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Enhancing Judicial Excellence

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SAJEI
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TRIBUTE TO AKHO NTANJANA

Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU

Production editor

Well done, Akho!

You have run your race; now, it is for us to take the baton and continue on your well-defined route.

Thank you for being our guiding light.

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Enhancing Judicial Excellence

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ARTICLES

A CLOSER LOOK AT THE REVIEWS AND APPEALS IN SOUTH AFRICA

JUSTICE JOHN ELDRID SMITH
Supreme Court of Appeal

Abstract

Section 33 of the Constitution (read with the Promotion of Administrative Justice Act 3 of 2000) guarantees the right to lawful administrative action that is reasonable, and procedurally fair. It further provides that those whose rights have been adversely affected by administrative action have the right to be given written reasons. Section 6(2) of PAJA codifies the grounds of review of administrative action. Section 6(2) then codifies the grounds upon which a court may review administrative action. Section 8 then deals with remedies which a court may grant once an administration action has been found to be irregular. Review applications are not concerned with merits but procedural fairness whilst appeals are concerned with the merits of a decision taken – was a decision correctly made? The review is concerned with the lawfulness of the decision. This article seeks to clarify certain grey areas of reviews and appeals for Judges in general and the newly appointed or aspirant Judges in particularly.

Keywords: Section 33, review, appeal, administrative action, grounds of review, irregular, principle of legality, remedies, automatic review

I INTRODUCTION

The centrality of the venerable and immutable principle of the rule of law in our jurisprudence is beyond question. And of the four universal building blocks of a system based on the rule of law – namely just laws, accountability, transparent government and accessible and impartial justice – an independent, representative, and well-resourced judiciary is the glue that holds it all together. When exercising judicial review or appeal jurisdiction, judges must be mindful of this exacting responsibility. These are the processes through which courts hold the executive, private individuals, institutions, and even themselves, accountable to the tenets of the rule of law. It is a function that we must perform without fear or favour lest our constitutionally entrenched rights are reduced to meaningless platitudes.

The right to have an adverse verdict or decision reconsidered by a court of appeal or by way of judicial review (subject to the law) is an essential component of the constitutional guarantee for every citizen to have his or her legal dispute resolved in a fair and public hearing before a court of law or, where appropriate, by another independent and impartial tribunal or forum.

The system of judicial review is radically different from that of appeals. When hearing an appeal, the court is concerned with the merits of a decision, the question being: Is it correct? It is often said that the appeal lies not against the reasons but against the order. When subjecting some administrative act or order to judicial review, the court is concerned with its legality, namely: Is it within the limits of the powers granted? On an appeal, the question is: Right or wrong? On review, the question is: Lawful or unlawful? In other words, judicial review concerns not a re-hearing on the merits, as an appeal would, but the judicial scrutiny, for regularity, of administrative decisions, and their setting aside if they are found to conflict with the law.

Another important distinction is that in an appeal the parties are bound by the four corners of the record of proceedings, whereas in a review parties are allowed to lead other evidence, usually by way of affidavit, to support allegations of reviewable irregularities. If a party to an appeal is not satisfied with the record as it stands, it must apply for leave to amend and proper notice of such application must be served on the judicial officer who presided at the trial. The wrong exercise of a discretion by the trial court is a ground for appeal, but denying a party proper and fair opportunity to present its case is a ground for review. However, in certain circumstances, the same ground may be a basis for either a review or an appeal. For example, the absence of jurisdiction has been accepted as an appeal ground where that fact is apparent from the record. Where the conclusions of the court *a quo* is challenged on the basis of contended error in respect of the facts or the law, the correct procedure is an appeal. However, where the real grievance is against the method of arriving at the conclusion, the proper procedure is a review.

II REVIEW PROCEEDINGS

Section 33 of the Constitution[1] provides for a fundamental right to just administrative action comprising of rights to lawful, reasonable, and procedurally fair administrative action. It also entrenches a right to reasons for adverse administrative action. Section 33(3) places an obligation on Parliament to enact legislation to give effect to these rights. That legislation is the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It also provides for remedies, along the lines of section 172 of the Constitution, in the event of a court finding that an administrative action is invalid.

The different forms of review are the PAJA, the principle of legality, special statutory reviews, section 33 of the Constitution and the common law. Direct reliance on section 33 in cases involving the review of administrative action is extremely limited (if it is possible at all) as a result of the principle of subsidiarity, and the direct application of the common law is limited to the review of some exercises of private power created by contract.[2] Special statutory reviews are also limited in nature, being created on an *ad hoc* basis in a relatively small number of statutes.

The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved.

Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens on appeal, the court on review is concerned only with the question of whether the act or order under attack should be allowed to stand or not.

The exercise of all forms of public power is subject to judicial review but only administrative action is reviewable in terms of section 33, read with the legislation that gives effect to it – the PAJA. Other forms of public power, such as executive action, are reviewable in terms of the principle of legality sourced in the rule of law that is now an express founding value of the Constitution.

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1 The Constitution of the Republic of South Africa, 1996.

2 *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645H-646B. See also *National Horseracing Authority of Southern Africa v Naidoo and Another* 2010 (3) SA 182 (N).

The PAJA applies whenever administrative action, as defined in the PAJA, is taken on review.[3] If a form of public power that is either excluded from, or otherwise falls outside that definition is taken on review, the PAJA obviously cannot apply. The pathway to review will be the principle of legality, a 'residual source of review jurisdiction'[4] that has its source in section 1*(c)* of the Constitution, the founding constitutional value of the rule of law.[5]

In practice, however, drawing this distinction between administrative action in terms of the PAJA and other forms of public power is not always easy. As a result, applications for review are often brought in the alternative. And in a number of cases, courts, including the Constitutional Court, have avoided deciding which pathway applies. This has often been done on the basis that it does not matter to the outcome of the case whether the PAJA or the principle of legality applies.

Section 6(2) of PAJA is a codification of the common-law grounds of review and, as no statutory grounds of review apply in relation to legality reviews, the grounds of review that apply, of necessity, are the common-law grounds of review. Apart from the so-called established common-law grounds, which are individually set out, review for residual unreasonableness is dealt with in the PAJA in two sub-sections of section 6(2). First, section 6(2)*(f)*(ii) provides that a court may review administrative action if it is not rationally connected to either 'the purpose for which it was taken'; 'the purpose of the empowering provision'; 'the information before the administrator'; or 'the reasons given for it by the administrator'. Second, section 6(2)*(h)* enables a court to review administrative action if:

> *[T]he exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.*

III IMPACT OF THE REVIEW PATHWAY ON THE ISSUE OF DELAY

The issue of delay is significantly impacted by the species of the review under consideration. Section 7(1) of PAJA provides that proceedings for the review of administrative action:

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[3] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 25.

