



the doj & cd

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Attention: Mr Lawrence Bassett

Dear Ms Nonkululeko Sindane

LEGAL OPINION: CRIMINAL PROCEDURE AMENDMENT BILL, 2012

INTRODUCTION

The Bill presented to the JCPS Cabinet Committee was amended and differs from the Criminal Procedure Amendment Bill, 2012 ("the Bill"), which our office gave a provisional certification. The Department of Justice and Constitutional Development ("the Department") advised that at the last minute the Supreme Court of Appeal ("SCA") Judges, requested that the Bill be retrospective to the date of implementation of the Judicial Matters Amendment Act, 2008 (Act No. 66 of 2008), which came into operation in September 2010. The Department has informed that the judges of the SCA are of the view that retrospectivity should be permissible in this case because the SCA Judges are trying to avoid the need to call for the full record in the case of all the petitions that are at the SCA.

Our urgent opinion is requested by the Department of Justice and Constitutional Development on the following matters:

- (a) whether the retrospectivity aspect is constitutional; and
- (b) whether it is in fact constitutional to do away with the full record in the case “if the accused was legally represented at the trial” as set out in subparagraph (i) of the proviso to section 316(10), e.g. what is the situation where the accused has a legal representative who, for some reason, did not give the matter the attention it deserved.

OVERVIEW OF BILL

The aim of the Bill is to amend section 316 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (hereinafter referred to as “the Criminal Procedure Act”), to further regulate applications for condonation, leave to appeal and further evidence and to provide for matters connected therewith.

BACKGROUND

Section 316 of the Criminal Procedure Act

Section 316 of the Criminal Procedure Act provides for applications for condonation, leave to appeal and further evidence in cases of criminal proceedings in superior courts.

Section 316(10) reads as follows:

“When receiving notice of a petition as provided for in subsection (9), the registrar shall forward to the registrar of the Supreme Court of Appeal copies of the—

- (a) application or applications that were refused;*
- (b) the reasons for refusing the application or applications; and*
- (c) the record of the proceedings in the High Court in respect of which the application was refused.”¹*

Section 316(12) reads as follows:

“The judges considering a petition may—

- (a) call for any further information from the judge who refused the application in question, or from the judge who presided at the trial to which the application relates, as the case may be; or*
- (b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them.”²*

Section 316(10) and (12) was substituted by section 16(a) and (b) of Act No. 66 of 2008 and came into operation in September 2010.

¹ Subsection (10) substituted by section 16(a) of Act No. 66 of 2008

² Subsection (12) substituted by section 16(b) of Act No. 66 of 2008

Section 316(10)(c) of the Criminal Procedure Act currently causes the following difficulties:

- (a) The delay caused by having to wait for the record of proceedings result in grave injustice to the appellant, who has to wait for an inordinately long time for the matter to be decided;
- (b) the delay may also result in the appellant being detained in prison, or released on bail, without justification for longer than necessary;
- (c) the costs involved in obtaining the record which may be completely without justification. A record in a criminal appeal would usually be between 3-8 volumes, with the average being 5 volumes. On a calculation of approximately R3 000 per volume, the overall cost per record would be approximately R15 000, and over 6 months the cost of compiling records would be R1,15 million, and R2,25 million per year. In general, only a small percentage of petitions are successful.

The Bill

The Bill aims to enhance access to justice and organisational efficiency by seeking to amend section 316(10) and (12) of the Criminal Procedure Act. In doing so, the Bill intends to restore this section to that which prevailed prior to the amendment in 2008.

The Bill provides four exceptions where the petition by the accused does require a copy of the record of proceedings, such as where the accused was legally represented at the trial. The does not preclude the judges considering the petition to call for a copy of the record of the proceedings or any relevant portion thereof if it was not submitted in terms of subsection 316(10)(c). The Bill affords the judges considering the petition, with the discretion to call for a copy of the record of the proceedings or any relevant portion thereof even in cases where the accused was legally represented at the trial. The purpose for this is to ensure that the constitutional right of appeal to, or review by, a higher court is given effect to.

