v Benade* 1962 (1) SA 301 (C) at 302.' ... Dit is opvallend dat terwyl *S v Benade* (supra) op die feite gesag daarvoor is dat 'n appèl in 'n strafsaaik nie aangehoor kan word voordat 'n beskuldigde gevonniss is nie, die Hof in *S v Nhantsi* (supra) bevind het dat 'n appèl nie aanhangig gemaak kan word alvorens 'n beskuldigde nie skuldig bevind en gevonniss is nie. Die laasgenoemde beskouing is dan ook dié van *Lansdown & Campbell South African Criminal Law and Procedure vol V op 587 en Du Toit et al Commentary on the Criminal Procedure Act op 30-19*. Die onwenslikheid om, behalwe in buitengewone omstandighede, 'n reg van appèl of hersiening (sien: *S v Burns and Another* 1988 (3) SA 366 (K) op 367H) in 'n strafsaaik te erken voordat die verrigtinge voltooi is, is veral pertinent waar, soos die onderhawige geval, die verrigtinge ingevolge die bepalings van art 116 van die Strafproseswet in die landdroshof gestaak en 'n beskuldigde na die streekhof vir vonnis verwys word.... Arikel 309B(1), wat deur art 3 van die Strafproseswysigingswet 76 van 1997 in die Strafproseswet ingevoeg is, bepaal soos volg: ' 'n Beskuldigde wat teen 'n beslissing of bevel van 'n laer hof wil appelleer, moet binne 14 dae of binne die langer tydperk wat op aansoek om gegronde redes toegelaat word, by daardie hof aansoek doen om verlof om teen daardie beslissing of bevel te appelleer.' (Die onderstreping is aangebring.) Kan dit geargumenteer word dat die onderstreepte woorde 'n verandering teweeggebring het wat betref die ontvanklikheid van 'n appèl in 'n strafsaaik voordat 'n beskuldigde gevonniss is? Ek glo nie so nie.'" [Emphasis added]. The general rule is that leave to appeal cannot be granted before sentence.[See *S v Harman* 1978 (3) SA 767 (A) at 771B] (*Cf. ss.317 and 319 of the CPA*). Section 316 (1) specifically refers to an application after "the passing of any sentence. It follows that it would be premature for the Court to consider the merits of a conviction before sentence had been passed.

¹⁷⁷ *Vide.* rule 18 of the Rules of the Supreme Court of the United States which read: "When a direct appeal from a decision of a United States district court is authorized by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court ...". Available at <http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf> [2005, February 10].

¹⁷⁸ Section 309B of the CPA.

the trial court. In considering the application the magistrate must “disabuse his mind of the fact that he has himself found the Crown case to be proved beyond reasonable doubt, he must, both in relation to questions of fact and of law, direct himself specifically to the enquiry of ‘whether there is a reasonable prospect that the Judges of Appeal will take a different view’.”¹⁷⁹ If such a prospects exist, the court will grant leave. However, “the mere possibility that another Court might come to a different conclusion is not sufficient to justify the granting of leave to appeal”.¹⁸⁰ If the application for leave to appeal is refused, the appellant has recourse to the High Court by way of petition to the Judge President.

Although this dissertation is limited to appeal proceedings from the lower courts, because of the right to a fair trial, the trial and appeal proceedings must be looked at in its entirety. At this juncture it is thus appropriate to just briefly set out the trial and appeal¹⁸¹ processes¹⁸², in the South African legal system, starting with the accused’s appearance in the lower court. The accused pleads¹⁸³. Evidence is led (*viva voce* evidence and documentary evidence is led by the prosecution and the defence)¹⁸⁴. Argument (oral and or in writing) takes place and an application for acquittal in terms of section 174 of the CPA may be launched. Judgment (on the facts and law) is delivered¹⁸⁵. The accused, if he so elects, tenders evidence in mitigation and the state leads evidence in aggravation (the parties may address the court *ex parte* only). The accused is sentenced.¹⁸⁶ The appellant¹⁸⁷ may at this stage apply for leave to appeal.¹⁸⁸ In the case of leave to appeal being refused, the appellant¹⁸⁹ may petition to the Judge President of the relevant Provincial Division of the High Court. If leave to appeal¹⁹⁰ is refused, the appellant may approach the Supreme Court of Appeal;¹⁹¹ If leave to appeal is granted, the appellant, within a stipulated time limit, must file heads of

¹⁷⁹ *R v Miller* 1957 (4) SA 642 (AA) at 645E-F.

¹⁸⁰ *S v Ceaser* 1977 (2) SA 348 (A) at 350, as cited with approval in *S v Sikosana* * (1) 1980 (4) SA 559 (A) at 562.

¹⁸¹ As before the CPAA of 2003 or its forerunner.

¹⁸² For the purposes of this dissertation, excluding review proceedings.

¹⁸³ Section 105 of the CPA, and for the present purposes, it is assumed the accused pleads not guilty.

¹⁸⁴ The court may also call witnesses before judgment is delivered.

¹⁸⁵ Section 106 (4) of the CPA. The accused may either be convicted or found not guilty.

¹⁸⁶ Acquittals are irrelevant in this context.

¹⁸⁷ In practice called, the applicant.

¹⁸⁸ Section 309B of the CPA.

¹⁸⁹ In practice called, the petitioner.

¹⁹⁰ By way of petition to the Judge President.

¹⁹¹ *Vide. S v Khoasasa* 2003 (1) SACR 123 (SCA).

argument with the Registrar of the relevant Provincial Division of the High Court. The Respondent lodges heads of argument. The hearing of the appeal in die relevant division of the High Court involves both written and oral argument¹⁹² and judgment in open court.¹⁹³ The appellant, whether in custody or not, is not debarred from attending the appeal hearing. If the appeal is dismissed, the appellant may apply in the High Court for leave to appeal to the Supreme Court of Appeal. In the event of leave to appeal being dismissed, the appellant may petition to the President of the Supreme Court of Appeal.

It is clear from the case law that the approach of the Constitutional Court regarding the right to a fair trial pertaining to the trial¹⁹⁴ differs from the approach regarding appeal procedures.¹⁹⁵ There is a clear distinction between trial and appeal procedures.

1.3 Different levels¹⁹⁶

There is a clear distinction between the proceedings regarding appeals against decisions of the lower court and appeals against decisions of the High Court. The Supreme Court of Appeal is the highest court of appeal regarding the merits of an appeal.¹⁹⁷ A further appeal on constitutional and related grounds to the Constitutional Court of South Africa is also possible.¹⁹⁸ The rules and procedures for the respective tiers differ. The Rules of the Constitutional Court in certain instances allows a litigant

¹⁹² A High Court has yet to decide on an appeal in chambers. In their submissions to the Portfolio Committee on Justice and Constitutional Development all the Judges President (or a judge on their behalf) expressed the view that the CPAA of 2003 is in order. Yet to date not a single appeal has been determined in chambers.

¹⁹³ It is important to bear in mind that the appeal is argued and disposed of on the record as it stands. No further evidence, except on rare occasions, is led.

¹⁹⁴ The proceedings up and including sentence in the lower court.

¹⁹⁵ See the discussion under *S v Pennington* above.

¹⁹⁶ Section 166 of the Constitution provides, with regard to the judicial system, as follows : The courts are- (a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; (d) the Magistrates' Courts; and (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.

¹⁹⁷ The Court in *S v Shongwe* (supra) remarked *obiter* on the desirability of finality in litigation. The Court said the following at 278E-F para 5: "This Court has not yet considered the circumstances in which it would be proper to grant condonation in cases where a substantive constitutional issue is raised in a criminal matter where the time for an appeal has long since expired. In considering such a matter, the Court would be alert both to the need to provide protection for constitutional rights, on the one hand, and to the desirability of finality in litigation, on the other."

¹⁹⁸ See *Boesak v The State* 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC).

to gain direct access to the Constitutional Court.¹⁹⁹ It must however be kept in mind that Rule 17 of the Rules of the Constitutional Court can only be utilized in exceptional circumstances. In *S v Shongwe*²⁰⁰ the court stressed that the Rule 17 does not provide an appeal procedure, “nor may it be used for disguised appeals.”

Sections 309 to 314 of the CPA govern appeals against decisions of the lower courts. Sections 315 to 324 of the CPA govern appeals against decisions of the High Courts. The conclusion of the Court justifying the different “treatment” of appeals from the Magistrates’ Court and appeals from the High Courts on the basis of “differences in the standing and functioning of the courts” are debatable. In the light of the decision in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*,²⁰¹ it is argued that magistrates have the capacity and are competent to conduct fair trials. As was stated by the Constitutional Court, the lower courts are “ordinary courts” within the meaning of section 35(3) of the Constitution. The requirement of leave to appeal pertaining to proceedings in the High Court has been held to be in accord with the Constitution. It is contended that no cogent reasons for the distinction exists at present.



2. Key features of CPAA

2.1 Leave requirement

The rights contained in the Bill of Rights are not absolute rights and may be limited. Furthermore there is no hierarchy of constitutional rights in the South African law. Interference with a right listed in the Bill of Rights is permissible subject to various qualifications. The right of appeal is a constituent right and may be subject to qualification. The leave requirement is accepted as both necessary and reasonable in international and foreign jurisprudence. The leave requirement has the effect of reducing the number of appeals. To do away with this requirement will undoubtedly result in an avalanche of appeals. It may be argued that the courts might implode under the weight of appeals.

¹⁹⁹ Rules 18 to 21 of the Rules of the Constitutional Court promulgated under GN R1603 in GG 25643 of 31 October 2003.

²⁰⁰ 2003 (5) SA 276 (CC) at 278B-C para.4.

²⁰¹ 2002 (5) SA 246 (CC) at 333D-I.