[4] C Hoexter & G Penfold *Administrative Law in South Africa* 3ed (2021) 157.

[5] Constitution, section 1*(c)*. See in this regard, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 148 (*SARFU).*

> *[M]ust be instituted without unreasonable delay and not later than 180 days from the date of conclusion of any internal remedy or, in the absence of any internal remedy, the date on which the affected person was informed of the adverse administrative action, became aware of it and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.*

Section 9 allows for the condonation of the late institution of review proceedings 'by agreement between the parties or, failing such agreement, by a court … on application by the person or administrator concerned'. Section 9(2) provides that a court may grant condonation in terms of section 9(1) 'where the interests of justice so require'.

The common-law delay rule involves a two-stage enquiry. First, a court must determine whether a delay in the launch of a review application was unreasonable. If not, the enquiry ends there and the court proceeds to the remaining issues. If so, the court proceeds to the second leg or stage of the enquiry. That is whether the unreasonable delay ought to be condoned. If good grounds are put up for condonation, the court proceeds to the remaining issues. If inadequate grounds of condonation are put up, the court will decline to hear the application and dismiss it on account of the undue delay in its institution.[6]

Condonation for delay in terms of the PAJA is dealt with on a similar basis to condonation for delay in terms of the common law. The first enquiry is whether there has been a delay of more than 180 days[7] – as opposed to the more elastic concept of an unreasonable delay in the common-law rule. The second, discretionary, stage follows on a finding that a delay of more than 180 days has occurred. The question is then whether that delay should be condoned.[8] As a result, while there are small differences in detail between the provisions of the PAJA and the common law, the legal principles that apply to their application are, for all intents and purposes, harmonious.

IV LEGALITY REVIEWS

In the *Ronald Bobroff* judgment, the Constitutional Court explained the basis for a rationality review as follows:

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[6] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C-D; *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others* 2001 (4) SA 294 (C) at 306H-307G.

[7] Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000.

[8] *Beweging vir Christelik-Volkseie Onderwys and Others v Minister of Education and Others* [2012] 2 All SA 462 (SCA) para 46.

> *A rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. It is a less stringent test than reasonableness, a standard that comes into play when the fundamental rights under the Bill of Rights are limited by legislation.*[9]

The Constitutional Court decided in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*[10] that when an organ of state, acting in its own interest, brings on review its own decision, it may not do so in terms of the PAJA, even where the action in question is administrative action as defined in the PAJA. The court reasoned that section 33 of the Constitution, and the PAJA giving effect to it, were not passed for the benefit of organs of state, but only for other natural and juristic persons. An organ of state, not being a beneficiary of the right to just administrative action has no choice but to bring its review in terms of the principle of legality. The court founded the basis for the review in the principle of the rule of law.

Recently in *Buffalo City Metropolitan Municipality*,[11] two judges of the Constitutional Court expressed the view that Gijima may have to be revisited. On the basis of a claim of public interest standing in terms of section 38(*d*), the court held, in *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others*,[12] that the Registrar of Medical Schemes and the Council of Medical Schemes were entitled to apply for the review, in terms of the PAJA, of an administrative decision taken by a structure of the Council.

Plasket JA in his unpublished article: 'Administrative law in the courts: judicial review and the harmonisation of the pathways to review' argues that *Compare Wellness* 'demonstrates that it is a real possibility that, in one case, both the PAJA and the principle of legality can apply'. That, in turn, raises the question of how situations like this ought to be managed. The starting point is that it is not an instance of one pathway to review trumping the other: it has to be accepted that both apply; and that the application of both ought to provide one answer. In other words, legal policy ought to be directed at these two pathways to review.

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9 *Ronald Bobroff and Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2014] ZACC 2; 2014 (3) SA 134 (CC); 2014 (4) BCLR 430 (CC) para 7. 3.

10 *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).

11 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) para 112.

12 2021 (1) SA 15 (SCA) para 20.

While this debate will no doubt continue in academic circles, judges will be astute to bear in mind that the law is as declared by the Constitutional Court.

V LEGALITY GROUNDS OF REVIEW

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,[13] Chaskalson P, Goldstone J and O'Regan J held that 'it is a fundamental principle of the rule of law … that the exercise of public power is only legitimate where lawful'[14] and that 'the Legislature and Executive in every sphere [of government] are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'.[15] In *SARFU*,[16] the Constitutional Court held that when the President exercises executive power, he had to comply with prescribed statutory preconditions for the exercise of power, act in good faith and not misconstrue his powers.

In *Pharmaceutical Manufacturers*, Chaskalson P recognised the so-called Shidiack[17] grounds to be part of the principle of legality – grounds of review such as bad faith, improper purpose, and ulterior motive. In addition, he said, the exercise of public power, in order to be valid, could not be arbitrary and so had to be objectively rational.[18] Further in *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*,[19] O'Regan J identified vagueness as a ground of review when she said that it is 'an important principle of the rule of law that rules be stated in a clear and accessible manner'.

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[13] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

[14] Para 56.

[15] Para 58.

[16] Note 5 para 148.

[17] *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651-652.

[18] Para 85.

[19] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 47. See too *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 108. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 246 Chaskalson P, with specific reference to the rule of law, recognised vagueness, which had inexplicably been omitted from the PAJA, as a ground of review in terms of s 6(2)*(i)*. This catch-all section allows for the review of administrative action that is 'otherwise unconstitutional or unlawful'.

VI PROCEDURAL FAIRNESS

Masetlha[20] concerned the validity of the dismissal by the President of the Director-General of the National Intelligence Agency. A central issue was whether the Director-General had been entitled to a hearing prior to the decision being taken. Moseneke DCJ, having found that the taking of the decision was not administrative action in terms of the PAJA but executive action reviewable in terms of the principle of legality, held that was not entitled to a hearing. It would not, he held, 'be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action'.[21] He concluded that procedural fairness was not a requirement for the validity of executive action, and executive functions 'should not be constrained any more than through the principle of legality and rationality'.