The dilemma of the leave requirement stifling out meritorious appeals, especially in the case of unrepresented appellants, is a real one. Such dilemma would, without intervention, result in a real risk that appellants might not apply for leave to appeal, when they should. This makes the protection for the appellant of the ability to bring a proper application for leave to appeal particularly important. The risk is to a great extent eliminated by the various safeguards, *inter alia*, the provision of counsel at State expense and explanations by the magistrate,²⁰² *et cetera*.

2.2 Chamber appeals

Section 309(3A) of the CPA compels the court seized with an appeal to dispose of the appeal in chambers. Argument²⁰³ is limited to written briefs. The CPAA of 2003 does not distinguish between, firstly, appeals against conviction and sentence as opposed to appeals against sentence²⁰⁴ only, secondly, appeals subsequent to a guilty plea²⁰⁵ and appeals following a plea of not guilty, and thirdly, appeals on fact and law as against appeals against either fact or law²⁰⁶. The notion of the disposal of appeals on written argument only, is less hostile to appeals against sentence only, or appeals on a point of law only or appeals following a plea of guilty.

Does a right to public appeal proceedings accrue to the appellant? The Constitution does not provide for such a particular right under section 35(3). The Constitution does however enlist the right to “to a public trial before an ordinary court” as part of the component rights.

It is submitted that the conservative approach that the same principles apply to trials and appeal procedures is wrong. The view is based on the fact that it is a long-

²⁰² A more proactive role by the magistrate in ensuring the protection of an appellant’s constitutional rights is required.

²⁰³ Section 309(3A)(a) of the CPA.

²⁰⁴ In the South African context oral argument on appeal against sentence may be of less assistance because the principles involved on appeals against sentence differ from that of an appeal on the merits. A court of appeal does not interfere with an imposed sentence unless it is found that the court imposing the sentence did not exercise its discretion judicially, resulting in such sentence to be startlingly inappropriate or excessively severe.

²⁰⁵ As indicated earlier some jurisdictions do not allow appeals against the conviction where the appellant pleaded guilty.

²⁰⁶ Written argument would lend itself more to appeals on points of law than appeals on the facts.

established practice that appeals are argued in open court²⁰⁷. In accordance with this practice appeals have, save in exceptional circumstances, been heard in open court. Unfortunately the then Appeal Court clouded the issue in *S v Thomas*²⁰⁸ where the Court held that criminal proceedings include appeal proceedings. It is argued that the decision was not intended to disturb the settled practice that appeals are disposed of in the absence of the appellant. This submission is fortified because the case involved the transitional provisions in terms of section 344(3) of the CPA. To support the conservative view some writers contend, “Since an appeal is a continuation of the trial²⁰⁹ the provisions of sections 153 and 154 of the CPA concerning exclusion of the public and prohibition also apply to appeals.”²¹⁰ Considerations of legitimacy of the criminal justice system, transparency and enabling the public to be fully informed of the evidence, weigh heavily with proponents of the conservative approach.

Steytler²¹¹ argues, “Public appeal procedures appear not to be a right.”²¹²



²⁰⁷ As part of the fair trial notion. Compare section 152 of the CPA which reads as follows: “Except where otherwise expressly provided by this Act or any other law, criminal proceedings in any court shall take place in open court, and may take place on any day.”

²⁰⁸ 1978 (1) SA 329 (A).

²⁰⁹ This, it is submitted, is clearly wrong. As indicated above the right of appeal is but a component or facet of the right to a fair trial. This is consonant with the sentiments expressed in *S v Steyn (supra)* at para 13: “..the object of the right to a fair trial contained in s 35 (3) is ‘to minimise the risk of wrong convictions’ and inappropriate sentences ‘and the consequent failure of justice’...This object pervades all stages of a trial until the last word has been said on appeal.”

²¹⁰ Bekker *et al Criminal Procedure Handbook (2ed)* at 302.

²¹¹ *Constitutional Criminal Procedure A Commentary on the Constitution of the Republic of South Africa, 1996*

²¹² *Vide S v Pennington and Another (supra)*, where the court, regarding applications for leave to appeal, held (at 1093A-1094D) that “section 35(3) sets out what is required for a fair trial in criminal proceedings. Sections 35(3)(c) and (e) provide that every accused person shall have the right ‘(c)to a public trial before an ordinary court;. . .(e) to be present when being tried.’ In contrast section 35(3)(o) which deals with appeals provides only for the right ‘of appeal to, or review by, a higher court’. There is no express requirement that the appeal be in open court or that the accused person be entitled to be present at the appeal. ... There are sound practical reasons for this. If such matters had to be dealt with in open court, the court rolls would be clogged and the result would be additional expense and delays. [49] The European Court of Human Rights has held that an application for leave to appeal is a special procedure which does not necessarily call for a public hearing under the provisions of art 6(1) of the European Convention for the Protection of Human Rights. Article 6(1) provides that ‘in the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing . . .’. That requirement is met by the holding of the criminal trial in public, and ‘(t)he limited nature of the subsequent issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal appearance of the (accused) before the court of appeal’.

In *S v Rens*²¹³ the Constitutional Court referred, with approval, to the dictum in *Monnell and Morris v United Kingdom*²¹⁴ that an oral or public hearing is not required before the higher court.²¹⁵

Limitations of a public trial and the “right” to presence are well-established in the South African legal system. An example where the CPA permits “proceedings” in the absence of an accused is found in the sections dealing with admission of guilt. Of significance is the position with regard to the payment of admission of guilt at a police station or local authority. In terms of section 57(6) of the CPA the accused is deemed, subject to the provisions of subsection (7), to have been convicted and sentenced by the court of the relevant offence after the Clerk of the Court had entered the particulars of the summons or notice in the admissions of guilt register. The magistrate thereafter has to certify the proceedings to be in accordance with justice.²¹⁶ This amounts to the magistrate exercising special review powers in the absence of the accused.

Section 16 of Act 59 of 1959 provides an exception to the general rule that all proceedings must be carried on in open court. As is pointed out by the authors of *Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa*²¹⁷ section 16 “lays down a proposition which is well established in the law of all democratic countries, namely, that the judicial proceedings shall take place in open court save in exceptional circumstances.” The term “exceptional circumstances” resists easy definition. The authors of *Superior Court Practise*²¹⁸ observe that although the Courts interpret the said words narrowly, “it has declined to attempt any general definition of the expression ... and that each application must depend upon its own facts.”²¹⁹

²¹³ *Supra.*

²¹⁴ *Supra.*

²¹⁵ At 250-251. See also the foreign cases referred to at 249.

²¹⁶ In terms of subsection (7) of the CPA.

²¹⁷ At 448.

²¹⁸ Erasmus et al.

²¹⁹ At 206.

If an appeal is a continuation of the trial and consequently must proceed in open court, then surely, the other rights listed under section 35(3)²²⁰ must equally apply to appeals as well. This leads to an absurdity. It is true, though, that “a criminal charge²²¹ is not finally determined until the last court has spoken.”²²² It is submitted that the listed rights only find application during certain stages in the determination of the “criminal charge”.

Must the public understand the appeal proceedings to meet the requirement of a public hearing? If the conservative approach should prevail then the other listed rights apply equally. In the ordinary course of events, no evidence is led during appeal proceedings. The appeal is adjudicated upon on the typed record of the trial court and argument²²³ by the parties or their legal representatives. Only in exceptional cases, and only on a substantive application, is an appellant allowed to lead further evidence. Furthermore, the parties argue in their language of choice,²²⁴ and judgments on appeal are delivered in any of the eleven official languages. No interpretation takes place. In this regard, the view of the authors of De Waal et al²²⁵ who support the conservative approach, with reference to *S v Pienaar*²²⁶, is significant. They postulate the accrual to the accused of a “right to be tried in the language of the

²²⁰ Section 35(3) provides as follows: “Every accused person has a right to a fair trial, which includes the right-(a)to be informed of the charge with sufficient detail to answer it;(b)to have adequate time and facilities to prepare a defence;(c)to a public trial before an ordinary court;(d)to have their trial begin and conclude without unreasonable delay;(e)to be present when being tried; (f)to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;(g)to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;(h)to be presumed innocent, to remain silent, and not to testify during the proceedings;(i)to adduce and challenge evidence;(j)not to be compelled to give self-incriminating evidence;(k)to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;(l)not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;(m)not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;(n)to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and(o)of appeal to, or review by, a higher court.

²²¹ Note, not a criminal trial.

²²² Steytler (*supra*) at 392.

²²³ Heads of Argument (written argument) and oral argument.

²²⁴ In practise, either English or Afrikaans.

²²⁵ *Supra*.

²²⁶ 2000 (7) BCLR 800 (NC) at para 15.

community where he or she lives”. They argue that unless the accused’s trial is conducted in the said language the trial cannot be regarded as a public trial.²²⁷

It is theoretically possible that argument is presented and judgment delivered²²⁸ in English in a predominantly Afrikaans speaking (or any of the other eleven official languages) community. Will that render the trial (appeal proceedings) unfair in the sense that it was not a public trial due to lack of understanding of the proceedings by the public? It is submitted; it does not, as long as the proceedings²²⁹ in the court of first instance (pre-appeal proceedings) are conducted in accordance with the Constitution.

It is submitted that the provision in question does not infringe upon the appellant’s right to a fair trial as long as the pre-appeal²³⁰ proceedings are, save the long-established exceptions, conducted in open court. As has been held by the Constitutional Court, the right “of appeal to, or review by, a higher court” “is not a self-standing right; it is an incidence or component of the right to a fair trial contained in section 35(3) and appears in that context.” The Constitutional Court has furthermore ruled that the lack of “full oral argument or a full rehearing of the matter, ... does not in itself mean that the procedure is not fair.” Strict adherence to the principle of open trials may result in delays that are inconsistent with the principles of a speedy trial.²³¹

2.3 No oral argument

Does the appellant have a specific constitutional right, be it a secondary right, to oral argument at the appeal stage? The answer is in the negative.