In *Albutt*,[22] Ngcobo CJ developed the principle of legality's ground of rationality to impose a duty on the President to hear victims of crimes before deciding whether to grant pardons to the perpetrators of those crimes.

Ngcobo CJ reasoned that in order to decide whether to pardon an offender or not, the President had to first 'establish the facts in accordance with the criteria set out in the special dispensation process, namely, whether the offence was committed with a political motive'. In order to do that, he had to 'hear both the perpetrators and the victims of the crimes in respect of which a pardon is sought'. It was, he said, difficult to understand how the President could 'establish the truth about the motive with which a crime was committed without hearing the victim of that crime'.[23] A process that allowed political parties and their members to be heard but not the victims was at odds with important constitutional values such as accountability, responsiveness and openness, and the purpose of the amnesty process, which was to achieve national unity and reconciliation.[24] He concluded:[25]

> *In these circumstances, the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that*

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[20] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC).

[21] *Masetlha* (note 20 above) para 77.

[22] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[23] *Albutt* (note 22 above) para 70.

[24] *Albutt* (note 22 above) para 71.

[25] *Albutt* (note 22 above) para 72.

> *the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.*

Ngcobo CJ stressed, however, that the default position remained that a person was not entitled to be heard before executive action was taken against him or her: it was only necessary for a person to be heard if, in the context of the legislation that was being implemented, rationality required it.[26] Nugent JA in *Minister of Home Affairs and Others v Scalabrini Centre and Others*[27] made this point when he said that, there was no general duty on executive decision-makers to hear those affected by their decisions, and that '[s]uch a duty will arise only in circumstances where it would be irrational to take the decision' without hearing the other side.

(a) Internal remedies

In certain circumstances, an applicant may have to establish that he or she has exhausted internal remedies. Section 7(2) of PAJA places an obligation on applicants for judicial review of administrative action to exhaust any internal remedy that is provided for prior to instituting review proceedings. It states:

> *(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
>
> *(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
>
> *(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.*

The common-law position is to the opposite effect as the cases cited below attest. In *Bindura Town Management Board v Desai & Co*,[28] Van den Heever JA said that there is no general rule 'that a person who considers that he has suffered a wrong is precluded from having recourse to a Court of law while there is hope of extrajudicial redress'; and in *Golube v Oosthuizen and Another*,[29] De Wet J held that '[t]he mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that

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[26] *Albutt* (note 22 above) paras 74–75.

[27] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) para 72.

[28] *Bindura Town Management Board v Desai & Co* 1953 (1) SA 358 (A) at 362H.

[29] *Golube v Oosthuizen and Another* 1955 (3) SA 1 (T) at 4F-G.

recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies'. In *Welkom Village Management Board v Leteno*,[30] Ogilvie-Thompson AJA held that '[w]henever domestic remedies are provided by the terms of a Statute, regulation, or conventional association, it is necessary to examine the relevant provisions in order to ascertain in how far, if at all, the ordinary jurisdiction of the Courts is thereby excluded or deferred.'

Mapholisa NO v Phetoe NO and Others[31] involved an application to review an adverse administrative decision, brought by the statutory pro-forma prosecutor against the members of a statutory disciplinary tribunal created and empowered by the Health Professions Act 56 of 1974. In the court of first instance, the application was dismissed on the basis that the Act created an internal appeal that the prosecutor had not exhausted, as required by section 7(2) of PAJA. In this way, the issue arose as to which pathway to review applied. If the PAJA applied, section 7(2) would have been fatal to the application as it was common cause that the prosecutor had not exhausted the internal remedy or applied to be exempted from doing so. If, on the other hand, the principle of legality applied, the common law applied, with the result that there was no obligation on the prosecutor to exhaust the internal remedy.

In deciding on the pathway to review, the Supreme Court of Appeal had to consider the basis of the *Gijima* judgment.[32] It had expressly only dealt with an organ of state reviewing its own decision and not, as in this case, an organ of state reviewing the decision of another organ of state. Mali AJA held that despite the Constitutional Court seeking to limit the application of its finding to the former case, the crux of its reasoning was that 'the rights under section 33 of the Constitution are enjoyed by private persons and not organs of state'. That being so, she held, its reasoning applied 'whether an organ of state is reviewing its own decision, as in *Gijima*, or reviewing the decision of another organ of state, as in this case'.[33] The result was that section 7(2) of PAJA did not apply. Instead, the common law applied. As no obligation to exhaust the internal remedy was provided for in the applicable legislation, the *pro forma* prosecutor's failure to do so was not fatal to the application.[34]

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30 *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502D-E. See also *Mahlaela v De Beer NO* 1986 (4) SA 782 (T) at 790F-I; C Plasket 'The exhaustion of internal remedies and section 7(2) of the Promotion of Administrative Justice Act 3 of 2000' (2002) 119 *South African Law Journal* 50 at 51.

31 2023 (3) SA 149 (SCA).

32 *Gijima* (note 10 above).

33 *Mapholisa NO* (note 31 above) para 18.

34 *Mapholisa NO* (note 31 above) paras 21–22.

Mapholisa NO is an instance of the pathway to review having a profound impact on the outcome of a case: if the PAJA had been the pathway, the review could not have succeeded, but if the principle of legality was the correct pathway, the merits of the review could be considered. On the merits, it was found by Mali AJA that the tribunal had committed a reviewable error of law.[35]

(b) Remedies

Section 172(1)*(b)* of the Constitution provides that:

> *(1) When deciding a constitutional matter within its power, a court– … (b) may make any order that is just and equitable including– (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (Gijima)*[36] the nature of the remedial power afforded to a court by s 172(1)*(b)* of the Constitution was described: '…[U]nder section 172(1)*(b)* of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity.' An example of the exercise of that power would be if, after declaring the lease invalid, the high court had set it aside. It could, in addition, have declared it to have been void *ab initio*. It could have preserved the lease if it had a few months to run and there was insufficient time to conclude a new lease for the DOJ. These are but some examples of orders which might follow a declaration of invalidity. The only qualification is that any order made must be just and equitable in the particular circumstances of the matter. Such an order clearly involves the exercise of a discretion.

The usual course in administrative review proceedings is for the court to remit the matter to the administrator for decision. However, where in exceptional circumstances contemplated in terms of section 8(1)*(c)*(ii)*(aa)* of PAJA, the decision would be a foregone conclusion or the administrator has exhibited bias or incompetence to such an extent that it would be unfair to require the applicant to submit to the same authority, the court may substitute its own decision for that of the administrator.[37]

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[35] *Mapholisa NO* (note 31 above) paras 23–25.

[36] *Gijima* (note 10 above).

[37] See *Trencor Construction (Pty) Limited v Industrial Development Corporation of South Africa and Another* 2015 (5) SA 245 (CC).

(c) Principle of ripeness

While a decision involving the exercise of public power may be subject to legality review in the normal course, it does not follow that it may be taken on review. Under the doctrine of ripeness, an exercise of public power may only be taken on review if it is ripe for review. It becomes ripe for review only when prejudice has either resulted from it or is inevitable.

According to Hoexter and Penfold,[38] the idea behind the doctrine is that a complaint should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is thus the opposite of the doctrine of mootness which prevents courts from deciding an issue when it is too late. The appropriate criterion is when 'prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not.'

In *Fereira v Levin NO*,[39] the Constitutional Court endorsed the existence of this doctrine in our law. Kriegler J said that the business of courts is generally retrospective; it deals with situations that have already arisen or problems that have ripened for hearing and that the 'time of this court is too valuable to be frittered away on hypothetical fears of corporate skeletons being uncovered'.

Plasket J applied this doctrine in *Rhino Oil and Gas Exploration South Africa v Normandien Farms*.[40] He held that since Normandien Farms had approached the court before any decisions had been taken or it had suffered any prejudice, its challenge was therefore premature. In *Carte Blanche Marketing v Commissioner*,[41] the High Court applied the doctrine to an application by a taxpayer to review SARS's decision to investigate his affairs. The court concluded that the decision to investigate is not subject to review because it did not meet the requirement of ripeness.

(d) Review of decisions of voluntary associations

The PAJA applies to voluntary associations under restricted circumstances. The definition of administrative action means that the decision must be public in nature or exercised in terms of an empowering provision. Most decisions of voluntary associations do not fall into this category and would accordingly depend on its constitution.

It is established law that the constitution of a voluntary association, together with all the regulations or guidelines promulgated in terms thereof, constitute the agreement between the association's members.[42] The constitution must,

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38 Hoexter & Penfold (note 4 above) 840.

39 *Fereira v Levin NO* 1996(1) SA 984 (CC) at para 199.

40 2019 (6) SA 400 (SCA).

41 *Carte Blanche Marketing v Commissioner SARS* 2020 (6) SA 463 (GJ).

42 *Turner* (note 2 above) at 645C; *Natal Rugby Union v Gould* 1999 (1) SA 432

therefore, be interpreted in accordance with the canons of interpretation applicable to contracts.[43]

VII AUTOMATIC REVIEW OF CRIMINAL CASES

The system of automatic review of certain cases in the magistrate's court is unique to South Africa and goes back a long way. It is intended to protect an undefended accused against unjustified convictions and sentences imposed by magistrates. In terms of section 302 of the Criminal Procedure Act, the following cases go on automatic review:

- Imprisonment exceeding three months, where the magistrate has less than seven years' service as such;
- Imprisonment exceeding six months, where the magistrate has at least seven years' service as such; and
- Fines exceeding the amount determined by the Minister from time to time (currently exceeding R6 000 for a magistrate with less than seven years' experience, and R12 000 for a magistrate with more than seven years' experience).

It is the individual sentence on each count that is taken into consideration when determining whether the sentence exceeds these limits, not the total effect of all the different sentences on each count. Even when the sentence exceeds the limit, there is no automatic review if the accused had a legal adviser.

The automatic review process is also suspended if the accused has noted an appeal, but it revives if the appeal is abandoned and falls away if and when the appeal is disposed of. The clerk of court prepares a record and forwards it to the High Court within one week after the determination of the case. On receipt of the record, the case is considered by a single judge of the High Court. If he is satisfied that proceedings are in accordance with justice, he endorses the record accordingly, whereupon the record is returned to the magistrate's court.

If the judge is not satisfied that proceedings are in accordance with justice, or if he is in doubt, he will refer the case back to the magistrate for reasons. In practice, he often queries a particular point or points. On receipt of the magistrate's reasons, the judge refers the case to a court of the Provincial or Local Division of the High Court to treat as an appeal. In practice two judges then consider the case in chambers and then confirm or alter or set aside

(SCA); [1998] 4 All SA 258 (A) at 440F–G.

[43] *National African Federated Chamber of Commerce and Industry and Others v Mkhize and Others* [2014] ZASCA 177; [2015] 1 All SA 393 (SCA) para 21.

proceedings, giving a written judgment.

If it is clear that the conviction or sentence is not in accordance with justice, and the accused would be prejudiced by a delay in getting the magistrate's reasons, the judge may skip the step of requesting such reasons.

The court of appeal, in considering a review after receipt of the magistrate's reasons (or where this step is skipped), may have the case set down for argument by the Director of Public Prosecutions and counsel. The court may also hear any evidence, although this rarely happens.

(a) Powers of court on automatic review

The powers of the court on review are as follows:

- To confirm, alter or quash the conviction, and where appropriate to substitute the conviction on another alternative charge;
- To confirm, reduce, alter or set aside the sentence or other order;
- To set aside or correct the proceedings;
- To give such judgment or impose such sentence, or give such order, as the magistrate's court ought to have given or imposed;
- To remit the case to the magistrate with instructions to deal with any matter as the High Court may think fit; and
- To make any order suspending the execution of sentence or releasing on bail as seems appropriate.

The review court decides the issue on the basis of real and substantial justice, not necessarily according to strict law. The review court does not have the power to increase the sentence. If the trial court has imposed an invalid sentence, however – if, for example, it has ignored a mandatory sentence – the High Court imposes a proper sentence, which may have the effect of an increase.

The review court may substitute the conviction for a more serious offence but should give notice to the accused before doing so.

When a magistrate has imposed a sentence not automatically reviewable, or where a regional court has imposed any sentence, and it comes to the notice of the High Court or any judge that proceedings were not in accordance with justice, the judge or High Court has the same powers as if it were an automatic review under section 302. This is known as a special review. In practice, judges intervene in this way after the magistrate or regional magistrate in question, or a colleague or superior, or the DPP, discovers that something is wrong and brings it to the judge's attention, or even after the judge gets information from outside: from the press, for example, or from a concerned member of the public.