Judgments in chambers do not involve oral argument by either the appellant personally or his or her legal representative. The decision of the court of appeal is based on written argument only. Provision is however made for oral argument by the

²²⁷ At 624.

²²⁸ In the case of an English speaking accused.

²²⁹ In the trial court.

²³⁰ From the lower courts to the High Court.

²³¹ Section 35(3)(d) of the Constitution.

appellant or by a legal representative on his or her behalf where the court of appeal deems oral argument necessary.²³²

The CPAA of 2003 undeniably curtails oral argument to some extent. The CPAA of 2003, however, does not totally exclude oral argument. It leaves the door open for oral argument in appropriate instances.

2.4 No presence of appellant

Although the case involves determination of a failure of justice during the trial, it provides a guideline for determination of the same regarding appeal proceedings. With reference to the provisions of sections 158(1) and 322(1) of the CPA the High Court held in *S v M*²³³ that the absence of an accused does not *per se* result in a failure of justice. The Court held that whether an accused's absence result in failure of justice has to be determined with reference to circumstances and facts of each case.

The Constitution does not bestow a right to be present at appeal proceedings to an appellant. In South Africa appellants have never had a right to be present at appeal hearings and in practice²³⁴ never attended such hearings. The framers of the Constitution must have been aware of the situation, but did not deem it necessary to include such a right under section 35(3) of the Constitution. It is well-settled practice that a court of appeal may in the exercise of a judicial discretion decide an appeal in the absence²³⁵ of an appellant. The Courts have in the past disposed of appeals either in favour of or against absent appellants. In dismissing an appeal against conviction in *R v Mokwena*²³⁶ the Supreme Court of Appeal²³⁷ (then the Appeal Court) took into account the facts of the case and the interests of justice. The Court concluded that the facts proving the appellant's guilt were "so clear" that it was in the interests of justice to dispose of the appeal.²³⁸

²³² Section 309(3A)(a) of the CPA.

²³³ 2004 (1) SACR 238 (N).

²³⁴ With specific exceptions.

²³⁵ In the context of this dissertation "absence" means no appearance by both the appellant or a legal representative on his or her behalf.

²³⁶ 1954 (1) SA 256 (A).

²³⁷ Herein referred to as the "SCA".

²³⁸ At 257D.

The High Courts have on occasion decided appeals in the absence of an appellant where the Court was of the opinion that the appeal should succeed.²³⁹ Provided that if the appellant was charged with an alternative count, he or she ought not to have been convicted either on the main count or on the alternative count²⁴⁰.

2.5 Legal representation/Legal Aid

The right to legal representation permeates the entire criminal process. The protection of an accused's rights is of fundamental importance; hence the presence of a legal representative to effectively protect an accused's rights applies to every stage of a criminal charge.

Measures are in place to ensure that each appellant is represented by counsel for purposes of an appeal. However, there may be exceptions.²⁴¹ The fairness of the trial and hence the constitutionality of the provisions in question, also hinges on the contribution of the representative of the DPP, who stands in a special position.



Those appellants who, by choice, do not engage the services of a lawyer (even at State expense) and choose to prosecute their appeals in person²⁴², having filed heads of argument, will undoubtedly have to make an informed decision regarding section 309(3A)(b) of the CPA. This creates a problem in the case of unrepresented, unsophisticated and illiterate appellants. It is argued that in such cases the appeal should rather be proceeded with in open court and oral argument should be presented. It is submitted that it would not be an "appropriate case" where an unrepresented and unsophisticated appellant agrees to the appeal being disposed of in chambers and on the written argument only. This may also be the solution in the case of illiterate appellants.²⁴³

²³⁹ *S v Papu* 1968 (4) SA 248 (E) at 249A. See also *R v Nlapo* 1958 (3) SA 142 (T).

²⁴⁰ *R v Nhlapo* 1958 (3) SA 142 (T) at 142F-G. See also *R v Geelbooi* 1923 TPD 388, *R v Mashebe* 1927 TPD 1 and *R v Grundlingh* 1955 (2) SA 269 (A) at 277.

²⁴¹ Should the legal representative file a "no-merit report", the appellant will have to argue his appeal in person.

²⁴² History indicates that only a very small number of appellants argue their appeals in person.

²⁴³ This submission in no way presupposes that illiterate persons are ignorant or that they are not able to arrange the filing of written argument.

Steytler²⁴⁴ observes as follows: “An accused should be able to participate fully in the proceedings by advancing argument. However, appeal or review proceedings need not include an oral hearing as long as an accused has the fullest opportunity of submitting written submissions.”²⁴⁵

3. **Practical implications**

3.1 In person appeals (*pro se* appeals)

The Constitutional Court in *S v Steyn*²⁴⁶ discussed certain hurdles or barriers to be scaled by a person convicted in the lower courts. It needs to be established whether a would-be-appellant is faced with any jurisdictional or procedural hurdles, obstacles or barriers that may restrict access to a higher court for purposes of an appeal. If such difficulties still exist, the question is then, whether they pose insuperable hurdles. What relief or aids are provided to assist the appellant to overcome the hurdles? If the appellant cannot surmount the hurdle, does such hurdle amount to a violation of the secondary right²⁴⁷ or an infringement of the primary right?²⁴⁸ If the obstacles constitute a limitation of the appellant’s right of appeal and/or the broader right to a fair trial, is the limitation justifiable?

The unrepresented appellant’s ability to draft a proper notice of appeal was considered by the Constitutional Court. Once having obtained leave to appeal it is incumbent on the appellant to prosecute his appeal. Leaving aside, for the moment, other rules such as the requirement to inform the DPP about his intention to prosecute the appeal within a prescribed time frame, et *cetera*, the appellant will essentially have to compile and file heads of argument, present oral argument if applicable, apply for leave to appeal and or to lead further evidence²⁴⁹, petition to the President of the

²⁴⁴ *Supra.*

²⁴⁵ At 396.

²⁴⁶ *Supra.*

²⁴⁷ The right to appeal or review by a higher Court is classified as a secondary right.

²⁴⁸ The right to a fair trial is a primary right.

²⁴⁹ In the event of the appeal being dismissed and if the appellant wishes to pursue the matter further.

SCA²⁵⁰ and, if applicable, apply for leave to appeal to the Constitutional Court.²⁵¹ For purposes of this dissertation, only the first two points above are relevant. Furthermore the ability of the appellant (either in person or by a legal representative on his or her behalf) to present oral argument (if applicable) is, as far as the constitutionality of the provisions of the CPAA of 2003 is concerned, determinative.

3.2 Formulating a notice of appeal

In practice the courts are reasonably accommodating when dealing with unrepresented appellants. The requirement of a notice of appeal is relaxed in the case of undefended accused.²⁵² Sometimes even a rudimentary letter from an unrepresented appellant will suffice. Whether or not the *pro se* applicant/appellant raises all the possible points in the notice of appeal should not be of too much weight, since application may be made at a later stage to amend the notice of appeal.²⁵³

3.3 Formulating and bringing of an application for leave to appeal

Can it be reasonably expected of an unrepresented appellant to properly formulate a notice of appeal and an application for leave to appeal? Since the requirement of an application for leave to appeal from the lower courts is *terra nova*, no High Court cases have yet been decided on the issue. However, the terminology for the requirements of such applications in the lower court is similar to those for applications in respect of trials in the High Court. Perusal of the authorities on such applications in the High Court reveals the following: For an application for leave to be successful the applicant (sentenced person) must convince the trial court that if leave is granted, a reasonable prospect of the appeal being successful exists²⁵⁴. A reasonable prospect of success may involve both factual and/or questions of law as

²⁵⁰ If the application with respect to point 3 is refused and the appellant intends to pursue the matter further.

²⁵¹ On constitutional grounds only.

²⁵² *Cf. S v Ho* 1979 (3) SA 734 (W).

²⁵³ It is a reversible error.

²⁵⁴ *R v Ngubane and Others* 1945 AD 185.

well as other questions of principle.²⁵⁵ The standard is much lower than, if applicable, proffering a version²⁵⁶ that is reasonably, possibly true.²⁵⁷

3.4 Formulating an application to lead further evidence

The unrepresented accused's ability, in the context of the equal justice principle, to bring a proper application to lead further evidence may also present a hurdle. Prior to the enactment sections 309B of the CPA²⁵⁸ further evidence could only be heard by the lower courts after sentence if the High Court, on a substantive application, remitted the matter for such further evidence to be led. The Court of Appeal could also, in rare instances, accept further evidence.²⁵⁹ Section 309B now empowers the lower courts to entertain applications to lead further evidence.²⁶⁰ The latter application must be supported by affidavit.²⁶¹

The requirements concerning applications in the High Court to lead further evidence, is set out by Kriegler.²⁶² The authors point out that the requirements for referral back to the trial Court for the hearing of further evidence is trite. As was decided in *S v De Jager*²⁶³ and approved in *S v H*²⁶⁴, the requirements are:

²⁵⁵ See *S v Sinama* 1998 (1) SACR 255 (SCA) at 257B.

²⁵⁶ To be acquitted the accused need only provide a version that is reasonably, possibly true during the main trial. The accused is not required to prove his innocence.

²⁵⁷ Further cases dealing with the subject-matter are: *S v Khoasasa* 2003 (1) SACR 123 (SCA); *S Farmer* 2001 (2) SACR 103 (SCA); *S v Sikosana* (1) 1980 (4) SA 559 (A); *S v Ackerman and Another* 1973 (1) SA 765 (A).

²⁵⁸ As amended by Act 42 of 2003, which came into operation on 1 January 2004.

²⁵⁹ See *S v Dampies* 1999 (1) SACR 598 (E) and the reference therein at 599H-I to s. 22(a) of the Supreme Court Act, 59 of 1959.

²⁶⁰ That is after the sentencing stage.

²⁶¹ In this regard reference is made to paragraph (b) of section 309B (5) of the Criminal Procedure Act as Amended. The relevant provision reads as follows: "An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.(b) An application for further evidence must be supported by an affidavit stating that- (i) further evidence which would presumably be accepted as true, is available; (ii) if accepted the evidence could reasonably lead to a different decision or order; and (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial."

²⁶² *Hiemstra Suid-Afrikaanse Strafproses* (6ed) at 833.

²⁶³ 1965 (2) SA 612 (A) at 613C-D.

²⁶⁴ 1998 (1) SACR 260 (SCA).

- “(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it sought to lead was not led at the trial.
- (b) There should be a *prima facie* likelihood of the truth of the evidence.²⁶⁵
- (c) The evidence should be materially relevant to the outcome of the trial.”

As alluded to by Kriegler²⁶⁶ the SCA did not decide the question whether the requirement that the evidence sought to be led must be materially relevant to the outcome of the trial, postulates a probability or a reasonable possibility.²⁶⁷

If an application to lead further evidence is successful, the prosecution is entitled to proffer evidence in rebuttal. The trial court may also call witnesses.²⁶⁸

The court granting an application for further evidence must receive such evidence and “record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.” Such received evidence is, for the purposes of an appeal, deemed to be part of the “evidence taken or admitted at the trial in question.”²⁶⁹

²⁶⁵ In this regard Foxcroft J in *S v Naidoo* 1998 (2) SACR 458 (C) at 461E-F quoted and applied the following passage from *Diale v R* 1953 (1) PH H12 (A): It seems to me that before this Court would be justified in exercising its right to remit the case for further evidence, it must, at least, be satisfied that there is a reasonable prospect that the appellant will be able to establish the facts which he proposes to prove.”

²⁶⁶ *Supra*.

²⁶⁷ In *S v Naidoo* (*supra*) Foxcroft J at 462G cited the following passage from *R v Weimers and Others* 1960 (3) SA 508 (A): “In the present matter it is sufficient to adopt the view most favourable to the appellants, that there must at least be a probability and not a mere possibility that the result would be different if the case was remitted.”

²⁶⁸ Section 309B (5) (c) of the CPA. The following authorities (regarding such applications in the High Court) may fruitfully be applied to the same issue in the lower courts: *S v Khoasasa* 2003 (1) SACR 123 (A); *S v Dampies* 1999 (1) SACR 598 (OPA); *S v Lowis* 1997 (1) 235 (T); *S v Majodina* 1996 (2) SACR 369 (A); *S v Petzer en 'n Ander* 1992 (1) SACR 633 (A).

²⁶⁹ Section 309B (5) (c) to (6) of the CPA.

3.5 Drafting of a petition

The petition procedure is governed by section 309C of the CPA. An unsuccessful applicant in an application for leave to appeal²⁷⁰ may, by way of petition, apply for leave to the Judge President of the High Court having jurisdiction.²⁷¹

The unsuccessful applicant who exercises the option of a petition must when lodging the petition, simultaneously give notice thereof to the relevant Clerk of the Court.²⁷² On receipt of the notice the Clerk of the Court must immediately forward, firstly, the relevant application, secondly, the magistrate's reason for refusal of the application and thirdly, the record of the proceedings to the Registrar of the relevant High Court.²⁷³ Parts of the record, on certain conditions, may in this case also be submitted.²⁷⁴

Unless exceptional circumstances exist a petition is considered in chambers by a single judge.²⁷⁵ A safety mechanism exists, in the sense that the door is left open for the judge who considers the petition, to “call for any further information, including a copy of the record of any proceedings that was not submitted in terms of section 309C (4) of the CPA from the magistrate who refused the application in question, or from the magistrate who presided at the trial to which any such application relates, as the case may be”.²⁷⁶ Court rules will in all probability provide for opposing papers to be filed by the DPP.

²⁷⁰ This may include an application for condonation and/or an application to lead further evidence.

²⁷¹ Section 309C (2) (a) of the CPA.

²⁷² Section 309C (3) (b) of the CPA.

²⁷³ Section 309C (4) of the CPA.

²⁷⁴ In terms of section 309C (4) (c) “(i) if the accused was tried in a regional court and was legally represented at the trial; or(ii)if the accused and the Director of Public Prosecutions agree thereto; or (iii)if the prospective appeal is against the sentence only; or(iv)if the petition relates solely to an application for condonation,a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (6) (a), suffice for the purposes of the petition.”

²⁷⁵ Section 309C (5) (a) of the CPA.

²⁷⁶ Section 309C (6) of the CPA.

The judge considering the petition may, furthermore, “in exceptional circumstances, order that the petition or any part thereof be argued before them at a time and place determined by them.”²⁷⁷

Does the above constitute the alpha and omega regarding the appellant’s application for leave to appeal to a higher court against a conviction and/or sentence of the lower court? The answer is in the negative. The appellant may still lodge an appeal against the refusal of leave to SCA.

3.6 Appeal to the SCA against refusal of leave to appeal

An aggrieved appellant may, if his petition is turned down, directly appeal to the Supreme Court of Appeal against the refusal of leave to appeal.²⁷⁸

3.7 Drafting heads of argument

Because High Courts are, in compliance with the provisions of the CPAA of 2003 obliged, save in the case of the enumerated exceptions, to dispose of appeals in chambers, written argument and a *pro se* appellant’s ability to properly formulate them becomes important. The inability of an appellant who chooses to prosecute his appeal in person to properly formulate heads of argument may lead to an injustice.

The form and content of heads of argument must comply with certain criteria. These criteria are set out in the court rules and notices as well as case law. The extent to which the *pro se* appellant can successfully commit his or her argument to writing and comply with the court rules and court notices as well as the requirements set out in the case law in that respect, will impact upon the fairness of chamber judgments. A brief exposition of the relevant rules, notices and case law serves to illustrate the difficulties faced by a *pro se* appellant in exercising his or her right to appeal.

²⁷⁷ Section 309C (6) (b) of the CPA.

²⁷⁸ See *S v Khoasasa* 2003 (1) SACR 123 (SCA).

In terms of the rules of the SCA the heads of argument must be, *inter alia*, “clear, succinct and without unnecessary elaboration” and “no lengthy quotations from the record or authorities” are allowed.”²⁷⁹

In terms of the Court Notices²⁸⁰ of the High Court the heads of argument pertaining to criminal appeals to the full bench must be “a concise and succinct statement of the main points (without elaboration).”²⁸¹

The Uniform Rules of Court²⁸² regarding criminal appeals from the Magistrate’s Court similarly prescribes the submission of a concise statement of the main points (without elaboration).²⁸³

The Courts dealt with the issue in a number of cases.²⁸⁴ In *Ensign-Bickford (South Africa (Pty) Ltd and Others v AECI Explosives and Chemicals Ltd* the Court stated that heads of argument must be of assistance to the Court. As such repetition of the

²⁷⁹ Rule 10(3) of the Rules of the Supreme Court of Appeal. The rule stipulates as follows: “(a) The heads of argument shall be clear, succinct and without unnecessary elaboration. (b) The heads of argument shall not contain lengthy quotations from the record or authorities. (c) References to authorities and the record shall not be general but to specific pages and paragraphs. (d)(i) The heads of argument of the appellant shall, if appropriate to the appeal, be accompanied by a chronology table, duly cross referenced, without argument. (ii) If the respondent disputes the correctness of the chronology table in a material respect, the respondent's heads of argument shall be accompanied by the respondent's version of the chronology table. (e) (i) The heads of argument shall be accompanied by a list of the authorities to be quoted in support of the argument and shall indicate the authorities to which particular reference will be made during the course of argument. (ii) If any such authority is not readily available, copies of the text relied upon shall accompany the heads of argument. (iii) The heads of argument shall define the form of order sought from the Court. (f) If reliance is placed on subordinate legislation, a copy of such legislation shall accompany the heads of argument.”

²⁸⁰ Rule 9(2) of the Court Notices.

²⁸¹ Rule 49A(3) reads as follows: “Not later than 20 days before the appeal is heard the appellant shall deliver one copy of a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal as well as a list of the authorities to be tendered in support of each point to the attorney general (*sic*) and four copies to the registrar.”

²⁸² Rule 51(4) of the Uniform Rules of Court which provides as follows: “(4) Before the appeal is heard the appellant shall deliver a concise statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and before the appeal is heard the respondent shall deliver a similar statement. The periods, within which the aforesaid heads of argument and list of authorities shall be delivered, are those which the judges president of the various divisions determine from time to time. Three additional copies shall in each case be filed with the registrar.”

²⁸³ See also Rule 2(b) of the Cape of Good Hope Court Notices.

²⁸⁴ Among them *Ensign-Bickford (South Africa (Pty) Ltd and Others v AECI Explosives and Chemicals Ltd* 1999 (1) SA 70 (SCA), *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) and the case of *City Deep Ltd v Johannesburg City Council* 1973 (2) SA 109 (W).

facts and lengthy quotations with no mention of any process of reasoning serve no purpose. With reference to *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another*, the Court pointed to the fact that the heads must be related to specific arguments or contentions to be made. The heads must set out a process of reasoning.²⁸⁵

In *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another*²⁸⁶ the Court drew attention to the importance of the meaning of the words “main heads” of argument in the Rules of the Court. The Court observed that “main” refers to the “most important part” of the argument and that it does not mean a dissertation. In *City Deep Ltd v Johannesburg City Council* it was pointed out that “main points” of argument amounts to heads of argument.

The question arises as to whether heads of argument, main points of argument or main heads of argument as prescribed by the rules of court satisfy the requirements for “written argument of the parties or their legal representatives” as provided in section 309(3A) of the CPA. Neither the CPA nor the rules of court provides guidance in this regard necessitating reference to foreign law.

The Canadian Law distinguishes between, firstly, a concise statement of points of fact and law to be argued with references to the evidence and to the authorities relied upon²⁸⁷, and, secondly, argument in writing. It is noteworthy that the court rules enable the appeal court to dispense with oral hearings where all the parties have filed written argument.