Prior to the introduction of section 304A, the common law applied, permitting no review under sections 302 to 304 until after sentencing. Now there may be a review before sentence if the magistrate or regional magistrate is of the view that an irregularity has taken place. In terms of section 307, execution of sentence is not suspended by transmission of a case for review, unless the sentencing court releases the accused on bail.

VIII AUTOMATIC REVIEW UNDER THE CHILD JUSTICE ACT 75 OF 2008

Section 85(1)*(a)* of the Child Justice Act 75 of 2008 (CJA) reads as follows: Automatic review in certain cases (1):

> *The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence– (a) Under the age of 16 years; or (b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre, providing a programme provided for in section 191(2)(j) of the Children's Act, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.*

The question of whether section 85 applies in relation to cases from the regional court as well as the district level of the magistrate's court came up in the course of a special review of a case that was referred to the North Gauteng High Court, Pretoria. The regional court magistrate was uncertain as to whether regional court cases should be sent on automatic review. Due to the importance of deciding the proper interpretation of the clause, the Deputy Judge President convened a full court to hear the matter.[44]

The court accordingly concluded that section 85 should be interpreted to provide for automatic review in respect of all children who are sentenced to a period of imprisonment or detention in a child and youth care centre, including children who are sentenced in a regional court.

In *S v LM*,[45] the Western Cape Full Court held that all cases are subject to automatic review in terms of the provisions of section 85 of the CJA where a child was *(a)* below the age of 16 years, or *(b)* 16 years or older and under the

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[44] The case is reported as *S v FM* 2013 (1) SACR 57 (GNP).

[45] *S v LM, Faculty of Law, University of the Western Cape: Children Rights Project of the Community Law Centre and Others as Amici Curiae,* (1) SACR 188 (WCC) 2013. See also A Skelton 'The automatic review of child offenders' sentences' *South African Crime Quarterly* no 44 (June 2013) 37.

age of 18 years, if the sentence to imprisonment was not wholly suspended, or to detention in a child and youth care centre, or *(c)* if sentenced to a period of imprisonment after a suspended sentence was put into operation. This would be irrespective of: (i) the duration of the sentence or the length of time the judicial officer had held the rank of magistrate; or (ii) whether the child was legally represented; or (iii) whether the child was sentenced by a regional court. The judgment also made it clear that section 302 of the CPA does not apply to child offenders.

IX APPEALS

(a) Applications for leave to appeal

The first challenging aspect regarding appeals that judges are required to deal with is when a presiding officer is called upon to grant leave to appeal against his or her judgment or that of a lower court, where leave to appeal has been refused. Section 17 of the Superior Courts Act provides that such leave may only be granted where the judge is of the opinion that the appeal would have a reasonable prospect of success; or there is some compelling reason why the appeal should be heard, including conflicting judgments on the matters under consideration. The use of the word 'would' means that the bar has been raised, and the judge must consider dispassionately, whether there are reasonable prospects that another judge would find differently but does not elevate the requirement to one of absolute certainty. In *Mount Chevaux Trust* Bertelsmann J said:

> *It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. What is required of this court is to consider, objectively and dispassionately, whether there are reasonable prospects that another court will find merit in the arguments advanced by the losing party.*[46]

The question as to whether an order is appealable may also arise in certain circumstances. As set out by the Supreme Court of Appeal (SCA) in *Zweni v Minister of Law and Order* it is trite that for an order to be susceptible to appeal, 'the decision must be final in effect and not susceptible to alteration by a court of first instance, it must be definitive of the right of the parties, and it must have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings.'[47] To this, the SCA has held that in determining whether to grant leave to appeal, the courts must consider whether allowing

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[46] *Mount Chevaux Trust [IT 2012/28] v Tina Goosen and 18 Others* Case No. LCC14/2014.

[47] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

the appeal would lead to piecemeal adjudication and prolong the litigation leading to the wasteful use of judicial resources.

An interim order *prima facie* fails on all grounds to satisfy the test set out in *Zweni*.[48] However, the court in the *Zweni*, rightly considered further the decision in *National Treasury v Opposition to Urban Tolling Alliance*[49] where the Constitutional Court confirmed that the interests of justice are paramount in assessing the appealability of an interim order. The Constitutional Court held that although it is important to consider whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review, it is just as important to consider whether 'the harm that flows from the interim order is serious, immediate, ongoing, and irreparable'.

It is therefore imperative that judges seized with applications for leave to appeal carefully consider the prospects of another court upholding the contended grounds of appeal.

Whether as the judge you decide to grant or refuse leave, provide brief but sufficiently clear reasons so that the appeal court can understand the basis of your decision. If you refuse, it is not necessary to traverse the reasons set out in your main judgment. A brief explanation as to why you think there are no prospects will suffice.

Similarly, if you decide to grant leave, explain perhaps more specifically, in which respects you think there are reasonable prospects and whether leave should be granted on all or limited grounds. Always bear in mind that the overriding principle is that section 19 of the Superior Courts Act is designed to ensure that only deserving appeals are referred to appeal courts. It is also advisable to devise a strategy for considering petitions for leave to appeal from the magistrate's court. A full record of the proceedings, the grounds of appeal or condonation applications will be placed before you and another colleague. I have found it helpful to start with a perfunctory perusal of the appeal grounds set out in the petition judgment; first to determine whether it is against both conviction and sentence, and second, to gain an overall understanding of those grounds. I will then read the judgment. In most cases you would at this point have a very good idea of the prospects and you can then read the record more critically to consider whether the magistrate's findings are supported by the evidence.

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[48] As above.

[49] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) 223 (CC).

(b) Hearing of appeals

Section 19 of that Act deals with the powers of an appeal court. They are: a court may dispose of the appeal without the hearing of further argument; may receive further evidence; remit the case to the court *a quo* with further directives; or confirm amend or set aside the appealed decision.

In our division, and I assume this is the case in most divisions, you will receive the appeal records in good time. At this time, you will probably not yet have heads of argument, but it is important to go through the records to establish whether they are in order. A record that is replete with 'inaudible' is unacceptable and if you are convinced that material parts thereof are incomprehensible as a result, the parties must be instructed to supplement it. In most cases, they will be able to do so in conjunction with the presiding magistrate.