It is also apposite to call attention to the required format of a similar rule in the Rules of the Supreme Court of the United States. Rule 24 (1) (g) – j defines the nature and content of “written briefs” as, firstly, a “concise statement of the case”, secondly, a “summary of the arguments”, thirdly, arguments and, lastly, a “conclusion”.²⁸⁸

²⁸⁵ At 84H-85B-C.

²⁸⁶ At 955B-F.

²⁸⁷ Rule 42 of the Rules of the Supreme Court of Canada.

²⁸⁸ Rule 24 (1) (g) – j reads: “A brief on the merits for a petitioner or an appellant shall comply in all respects with Rules 33.1 and 34 and shall contain in the order here indicated:...(g) A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g. App 12, or to the

Given the difficulties that may arise as a consequence of self-representation, it is important that appellants who cannot afford a lawyer be provided with one at State expense. It is propounded that the proscription of oral argument is constitutionally sound, as long as the court of appeal is allowed to order that oral argument be presented to “emphasize and clarify the written arguments in the briefs on the merits.”²⁸⁹

Prior to the enactment of the predecessor of the CPAA of 2003 an appeal in criminal matters involved the delivering of a concise and succinct statement of the main points (without elaboration) of argument (Heads of Argument), oral argument in open court and the delivery of judgment in open court. In order to streamline the appeal procedure the Legislature introduced the forerunner of the above Act. With the advent of the said Act the procedure changed, to the effect that appeals, except where the judges deem that the interests of justice demand otherwise, must be disposed of on written argument only and in chambers. Certain provisions of the said forerunner of the CPAA of 2003, however, were held to be in violation of the sentenced person’s right to a fair trial. The CPAA of 2003 re-introduced the impugned provisions in a form that the Legislature deemed constitutionally sound. Certain issues were raised in submissions to the Portfolio Committee on Justice and Constitutional Development in respect of the CPAA of 2003. The submissions addressed the negative impact of automatic appeals on case management.²⁹⁰ It was acknowledged that appeals as of right would further burden the already overloaded infrastructure and resources. The question whether additional courts, staff and resources would alleviate the problem of clogged court rolls was looked at. It was submitted that the leave requirement limits the right to appeal, but the necessity of eliminating unmeritorious appeals was

record, *e.g.*, Record 12. (h) A summary of the argument, suitably paragraphed. The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient. (i) The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on. (j) A conclusion specifying with particularity the relief the party seeks.”

²⁸⁹ Rule 28 (1) of the Rules of the Supreme Court of the United States regarding oral argument.

²⁹⁰ Memorandum prepared by the Judges of the Natal Provincial Division dated 7 May 2001 that was submitted to the Portfolio Committee on Justice and Constitutional Development.

acknowledged. The importance of a filtering procedure or a sifting mechanism²⁹¹ and the level²⁹² at which the filtering process should take place were raised. It was submitted that the Magistrates' Court would be the appropriate forum where the sifting process should take place. Attention was drawn to the need to lay down a framework²⁹³ conducive to fairness regarding leave and petition proceedings. Concerns were raised about the absence of an absolute right to oral argument.²⁹⁴ Suggestions to ensure that the amendments adequately address the concerns raised by the Constitutional Court in *S v Steyn*²⁹⁵ were made. The importance of explanations of his or her right to appeal to an unrepresented sentenced person was stressed.²⁹⁶ Concerns were raised that the new procedure, rather than alleviating the case management problem, may in reality exacerbate it.

3.8 Adequacy of information

The provisions of section 309C of the CPA are intended to allay the concerns of the Constitutional Court regarding the paucity of information placed before the judge or judges who must consider the petition. The Clerk of the Court²⁹⁷ is enjoined to submit copies of the application that was refused, the magistrate's reasons for refusal of the application, the record of the proceedings in the magistrate's court in respect of which the application was refused.²⁹⁸ The judge (or judges) who is seized with the matter may call for further information and/or order that the petition be argued.²⁹⁹

²⁹¹ Comments by the Judge President of the Transvaal Provincial Division in a letter to the Minister of Justice and Constitutional Development dated 26 July 2002, which was submitted to the Portfolio Committee on Justice and Constitutional Development.

²⁹² Suggestions by the Judge President of the Free State Provincial Division contained in a letter to the Minister of Justice and Constitutional Development dated 31 July 2002, which was submitted to the Portfolio Committee on Justice and Constitutional Development.

²⁹³ Representations by the Judge President of the Transkei Provincial Division contained in a letter to the Minister of Justice and Constitutional Development dated 22 July 2002, which was submitted to the Portfolio Committee on Justice and Constitutional Development.

²⁹⁴ Submissions by the Regional Court President, Regional Division Johannesburg dated 3 August 2002 to the Portfolio Committee on Justice and Constitutional Development.

²⁹⁵ *Supra*.

²⁹⁶ Representations from the Regional Court President, Regional Division Northern Transvaal dated 5 August 2002 to the Portfolio Committee on Justice and Constitutional Development.

²⁹⁷ Section 309C(4) of the CPA.

²⁹⁸ In the following instances the submission to the Registrar of the High Court of a full record is not necessary if: (1) the accused was tried in a regional court and was legally represented at the trial, or (2) the accused and the Director of Public Prosecutions agree thereto, or (3) if the prospective appeal is against the sentence only, or (4) the petition relates solely to an application for condonation.

²⁹⁹ Section 309C(6) of the CPA.

4 Conclusion

4.1 Does the CPAA limit any constitutional right?

In evaluating the constitutionality of the CPAA of 2003 regard must be had to the factors enumerated by the Constitutional Court in *Steyn*³⁰⁰ in conjunction with the stated issues, namely, the leave requirement, public proceedings, presence of the accused, oral argument and legal aid.

To this end the mode of interpretation of the Bill of Rights needs restating. In this regard section 39 of the Constitution reads:

- “(1) When interpreting the Bill of Rights, a court, tribunal or forum-
- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

4.1.1 Leave requirement

The leave requirement is intended to winnow out only meritless or vexatious appeals. Taking into consideration the safeguards built into the CPAA of 2003, it is submitted that the risk of meritorious appeals being caught in the net has been eliminated. The right of appeal exists for the sole purpose of correcting a wrong. In the case of an appeal that is devoid of any merit there is thus no wrong to be corrected. The question then is whether the right to appeal extend to a case where there is clearly no error of

³⁰⁰ *Supra.*

fact or law. It is submitted that in the South African context³⁰¹ the existence of an error is foundational to the right of appeal. Phrased in another way, the right of appeal is the right to a reassessment or reappraisal by a higher court to correct an error of fact or law. An important point in the determination of a criminal charge is when the appeal process starts. The appeal process starts as soon as the notice of appeal is lodged with the Clerk of the Court. It is submitted that when a judge or judges consider a petition³⁰² consequent to a refusal of leave by a magistrate, it constitutes some form of reappraisal by a higher court. Although the reappraisal at this stage is only for purposes of determining the prospects of success, the same information and argument as would have been placed before a court of appeal in the ordinary sense, may be presented to the higher court since the judge or judges may order that argument be presented.³⁰³ It is submitted that during the petition proceedings an adequate reappraisal by a higher court takes place and the appellant's right to appeal, that is, the right to an adequate reassessment, is not infringed by the provisions of the CPAA of 2003.

4.1.2 Public hearing or presence



It is trite that the right to a fair trial and the constituent rights, i.e., the right to a public trial, the right to be present when being tried, the right to legal representation and the right to adduce and challenge evidence apply to the trial stage. As has been indicated above the publicity right and the right of presence may be limited during the trial stage. If the limitations are constitutionally sound with regard to trial proceedings than it should be even more so during appeal hearings. To determine the constitutionality of the provisions of the CPAA of 2003 it has to be established whether these rights apply to appeal proceedings as well. The Constitution does not expressly mention a right to public appeal proceedings or a right to presence or a right to oral argument at appeal hearings. The Constitutional Court has clearly indicated in *Pennington*³⁰⁴ that the right to a fair trial does not include a right to public appeal hearings or a right to be present during the appeal hearing.

³⁰¹ An appeal does not, as a rule, involve a rehearing.

³⁰² The petition procedure is available to all applicants whose applications were turned down by the trial court.

³⁰³ See para.3.5 above.

³⁰⁴ *Supra*.

The appellant has no constitutional (and or other) right to be present at appeal hearings. Therefore, the absence of the appellant at such hearings does not violate his right in terms of section 35(3)(e) of the Constitution. Appeal hearings in the absence of the appellant are in any event a long-established practice.

4.1.3 Oral argument

Turning to the orality issue, it has been stated by the Constitutional Court in *Rens*³⁰⁵ and *Twala*³⁰⁶ that oral argument is not required and that the absence of oral argument does not mean that the procedure is unfair or falls short of the right to appeal. By implication the Court thus found that a right to oral argument at appeal stage does not exist. The lack of oral argument, save in appropriate cases, does not *per se* render the trial unfair.³⁰⁷ Other legal systems allow appeals to be disposed of without oral argument. The courts are empowered to regulate their own processes. A judgment in an appeal hearing is however made public.³⁰⁸ The right to appeal against a decision of the High Court to the SCA provides a further guarantee for the right to a fair trial.



4.1.4 Legal representation

Although a right to legal representation during appeal proceedings is also not expressly enumerated in the Constitution, having regard to international and foreign law and Constitutional Court jurisprudence, the appellant's ability to overcome the procedural hurdles in effectively exercising the right conferred by section 35(3)(o) of the Constitution may in appropriate cases necessitate the appointment of a lawyer. The effective exercise of the appellant's right to appeal is closely tied to his or her ability to surmount the procedural obstacles.

³⁰⁵ *Supra.*

³⁰⁶ *Supra.*

³⁰⁷ See *S v Rens (supra)*.