It is a salutary practice to start reading the records as soon as possible and even before you receive the heads of argument. I start with the judgment and appeal grounds and have found that it helps me to read the record in an informed manner.

When you sit in appeals it will be the only occasion when you are required to collaborate with colleagues. It is acceptable to have *prima facie* views. Judges are human beings and it is unavoidable that they will have preliminary views.

It is also important to bear in mind that you are an equal member of the court and do not be intimidated when sitting with a more experienced colleague. It is important to express your views in the post-hearing conference.

In the course of considering an appeal you will likely be required to rule on procedural matters such as condonation for failure to comply with the relevant Unform Court Rules, contended peremption, applications to lead new evidence on appeal or to amend grounds of appeal or pleadings. In respect of these matters, you will be called upon to exercise a discretion which you are bound to do in a fair and judicious manner.

It will, however, serve you well to remain cognisant of the fact that the adjectival law is as important as the substantive law. The court rules are there for a good reason, namely, to ensure fair play between the opposing parties and courts must insist on proper compliance. *Bona fide* non-compliance can only be condoned if good cause is shown. A defaulting party seeking condonation must thus provide a reasonable explanation for the default and show reasonable prospects of success.

Moreover, the centrality of the rules and procedures of adjectival law in driving a civil matter to finality should not be underestimated. It is often the meticulous observance of those procedures by a litigant and the relentless pressure put on the other side to comply with the applicable rules and time limits that play a significant role in the outcome of a civil proceedings. In the

words of the renowned legal historian, Henry Summer Maine: 'substantive law had at first the look of being gradually secreted in the interstices of procedure'.

The following are the legal principles which underpin applications for condonation. The standard for considering an application for condonation is the interests of justice. This will depend on the facts and circumstances of each case. Factors which the court must take into account are, inter alia: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issues to be raised in the contested appeal; and the prospects of success.[50]

The legal principles that inform the admission of new evidence on appeal are as follows: *(a)* in deference to the principle that there should be finality in litigation, a litigant should only be allowed to introduce new evidence on appeal in exceptional circumstances; *(b)* the party seeking to present the new evidence must satisfy the court that he or she could not have procured the evidence earlier by the exercise of reasonable diligence; *(c)* the evidence sought to be introduced must be relevant, substantial, and credible, and it must be shown that its introduction would be conclusive of the dispute between the parties; and *(d)* the delay in introducing the new evidence must not unduly prejudice the other party.[51]

Once all procedural obstacles have been overcome and the appeal is ready for hearing, the presiding judges must remain mindful of the following legal principles applicable to an appeal court's approach to factual and credibility findings by the trial court as enunciated in *Meintjies*:

> *A trial judge who has not disqualified himself by misdirection is in a better position than a court of appeal to make a correct determination of the facts because, being steeped in the atmosphere of the trial, he has had the opportunity of seeing, hearing and appraising the witnesses. He is best able to assess the credibility of the witnesses and the reliability and honesty of their versions. This advantage is not necessarily confined to the fact-finding processes but may also extend to the correct inferences to be drawn from the facts. The result is that the trial judge's findings of fact are presumed to be correct, and it is only in exceptional circumstances that a court of appeal would interfere with this evaluation of oral testimony. It will only do so when, after making due allowance for the trial judges' advantages, it is quite satisfied that the evidence taken as a whole cannot support his conclusions.*[52]

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[50] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC).

[51] *South African Police Services v Myers* (2018) 39 *ILJ* 1965 (LAC).

[52] *Meintjies v Oosthuizen and Another,* ECD 8 November 2003 JOL 12335 (E).

In *S v Hadebe*, the Supreme Court of Appeal stated that: 'In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.' [53]

However, where the reasons for the findings are seriously flawed, a court of appeal should not overemphasise the advantages enjoyed by a trial court and shy away from interfering with those findings, so as to avoid rendering the appellant's right of appeal illusory.[54] In *Makate*,[55] the Constitutional Court, also cautioned that:

> *[T]he deference afforded to a Trial Court's credibility findings must not be overstated. If it emerges from the record that the Trial Court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty bound to overrule factual findings of the Trial Court so as to do justice to the case.*

Subject to the difference regarding the issue of onus the same general principles apply to both civil and criminal appeals.

As the above-cited authorities clearly demonstrate, courts of appeal must guard against deference for the trial court's advantages translating into an approach that would render an accused's right to appeal illusory. This means that the basis for factual findings, including credibility findings by the trial court must be critically analysed.

The starting point is to test whether factual findings are supported by the evidence. If this scrutiny shows that errors have been made in the summary of the evidence, the next step will be to determine whether those errors are material in the context of the evidence. An error regarding the evidence of one witness, may be irrelevant in a case where there are several other witnesses who independently testified to the same effect. However, where it relates to the evidence of a crucial witness it will invariably taint the reasoning and findings. In such a case the court should undertake its own analysis of the evidence and decide on the basis thereof whether it provides a proper basis for the trial court's order, bearing in mind that the appeal is against the order and not the reasons.

In most cases it is possible to explore credibility findings of the trial court by careful analysis of the evidence. Findings such as, for example, that a witness was reluctant to answer questions, appeared ill at ease when confronted with certain aspects of his or her testimony and other comments relating to demeanour, must be critically analysed in the light of the recorded evidence. This is invariably possible even in the case of credibility findings. Findings of

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53 *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645e-f.

54 See *Santam v Biddulph* 2004 (5) 586 (SCA) at para 5.

55 *Makate v Vodacom (Pty) Ltd* 2016 ZACC 13 at para 37.

inconsistencies or contradictions in the testimonies of witnesses must also be subjected to scrutiny based on a careful analysis of the evidence. This process will assist in evaluating findings regarding the significance of inconsistencies or differences between witnesses' testimonies.

Also consider whether the judgment evinces a proper approach regarding the evaluation of the evidence of expert witnesses. The applicable legal principles are as follows:

(a) An expert's opinion represents his or her view based on facts which are either common cause or established. An expert's opinion can accordingly only be accorded weight if the facts upon which that opinion is based are found to exist;[56]

(b) Although experts are, by virtue of their specialised knowledge and skill, better qualified than the presiding judge to draw inferences, the probative value of an expert's testimony must be considered in the same manner as that of any other witness. The court is accordingly not bound by an expert's opinion;

(c) An expert's testimony can only be of value to the court if he or she is found to be neutral and impartial;

(d) An expert must not advocate his or her client's case or selectively examine only the evidence that supports his or her client's case and ignore other relevant evidence;[57]

(e) An expert's bald statement of his or her opinion is of no assistance to the court unless it is uncontroverted. The expert must accordingly fully disclose the premise on which his or her reasoning is based and the process of the reasoning which led to the conclusion.