³⁰⁸ Judgments are public documents.

4.1.5 Reappraisal mechanism

Having determined that there is no constitutional right to a public appeal hearing, to be present or to oral argument, and that adequate provision has been made for legal representation, what remains is to ascertain whether the reappraisal mechanism, pertaining to the appeal hearing, introduced by the CPAA of 2003 is procedurally unfair or falls short of the right to appeal as set out in section 35(3)(o) of the Constitution.

For the provisions of the CPAA of 2003 to pass constitutional muster the factors mentioned in the *Steyn* judgment must be satisfactorily addressed by the new provisions.³⁰⁹ Is the procedure in terms of the new provisions systematic and is the process regulated? The bottom line is whether the procedure in terms of the new provisions is “a reasonable procedure for correcting errors that may have occurred at the trial stage”,³¹⁰ or whether the latitude extended might lead to results incompatible with the purpose and object of the Constitution.

In *Steyn*³¹¹ the Constitutional Court raised several matters, which may render the reassessment mechanism unfair or does not enable the appellant to effectively exercise his right in terms of section 35(3)(o). To neutralise the *Steyn* heptad of impediments the Legislature incorporated safeguards into the CPAA of 2003.

Although section 309(3A) is peremptory, the Legislature has added a proviso, which will ensure fair adjudication. The section concludes with a rider, which gives it flexibility: "unless the Court is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the Court regarding the appeal". It is respectfully submitted that the Court still regulates its own process.

The CPAA of 2003 provides a fair and constitutionally adequate reappraisal mechanism. It is submitted that the court of appeal is not obliged to dispose of the appeal in all cases in chambers and on written argument only. Though a restrictive

³⁰⁹ Of the CPAA of 2003.

³¹⁰ At para. 23.

³¹¹ *Supra*.

appeal procedure, it is argued that the envisaged reassessment mechanism, having regard to the rider, lends itself to an adequate reappraisal and the making of an informed decision in chambers by the court of appeal. The court still maintains judicial control³¹² over the proceedings.

Provision is made for the submission of the full record of the trial before the judges considering the petition. This significantly reduces the risk of an error that may lead to an injustice. The process is now also regulated well.

It is contended that the provisions in question do not constitute an infringement of the appellant's right to a fair trial. The measures instituted by the CPAA of 2003 do not constitute insuperable hurdles to the appellant for the reasons as set out hereunder. On perusal of the cases cited above it seems that the basic underlying concerns of the Constitutional Court are the status of the Magistrates'³¹³ Court and difficulties facing the unrepresented appellant in exercising his or her constitutional rights. The other reservations the court expressed flows from these two basic problems.



Confidence in the competence of magistrates to conduct fair trials has been unequivocally expressed by Chaskalson CJ in *Van Rooyen and Others v The State and Others (General Council of the Bar Intervening)*.³¹⁴ The distinction drawn in *Steyn*³¹⁵ between the standing of the Magistrates' Court and the High Court and the greater risk of error and consequent failure of justice in the Magistrates' Court is thus rendered nugatory. It is contended that the fact that magistrates are entrusted with the responsibility of conducting the main trial in accordance with the notion of a fair trial,³¹⁶ there is no cogent reason why they should not be endowed with the power to perform a screening or sifting function by way of applications for leave to appeal.³¹⁷

Pro se appellants will now, in terms of the CPAA of 2003, be better informed. The magistrate sentencing an "unrepresented and certain other accused"³¹⁸ must explain

³¹² And as such it can still fulfil its duty to protect the accused's constitutional rights.

³¹³ The competency of magistrates and the greater risk of error.

³¹⁴ *Supra.*

³¹⁵ *Supra.*

³¹⁶ Subject to possible appeal or review by a higher court.

³¹⁷ Again subject to a petition to the Judge-President or a possible appeal to the SCA.

³¹⁸ It is unsure what is meant by the phrase "certain other accused".

certain aspects to such accused.”³¹⁹ It is suggested that the explanation must capacitate the appellant to make an informed decision. The magistrate must explain the following to the accused, i e, (1) his or her rights in respect of appeal, (2) legal representation, and (3) the correct procedures to give effect to these rights.³²⁰

If the sentence imposed is subject to automatic review³²¹, the sentencing magistrate must furthermore, explain to the accused that in the event of him or her exercising his or her right of appeal “the provisions pertaining to such review ... shall: (1) be suspended; and (2) “cease to apply once judgment in the appeal has been given.”³²²

It is contended that should an accused intimates that he or she wishes to appeal against the conviction and/or sentence, the sentencing magistrate must postpone³²³ the matter to a fixed date for the accused to obtain the services of a legal representative, if he so wishes, to bring the application on his or her behalf.

In the event of an application for leave to appeal being refused, the sentencing magistrate must inform the unrepresented unsuccessful applicant of the possibility of a petition to the Judge President, rights to legal representation and the correct procedures to effectively exercise these rights.³²⁴ The CPA does not explicitly impose an obligation on the presiding magistrate to do more than just inform³²⁵ the accused of his or her rights if leave to appeal is refused. It is submitted that the magistrate must in this instance also postpone the matter, if necessary, for the accused to obtain legal representation. In this way the magistrate ensures that the accused is afforded an opportunity to obtain legal representation to lodge a petition and hence that his or her right to a fair trial is not infringed in this respect.

³¹⁹ Section 309D of the CPA.

³²⁰ Section 309D (1) (a) of the CPA.

³²¹ Section 302 (1) (a) of the CPA.

³²² Section 302 (1) (b) of the CPA.

³²³ If necessary.

³²⁴ Section 309D (2) of the CPA.

³²⁵ In respect of a possible petition. In this regard section 309D (3) of the CPA reads: “If an unrepresented accused has been convicted and sentenced” to a wholly unsuspending term of imprisonment or a sentence “which in view of the presiding officer may lead to substantial injustice for the accused, and he or she indicates to the presiding officer his or her intention to apply for leave to appeal ... or for leave (*sic*) to petition ... the presiding officer must refer the accused to the Legal Aid Board ... for the purpose of allowing him or her an opportunity to request legal representation to assist such accused in his or her application.”

Section 309B³²⁶ distinguishes between District Courts and Regional Courts³²⁷. In the event of the application being heard by a regional magistrate, other than the trial magistrate, and if the applicant had been defended during the trial, the Clerk of the Court need only submit a copy of the judgment, including the reasons for conviction and sentence, to the regional magistrate hearing the application. It is not necessary to submit a copy of the full record of the proceedings, as is the requirement with respect to applications for leave to appeal in the district court.³²⁸ The regional magistrate “may, if he or she deems it necessary in order to decide the application, request the full record of the proceedings before the trial magistrate.”³²⁹

On the application for leave to appeal succeeding, the Clerk of the Court must forward “copies of the record and of all relevant documents to the Registrar of the High Court concerned.” Provision is made for only parts³³⁰ of the record to be transmitted to the Registrar on condition that the DPP and the appellant consent thereto. The High Court may however, despite the agreement between the parties, still “call for the production of the whole record.”³³¹



If the magistrate, hearing the application, refuses it, he or she is obliged to immediately record his or her reasons for such refusal.”³³² This clearly is intended to obviate the need for the Judge President to request reasons from the presiding officer at a later stage and to ensure that adequate information is placed before the Judge President in the case of a petition.

³²⁶ Of the CPA.

³²⁷ The Magistrates’ Court (or lower court) comprises of what is referred to as the District Court and the Regional Court. The District Court has jurisdiction in respect of a specific magisterial district. The Regional Court has jurisdiction in respect of a specific regional division. A regional division consists of a number of district courts. District and Regional Courts also differ in jurisdiction regarding crimes they hear and their penal jurisdiction. Regional divisions hear more serious crimes and are empowered to impose heavier penalties. Magistrates presiding in the Regional Court are called regional magistrates.

³²⁸ Section 309B (2) (b) of the CPA.

³²⁹ Section 309B (2) (c) of the CPA.

³³⁰ Such parts as the parties, the DPP and the appellant, agrees upon.

³³¹ Section 309B (4) (a) of the CPA.

³³² Section 309B (4) (b) of the CPA.

The possibility of an appeal to the SCA or Constitutional Court is a further guarantee of the right to a fair trial. Steytler³³³ opines as follows: “One level of appeal or review should be sufficient to ensure that an accused has indeed received a fair trial.”³³⁴

The main thrust of the Constitutional Court’s criticism in respect of applications for leave to appeal and petitions was aimed at the risk of worthy appeals being stifled or an injustice ensuing in the case of unrepresented accused. Cases where the accused is defended seems not to present any problems regarding the requirement of leave to appeal. With the Public Defender system in full operation few accused should still be unrepresented, especially in appeal proceedings.³³⁵ The Act enjoins the magistrate to, in the instances referred to in paragraphs (a) and (b) of subsections (3) of section 309D, refer the unrepresented accused to the Legal Aid Board. In all other instances the magistrate must fully explain the accused’s rights regarding an appeal, legal representation and the correct procedures to enforce those rights to the accused.

As highlighted above, the duties imposed on the magistrate provides a guarantee or safeguard. The magistrate is required to inform, guide, and assist the accused. Presiding officers are not mere umpires in an adversarial system, but must see to it that justice is done,³³⁶ and that the accused receives a fair trial. The magistrate’s compliance with his duties reduces “the risk of a possible failure of justice.”

A further safeguard against a violation of the accused’s right to a fair trial, in particular the right to appeal, is the role of the public prosecutor. It is expected of the public prosecutor, an officer of the court, to place all the relevant facts before the court, assist the court to come to the correct conclusion, be conscious of the “justness

³³³ *Supra.*

³³⁴ At 497.

³³⁵ *Vide* section 309D (3) (b) of the CPAA.