Where the trial court has made findings in respect of conflicting versions, you will have to test the cogency of the reasoning in the light of principles set out by the Supreme Court of Appeal in *Stellenbosch Farmers Winery Group Ltd*[58] namely that: 'To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities.'

There are also certain important caveats regarding the appeal court's powers to interfere where the trial court has exercised a discretion. In *Trencon Construction*[59] the Constitutional Court, restated the legal principles applicable

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[56] *Coopers (S.A.) (Pty) Ltd v Deutsche Schädlingbekämpfung MBH* 1976 (3) SA 352 (A).

[57] *PriceWaterhouseCoopers Inc v National Potato Co-op Ltd* [2015] 2 All SA 403 (SCA) at paras 98-99.

[58] *Stellenbosch Farmers Winery Group Ltd v Martell Et Cie* 2003 (1) SA 11(SCA) at 14I-15D.

[59] *Trencon Construction v Industrial Development Corporation of South Africa Limited*

to an appellate court's powers to interfere where the court *a quo* has exercised a discretion. They are:

(a) A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply, and any option can never be said to be wrong as each is entirely permissible.

(b) In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in Knox, a discretion in the loose sense – meaning no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.

(c) An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining that matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.

The restriction upon the power of a court to interfere with the exercise of a discretion by the trial court was expressed as follows in *Kekana v Society of Advocates of South Africa*:[60]

> *[A]ppellate interference with the trial Court's discretion is permissible on restricted grounds only. In Beyers v Pretoria Balieraad 1966 (2) SA 593 (A) at 605F-H, Olivier v Die Kaapse Balieraad 1972 (3) SA 485 (A) at 495D-F and Swain v Society of Advocates, Natal 1973 (4) SA 784 (A) at 786H ad fin the grounds for interference are stated in slightly different terms, but the approach is essentially the one adopted in all other cases where a Court of Appeal is called upon to interfere with the exercise of a discretion, viz that interference is limited to cases in which it is found that the trial Court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reason. (See Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) at 781I-782A and the cases referred to there.)*

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and Another (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC).

[60] 1998 (4) SA 649 (SCA); [1998] 3 All SA 577 (A) at 654 E-H.

In *Fine v Society of Advocates of SA (Witwatersrand Division)*[61] it was expressed differently, but to the same effect, when the court said that:

> *[T]he Appeal Court will only interfere with the exercise of this discretion on the grounds of material misdirection or irregularity, or because the decision is one no reasonable Court could make. (See Nyembezi v Law Society, Natal 1981 (2) SA 752 (A)).*

A well-known example is the limited powers of an appeal court to interfere with the trial court's exercise of its sentencing jurisdiction. It is well established that the sentencing court is exercising a discretion in the true sense and a court of appeal will only interfere with a sentence when it is satisfied that the trial court has committed an irregularity, or there is such a striking disparity between the sentence imposed by the trial court and that which the appeal court would have imposed, that the only reasonable inference is that the trial court did not exercise its discretion properly. You will be well advised to bear in mind that these restrictions do not apply to the sentencing court's findings regarding the presence or absence of substantial and compelling circumstances. In that regard, the court has exercised a discretion in the loose sense on the admitted evidence and the court of appeal is at liberty to interfere with the sentence, even in the absence of an irregularity, if it is of the view that the court below has erred. In *S v Tafeni*[62] Binns-Ward J said the following:

> *However, the exercise of a narrow discretion is not involved in the making by a sentencing court of a finding in terms of s 51(3) of the Criminal Law Amendment Act 105 of 1997 that it is, or is not, satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum sentence prescribed in subsections (1) and (2). While the range of relevant circumstances falling to be taken into account in making the finding in the given cases will in the nature of such matters necessarily be disparate and incommensurable, there is not a range of equally permissible options available to the decision maker. The court is either properly satisfied as to the existence of substantial and compelling circumstances, or it is not.*

Referring to a dictum in *Knox D'Arcy Ltd v Jamieson*[63] in respect of the discretionary nature of an interdict supra at 362D-E, Grosskopf JA that:

> *[I]f a Court hearing an application for an interim interdict had a truly discretionary power it would mean that, on identical facts, it could in principle choose whether or not to grant the interdict and that a Court of appeal would not be entitled to*

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61 1983 (4) SA 488 (A) at 494H–495(A).

62 2016 (2) SACR 720.

63 *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A).

> *interfere merely because it disagreed with the lower court's choice … . I doubt whether such a conclusion could be supported on the grounds of principle or policy.*

The learned judge concluded that observation must apply equally to the determination of the existence of substantial and compelling circumstances within the meaning of section 51(3) of the Criminal Law Amendment Act and found that '[n]either principle nor policy could support one court holding that such circumstances existed and another concluding on identical facts that they did not, and a court of appeal not being able to interfere with either's choice'.

The appeal court is nevertheless not precluded from determining whether the trial court exercised its discretion in a fair and judicious manner and the abovementioned approach will also be of assistance. Where the conclusion arrived at has been actuated by bias, or is capricious, there has been no evaluation at all. Where the evaluation proceeds from incorrect facts, or from an incorrect appreciation of the law, or where a wrong principle is applied, the evaluation has gone in the wrong direction. As the court said *S v Pillay*,[64] which related to criminal sentencing in which the same principles apply, '"misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence'.

Misdirection in the enquiry might be revealed by the express language of the reasoning, or by necessary inference from that expressed reasoning, or by an outrageous conclusion. For if the conclusion it came to is one that 'no reasonable court could make'[65] it can be inferred that somewhere along the line it must have misdirected its enquiry, or acted with bias or been capricious, or acted upon a wrong principle, notwithstanding the language in which it expresses its reasoning.[66]

The grounds for review of proceedings of the magistrate's court are set out in section 22 of the Superior Courts Act. They are: absence of jurisdiction on the part of the court; interest on the cause, bias, malice etc; gross regularity in the proceedings (for example, ignoring the *audi alteram partem* rule); and the admission of incompetent or inadmissible evidence or the rejection of admissible evidence.