³³⁶ See *S v Gabaatholwe and Another* 2003 (1) SACR 313 (SCA) where Heher AJA said at 316I-J: “The role of a judicial officer in a criminal trial as an administrator of justice, open-minded, impartial and fair in fact and in demeanour (*R v Hepworth* 1928 AD 265 at 277; *S v Rall* 1982 (1) SA 828 (A) at 831A - 832H;..” Curlewis JA said in *Hepworth (supra)* at 277: “By the words “just decision of the case” I understand the Legislature to mean to do justice as between the prosecution and the accused. A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge or an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.”

of judicial proceedings” and to “ensure that justice is done.” A public prosecutor performing his function with firmness, fairness and cognisant of his special position as delineated above and as a guardian of the constitution is an indispensable pillar on which the right to a fair trial rests. The courts when considering the constitutionality of legislation unfortunately ignored the role of the public prosecutor in ensuring a just result and the protection of an accused’s constitutional rights.

Even in the instances of the unrepresented accused presenting a poorly formulated application, the roles of the magistrate and public prosecutor should ensure that the accused’s right to appeal is properly exercised and considered. No cogent reasons exist to harbour any apprehension that the magistrate might not be objective, not be able to apply the principles pertaining to applications for leave to appeal³³⁷ or be able to disabuse his mind of the fact that he has himself found the State’s case to be proved beyond a reasonable doubt.

The concerns regarding the “paucity of information”³³⁸ that is submitted to the Judge President by way of a petition, have now been addressed. The Clerk of the Court is, on receipt of a notice to petition, compelled to forward the record of the main trial, the record of the application for leave to appeal and the magistrate’s reason for refusal of the application. A further safeguard is that the judge(s) may in “exceptional circumstances” order that the petition as a whole or part thereof be argued before them. Having said this, the spotlight will now be shifted to the procedure after leave of appeal has been granted and whether the provisions of the CPAA of 2003 regulating the proceedings accords with the Constitution.

As has been indicated above, the instances where an appellant will have to prosecute his appeal in person should be far and few in between. The provisions of the CPAA of 2003 compel the magistrate to fully explain his or her constitutional rights pertaining to appeal to the accused. Should the magistrate impose a term of imprisonment or a sentence “which in his view may lead to a substantial injustice” and the accused intimates his intention to appeal, the magistrate is obliged to immediately refer the accused to the Legal Aid Board.

³³⁷ Including an application for leave to lead further evidence.
³³⁸ See *S v Steyn (supra)* at 33A para 11.

As long as the appellant is made fully aware of his rights of appeal and is afforded sufficient opportunity to exercise those rights, in particular the right to legal representation, the inability to formulate and draft proper heads of argument³³⁹ of the appellant who by choice prosecutes his appeal in person should not render the trial unfair. The doors of the High Court are still open. It is in any event suggested that in such a situation the appeal hearing should proceed in the conventional way. That is, the appeal process should include written and oral argument in open court. In the case of the unrepresented appellant the interests of justice and the dictates of the fair trial notion may well require the accused's presence and oral argument in open court.³⁴⁰ This should provide an adequate reassessment of the main trial.

It is propounded that the reappraisal mechanism³⁴¹ instituted by the CPAA of 2003 ensures that the defended appellant's interests are put forward adequately and will find protection.

The fact that the higher courts, by way of appeals and review, continually exercise control over criminal proceedings ensures the elimination of errors and prevents the violation of an appellant's fair trial-right. Multiple procedural safety-nets underlay each step of the appeal process.

In conclusion it is observed that having regard to the matter of *Van Rooyen and Others v The State and Others (General Council of the Bar Intervening)*,³⁴² the fact that every appellant is now in a position to obtain legal representation (in the case of the indigent appellant, legal representation at State expense), the role of the magistrate and public prosecutor and the safeguards that have been put into place should bring the proceedings with regard to the requirement of leave to appeal and the further prosecution of appeals from the Magistrates' Court, on the same level as the High Court.³⁴³

³³⁹ As indicated above, the most rudimentary form of notice of appeal and/or written argument by unrepresented appellants, is accepted by the Courts.

³⁴⁰ See section 309(3A) of the CPA and paras. 39 and 44.

³⁴¹ Be it in chambers or in open court.

³⁴² *Supra*.

³⁴³ See *Rens (supra)* and *Twala (supra)*.

A question that arises at this juncture, is whether the fact that an accused who by his own choice conducts his own defence and does so poorly, but is assisted by the magistrate³⁴⁴, per se, render the trial unfair. In the same vein, can it be said that an appellant, who by choice, prosecutes his appeal himself and is unable to properly formulate a notice of appeal and or compile written argument, would not receive a fair trial? It is suggested it does not.

The new provisions are intended to allay these concerns. It is argued that the new provisions satisfactorily address the concerns mentioned in the *Steyn* case.

It is submitted that even if the new appeal procedure constitutes a limitation of the “right” of appeal as entrenched in section 35 (3)(o), such limitation is justified in terms of the Constitution.³⁴⁵ It is submitted that the factors mentioned hereunder constitute a justification of the limitation and, in addition, constitute exceptional circumstances justifying a departure from the open court procedure as well. It is contended that the provisions under discussion are reasonable legislative measures to ensure the accessibility and effectiveness of the courts. It is trite law that a right enumerated in the Bill of Rights does not exist in a vacuum,³⁴⁶ but should be determined in context.

³⁴⁴ Vide: *Hlantlala and Others v Dyanti NO and Another* 1999 (2) SACR 541 (SCA), per Mpati AJA at 547C-D: “They never put their defence to the witnesses and were never advised to do so by the magistrate, who was required to assist them in formulating their questions, clarifying the issues and properly putting their defence to the State witnesses. (*S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO and Another* 1989 (3) SA 368 (E) at 378D - E and the cases there cited.)”

³⁴⁵ See section 36.

³⁴⁶ “Fairness can never be determined in a vacuum. The fair trial approach with appropriate contextual emphasis is the only realistic and practical route to achieve the fair approach to the silence of the accused desired by the concurrence. As Madlanga AJ, 137 in a unanimous judgment of this Court, said: ‘In determining what is fair, the context or prevailing circumstances are of primary importance - there is no such thing as fairness in a vacuum. By “context” I am referring to such prevailing facts and circumstances as may have a bearing on the content given to a constitutional right. Examples of such facts and circumstances might be socio-economic, political, financial, as well as other resource-related considerations. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* Ackermann J said: “(I)t is salutary to bear in mind that the problem cannot be resolved in the abstract but must be confronted in the context of South African conditions and resources - political, social, economic and human. . . . One appreciates the danger of relativising criminal justice, but it would also be dangerous not to contextualise it.”. Per Yacoob J in *S v Thebus and Another* 2003 (6) SA 505 (CC) at 554I-555C.

In order to accord with the Constitution the provisions of the CPAA of 2003 should not limit any of the rights enshrined in the Bill of Rights or if such provisions constitute a limitation of those rights, the limitation must be justifiable. A balance must be struck between the measures to ensure accessibility and effectiveness of the courts and the dictates of a fair trial, in general, and the right to appeal to a higher court, in particular.

4.2 **Justification**

4.2.1 The limitation clause

The fundamental rights contained in the Bill of Rights are not absolute and may be restricted by the provisions of the general limitation clause.³⁴⁷ The limitation clause found in section 36 of the Constitution reads as follows: “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom³⁴⁸, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”³⁴⁹

4.2.2 Principles

As has been restated in *S v Steyn*³⁵⁰ section 36 involves a balancing process based on the principle of proportionality.³⁵¹ Reasonableness must be assessed on a case-by-case basis.

³⁴⁷ Section 36 of the Constitution.

³⁴⁸ The proportionality test.

³⁴⁹ Cf *S v Makwanyane* 1995 (3) SA 391 (CC) at para 104.

³⁵⁰ *Supra*.

³⁵¹ At 40E-F para 30. See also the following cases referred to by the Court: *S v Makwanyane and Another* 1995 (2) SACR 1 (CC); 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para [104]. See also *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 86 - 8; *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC); 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para [68]; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (1) SACR 414 (CC); 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para. 33.

4.2.3 Nature of the right

The Constitution confers, *inter alia*, the right to a fair trial,³⁵² the right of appeal,³⁵³ the right to a public trial,³⁵⁴ right to be present when being tried,³⁵⁵ and the right to legal representation³⁵⁶ on an accused. As submitted above, the appellant does neither have a constitutional right to public appeal proceedings nor a constitutional right to be present at appeal proceedings.³⁵⁷ Similarly, the accused does not have a constitutional right to oral argument on appeal.³⁵⁸ The only rights, as far as appeal proceedings are concerned, that might be infringed excessively are thus the right to a fair trial and the right to appeal. These rights play a cardinal role in the proper administration of justice.

4.2.4 Importance and the purpose of the limitation

Section 309(3A)³⁵⁹ is, intended to put a procedure in place to prevent the clogging³⁶⁰ of the appeal rolls. The provisions of the CPAA of 2003 seek not only to reduce overburdened court rolls, but also to facilitate the speedy disposal of meritorious appeals. If measures are not employed to eliminate meritless appeals, justice might well be delayed in respect of worthy appeals. If the provisions of the CPAA of 2003 limit the appellant's right to appeal, it is propounded that the benefits³⁶¹ which the CPAA of 2003 seeks to achieve weigh more than the limited infringement of the right. It is submitted that in the overall constitutional scheme the proper administration of justice, the appellant's right to a speedy trial (encompassing the appellant's "right" to have their appeals disposed of speedily) constitutes a compelling reason³⁶² to justify the limitation of the right to appeal and "most people would regard" the purpose as "particularly important".³⁶³ The provisions of the

³⁵² Section 35 (3) (o) of the Constitution.

³⁵³ Section 35 (3).

³⁵⁴ Section 35 (3) (c).

³⁵⁵ Section 35 (3) (e).

³⁵⁶ Section 35 (3) (f).

³⁵⁷ *S v Pennington* (supra).

³⁵⁸ *S v Rens en S v Twala* (supra).

³⁵⁹ Of the CPA.

³⁶⁰ By meritless and vexatious appeals.

³⁶¹ Including the proper administration of justice.

³⁶² Cf. note 75.

³⁶³ De Waal *et al The Bill of Rights Handbook* (4ed) at 145.

CPTA of 2003 is intended, in the broader sense, to reform the case management procedure for criminal appeals and it stands to reason that this purpose is compellingly important.

There is no *numerus clausus* of factors justifying the limitation of the fair trial³⁶⁴ right. The Constitutional Court in *S v Steyn*³⁶⁵ provided certain examples, namely, the clogging of the appeal rolls, the impact of unmeritorious appeals, and the existence of any resource-related problems or other relevant considerations.³⁶⁶ To these can be added vexatious litigation, the prevention of an abuse of the process and avoidance of delays³⁶⁷ in disposing of meritorious appeals. Delays in hearing meritorious appeals result in a concomitant delay in releasing the innocent.

It is notorious that the number of appeals against conviction and sentence has increased enormously in recent times. It is submitted that a large number of the appeals are without merit and not only clog the appeal rolls, but creates serious administrative problems. It is argued that the new provision also prevents “frivolous and vexatious”³⁶⁸ appeals from reaching the stage of oral argument in an open court and goes a long way in ensuring the speedy disposal of meritorious appeals.

The requirement that a person who wishes to appeal against an order of the lower court must first apply for leave to appeal, serves a useful and necessary purpose of screening appeals. It is essential that meritless appeals, which may clog the appeal rolls and bring extra pressure to bear on already limited resources, be eliminated. When the principal goal, that is the elimination of manifestly ill-founded appeals, is attained a concomitant positive spin-off is that cases worthy of appeal can be disposed of sooner. Reasons of expediency do not play a role in this instance.

It stands to reason that a significant number of appeals would be winnowed out by the leave requirement.

³⁶⁴ Bearing in mind that *in casu* the issue is limited to the the “component” or “facet” of the right to a fair trial, namely, the right of appeal.

³⁶⁵ *Supra*.

³⁶⁶ At 41 para.32.

³⁶⁷ In the English criminal justice system being referred to as a “process aim”.

³⁶⁸ Archbold *Criminal Pleading Evidence & Practise* (41 ed) (Sweet and Maxwell) at 786.

4.2.5 Nature and extent of the infringement

It is submitted that the right of appeal to or review by a higher court is a secondary right to the right to a fair trial. The right of appeal to or review by a higher court is one of the listed rights of a sentenced person, ensuring a fair trial. It is contended that the enforcement of a constituent right or minimum guarantee involves proceedings that are conducive to the due process or fair trial requirement and do not necessarily involve the simultaneous application of all the other constituent rights.

Does the infringement violate the right of appeal and/or the right to a fair trial more than is reasonable for achieving its purpose? Does it follow that the trial is unfair because the public may be excluded; the appellant may be prevented from attending the appeal hearing and be precluded from delivering oral argument? It is submitted that the appellant's access to the higher courts is infringed to a very limited extent.

It is a notorious fact that the number of appellants who argue their appeals in person is negligible. It is submitted that in view of the insignificant number of appellants who argue their appeals in person and, having regard to the judgments, the large number of manifestly ill-founded appeals, the right is infringed to a very limited extent.

It is further submitted that the infringement, with regard to open court proceedings and taking into account the realities, is of no consequence.³⁶⁹ Bearing in mind the tenet that justice must be seen to be done; it is argued that disposing of appeals in chambers does not negate the said principle. The judgment will in any event be public and be brought to the attention of the appellant.

Lastly, but not the least important consideration, is that the provision obliging courts of appeal to dispose of appeals in chambers and on written submissions only, does not preclude the judges of appeal from hearing oral argument in open court in appropriate cases. The CPAA of 2003 has not introduced a blanket exclusion of oral argument on appeal. The judges have control over the process.

³⁶⁹ It is a fact that during the majority of appeal hearings in the High Courts not a single member of the public attends court. Furthermore a great number of appeals, especially appeals against conviction following on a plea of guilty, and appeals against sentence are without merit.

4.2.6 Relationship between the limitation and its purpose

It is submitted that the purpose of the provisions of the CPAA of 2003 far outweighs the prejudice, if any, as a result of the minor infringement. It is envisaged that in terms of the provisions of the CPAA of 2003 a great number of appeals would be disposed of expeditiously. Meritorious appeals may also be disposed of in this way. That would enable the courts of appeal to finalize more appeals and bringing an end to the uncertainty hanging over the appellant's³⁷⁰ head in respect of unmeritorious appeals and the further incarceration and/or prejudice in the case of meritorious appeals. The aim is to ensure that the appellants do not remain for too long in a state of uncertainty about their fate. The provisions of the CPAA of 2003 provide impetus for the smooth running of the "wheels of justice", which in itself is a worthy or compelling cause. The provisions free the judges to deal more with arguable appeals in the conventional way. The enforcement of the right to a fair trial demands human and other resources. Disposing of appeals in chambers and on written argument only will undoubtedly contribute to the reduction of the workload.

It is further contended that the provisions under discussion are reasonable legislative measures to ensure accessibility and effectiveness of the courts and that these measures are consonant with the spirit, purport and objects of the Bill of Rights and give expression to the underlying values of the Constitution.

4.2.7 Less restrictive means to achieve the purpose

No effective alternatives exist to attain the envisaged result. Less restrictive alternative methods can be conjured up, but these alternatives are not feasible or practicable or economically viable. The appointment of more magistrates and judges, expansion of the courts (more court rooms and divisions)³⁷¹ and the appointment of more personnel are possible alternatives, but due to fiscal, manpower and other constraints these alternatives are not attainable.

³⁷⁰ As well as the victim.

³⁷¹ That would necessitate the extension of auxiliary services, viz. judge's clerks, court orderlies, recording (transcription) services, South African Police Service and Correctional Services.

4.3 Conclusion

It is submitted that the limitation does not encroach excessively upon the appellant's right of appeal. The limitation is commensurate with the purpose to prevent the clogging of appeal rolls by eliminating unmeritorious appeals and facilitate the speedy disposal of meritorious appeals. The measures in question are both necessary and reasonable.



6 CHAPTER 6 CONCLUSION

Initially an accused had an unfettered right to appeal against a decision of the Magistrates' Court. That right was not constitutionally entrenched and was later curtailed by the so-called Judge's Certificates. With the coming into being of the constitutional State the right of appeal, as a constituent right of the right to a fair trial, became constitutionally protected. For some time the requirement of a Judge's Certificate remained in the statute book alongside the constitutional right of appeal. As a consequence of the judgment of the Constitutional Court in the case of *S v Ntuli*³⁷² the requirement of a Judge's Certificate became invalid. There was (and still is) however a need to stem the flow of appeals resulting from the unqualified right of appeal. The Legislature introduced a screening mechanism in the form of section 309B of the CPA requiring every accused intending to appeal against a conviction or sentence emanating from a trial in the Magistrates' Court to first apply in the Magistrates' Court for leave to appeal.

In the case of *S v Steyn*, the Constitutional Court measured the provisions of sections 309B and 309C against the constitutionally entrenched right to a fair trial and the right of appeal or review and found the provisions to be wanting. Sections 309B and 309C became invalid. Although the Constitutional Court acknowledged the need for a filtering mechanism, the Court held that the reassessment mechanism was not reasonable and hence could result in the accused's right to a fair trial being violated. The Court listed a number of factors, which may adversely impact upon the unrepresented accused's right to a fair trial.

To remedy the situation the Legislature re-introduced significantly changed provisions regarding the leave to appeal requirement, petition procedures and prescripts for the disposal of appeals in chambers and on written argument only. The new provisions raise a number of constitutional questions. Does the leave requirement constitute a limitation on the right of appeal or the right to a fair trial? If it does infringe those rights, can it be justified in terms of the limitation clause? Mandatory disposal of appeals in chambers by its nature mean that the appellant does

³⁷²

Supra.

not attend the proceedings or present oral argument on appeal. In this regard it is important to establish whether the accused has a constitutional right to be present at the appeal hearing or a constitutional right to deliver oral argument on appeal. Since the appeal must be decided on written argument, the appellant's ability to draft proper notices and the right to legal representation are of fundamental importance. To determine the constitutionality of the new provisions they must be examined for compliance with the requirements enunciated in *S v Steyn*.

Pertaining to appeals emanating from trials in the High Court, the Constitutional Court has already ruled that the leave requirement is in compliance with the Constitution. On the questions of presence and oral argument the Constitutional Court has already held that there is no constitutional right to be present or right to deliver oral argument on appeal. By analogy it is submitted that the same should apply to appeals from the lower courts.

Perusal of international and foreign jurisprudence revealed that the leave requirement is a universally accepted and necessary screening mechanism to eliminate unmeritorious appeal. The disposal of appeals in chambers, and hence the absence of the appellant at appeal proceedings as well as the proscription of oral argument on appeal, is practised in foreign constitutional states.

It is contended that the provisions of the CPAA of 2003 do not infringe upon the appellant's right to a fair trial or the right of appeal. Alternatively, it is contended that the concerns regarding applications for leave to appeal and petition procedures have been adequately addressed in the CPAA of 2003 to bring it within the parameters of what amounts to a fair trial. It is contended that the provisions of the CPAA of 2003 are in conformity with the objects of the Constitution. Even if the relevant provisions constitute an infringement of the accused's constitutional rights, it is submitted that the factors mentioned above, singularly or cumulatively, justify the limitation of the right of appeal insofar as it pertains to the requirement of leave to appeal, open court proceedings and the disposal of appeals on written submissions and without oral argument. The Legislature has succeeded in correcting the deficiencies of the predecessor of the CPAA of 2003.



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