Section 22 reviews are brought in terms of Uniform Court Rule 53 and are heard by a full court (two judges). In the Eastern Cape these reviews are usually enrolled on the opposed motions roll. Make sure that two copies of

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64 1977 (4) SA 531 (A) at 535B.

65 *Fine v Society of Advocates of SA* (note 61 above) at 494A–495A.

66 *The General Council of the Bar of SA v Geach and Others* (277/12; 273/12; 274/12; 275/12; 278/12; 280/12; 281/12) [2012] ZASCA 175 (29 November 2012).

the record have been filed and in good time ask a colleague to sit with you. You will invariably be expected to write the judgement unless the senior judge offers to do so.

(c) Peremption of appeals

It is perhaps a sign of a growing tendency on the part of practitioners to take for granted that non-compliance with court rules will be condoned as a matter of rote that courts of appeal are now regularly seized with contended peremption and lapsed appeals.

The principles of peremption (abandoning a right of appeal by conduct inconsistent with an intention to exercise that right) were restated in this Constitutional Court judgment and are worth remembering: 'Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against.'

The principle underlying the doctrine is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to approbate and reprobate'.

The Constitutional Court, in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[67], held that principles of peremption also resonate in circumstances where, before a judgment, a litigant's conduct points to the conclusion that they have no intention of participating in the particular proceedings and have resigned themselves to any decision that the court might make. A litigant who has a judgment given against him or her and does not take prompt steps to appeal the judgment does so at his or her own risk, as does a litigant who elects not to participate in the proceedings leading to that judgment.

The doctrine of peremption requires a party who has lost a case to make up its mind. The party cannot equivocate and acquiesce in a judgment or arbitration award and later seek to appeal. In South African law, if the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that they do not intend to attack the adverse judgment, they are held to have acquiesced in it. The conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. The onus of establishing that position is upon the party opposing the appeal.

In *Busamed Health Care (Pty) Ltd v Du Plessis Van Der Nest* SC,[68] one of the unsuccessful applicants, a party to arbitration proceedings, sought to review

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67 [2016] ZACC 38.

68 2020 JDR 1331 (GP).

and set aside the award. The court held that on the facts it was incontrovertible that the applicant had by their own conduct acquiesced in the arbitration award obtained against it by partial participation in the award and the court declined to come to the assistance of a party who initially participated in the terms of the award by demonstrating an intention to abide by the original finding of the arbitration but suddenly changed its mind.

In *Jiyana v Absa Bank Limited*,[69] the parties had concluded a detailed settlement agreement providing for payment of an agreed outstanding amount and providing for the payment terms. The crucial portion of the agreement provided that the defendants (appellants) have confirmed that the judgment against them stands and (they) accept liability to the plaintiff jointly and severally for payment of the claimed amount. They consequently found to have acquiesced in the judgment.

The court held that, by confirming the validity of the judgment and accepting their liability towards the plaintiff pursuant to the judgment, it was not open to the appellants thereafter to impugn it. Not surprisingly the court said that there was no clearer conduct pointing to the abandonment of the right to attack the judgment than that particular clause of the settlement agreement. The appellants clearly resigned themselves to the consequences of the judgment against them and committed themselves to fulfilling its terms.

Parties to any award or judgment who do not timeously exercise their rights to appeal that award but rather conduct themselves in terms of the award or judgment, do so at their own risk of losing the right to appeal.

(d) Powers to interfere with damages awards

Appeal courts must also show restraint and great reluctance to interfere with an award of damages by a trial court. The proper approach was set out in *Road Accident Fund v Guedes*[70] as follows:

(a) Where the amount of damages is a matter of estimation and discretion the appeal court will be slow to interfere and substitute its own decision for that of the trial court;

(b) The appeal court will interfere with the award where there has been a misdirection or irregularity, for example, where the trial court has considered irrelevant evidence or ignored relevant factors or the court was too generous in making a contingency allowance;

(c) Where the appeal court is of the view that no sound basis exists for the award;

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[69] 2020 JDR 0650 (SCA).

[70] 2006 (5) SA 538 (SCA).

(d) Where there is a striking disparity or substantial variation between the appeal court's assessment of damages and the award made by the trial court.

(e) Raising of new legal points and amendments on appeal

Legal points may be raised for the first time on appeal if it is not unfair to the other side and provided that they are covered by the pleadings. In *Alexor Ltd v Richtersveld Community*[71] the Constitutional Court allowed the appellant to raise in that court a contention which it had abandoned in the Supreme Court of Appeal. The court held that they could only be allowed to do so 'if the contention is covered by the pleadings and the evidence and if it involves no unfairness to the other side'. The legal contention must, in other words, raise no new factual issues.

Similarly, the court of appeal may allow amendments to pleadings on appeal, provided that the issues raised have been properly canvassed in the court below.[72] In exceptional cases an amendment introducing issues that have not been properly ventilated in the trial court may be allowed, but in such a case the appeal court will invariably remit the matter to the trial court for hearing of further evidence.

(f) Bail appeals

Another species of appeal that will frequently come before you is bail appeals. Section 65 (4) of the Criminal Procedure Act 51 of 1977 (CPA) provides that:

> *The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.*

The court sitting on an appeal in terms of section 65 of the CPA must undertake its own analysis of the evidence and on the basis thereof decide whether or not the court a quo has made the correct decision regarding the discharge of the onus in terms of section 60(11) of the Act.[73]

Like all other reviews or appeals where the liberty of an appellant is at stake, judges hearing bail appeals are expected to deliver their judgments reasonably soon after hearing the appeal. In certain circumstances, in particular where a judge intends to grant the appellant on bail, it is wise to grant the order and provide reasons later.

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71 2004 (5) SA 460 (CC).

72 See Magistrate's Court Act, s 87*(d)* and Superior Courts Act, s 22.

73 *S v Porthern and Others* 2004 (2) SACR 242 (C).

X CONCLUSION

In conclusion, it is understandably impossible to thoroughly cover all aspects of appeals and reviews in this paper. I have accordingly decided to deal only with those issues, which, in my experience, are likely to require rulings when exercising appeal or review functions. The intention was to demystify and deconstruct these difficult concepts, and hopefully arm you with a conceptual understanding of the legal context in which you will be required to perform these important aspects of your judicial functions.