The Bill provides as follows:

“Amendment of section 316 of Act 51 of 1977, as substituted by section 5 of Act 42 of 2003 and amended by section 16 of Act 66 of 2008

1. Section 316 of the Criminal Procedure Act, 1977, is hereby amended—

(a) by the substitution for subsection (10) of the following subsection:

'(10) When receiving notice of a petition as provided for in subsection (9), the registrar shall forward to the registrar of the Supreme Court of Appeal copies of the—

- (a) application or applications that were refused;
- (b) the reasons for refusing the application or applications; and
- (c) the record of the proceedings in the High Court in respect of which the application was refused[.];

Provided that—

- (i) if the accused was legally represented at the trial; or
 - (ii) if the accused and the prosecuting authority 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 (12)(c), suffice for the purposes of the petition.”; and
- (b) by the substitution for subsection (12) of the following subsection:

- “(12) The judges considering a petition may—
- (a) call for any further information from the judge who refused the application in question, or from the judge who presided at the trial to which the application relates, as the case may be; **[or]**
 - (b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them[.]; or
 - (c) call for a copy of the record of the proceedings or any relevant portion thereof if it was not submitted in terms of subsection (10)(c).”.

The Department has informed that the Bill seeks to address the following challenges arising as a result of the implementation of section 316(10)(c) of the Criminal Procedure Act as referred to above.

The memorandum on the objects of the Bill also points out that—

- “(a) in cases where the appeal is against sentence only it is not necessary to place the entire record at the disposal of the petition judges; and
- (b) the current situation in which the petition cannot be disposed of without the record of proceedings being placed before the petition judges causes substantial delays in the finalisation of petitions even though it is clear from the judgement and the reasons provided by the High Court that the matter may be disposed of without the record of the proceedings.”

The Department has also informed that the procedure prescribed in section 316(10) of the Criminal Procedure Act gives rise to an intolerable situation.

CONSTITUTION

Section 35(3) of the Constitution affords every accused person the right to a fair trial and read as follows:

- “(3) Every accused person has a right to a fair trial, which includes the right—
- ...
 - (d) to have their trial begin and conclude without unreasonable delay;
 - ...

- (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;
- ... ; and
- (o) of appeal to, or review by, a higher court." (underlining our emphasis)

In *Qhinga and Others v S* (CCT 50/10) [2011] ZACC 18; 2011 (9) BCLR 980 (CC), the Constitutional Court considered an application for leave to appeal to the Supreme Court of Appeal against a dismissal of a petition filed by the applicants on the basis that relevant portions of the record of the proceeding in the High Court were not properly considered in the applicants' petition. It was held that the applicants did not have the benefit of a right of appeal or review by a higher court as envisioned in section 35(3)(o) of the Constitution and thus the order made by the Supreme Court of Appeal was dismissed, the order of the Supreme Court of Appeal was set aside, and the matter was remitted to the Supreme Court of Appeal for reconsideration.

We are of the opinion that the proposed amendment in the Bill is consistent with the Constitution because the Bill affords the judge considering the matter with the discretion to call for a copy of the record of the proceedings in a situation where the accused has a legal representative and for some reason, did not give the matter the attention it deserved.

It was reported to us that the amendment Bill was presented to Nugent AJ, of the SCA who agrees with the amendment, but suggested that the amendment be made retrospective to the date when the initial amendment took effect, namely 10 September 2010.

RETROSPECTIVITY

Difference between retroactive and retrospective

The two different concepts that are relevant to our consideration are the following:

- (a) Retroactive: retrospectivity in the strong sense; and
- (b) Retrospective: retrospectivity in the weak sense.

Despite the logic of the distinction between "retrospective" and "retroactive", there is a tendency on the part of the courts and academic writers to merge these principles in their application to a particular statute³. There is a strong presumption that new legislation is not intended to be retroactive⁴, meaning "retroactive legislation" is legislation which invalidates what was previously valid, or vice versa, i.e. which affects transactions completed before

³ *Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (C) at 350-351D per Corbett J

⁴ *S v Mhlungu* 1995 (3) SA 867 (CC) per Kentridge AJ

the new statute came into operation. It is legislation which enacts that 'as at a past date the law shall be taken to have been that which it was not'. A presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g. by invalidating current contracts or impairing existing property rights.

A retroactive statute operates as of a time prior to its enactment⁵ and changes the law from what it was. A retrospective statute operates for the future only but it imposes new results in respect of a past event. It looks backwards and attaches new consequences for the future to an event that took place before the statute was enacted. It changes the law from what it otherwise would be with respect to a prior event.

Test for retroactivity: Legislation invalidates what was previously valid and vice versa⁶. It affects transactions which were already completed before it came into operation and it enacts that as at a past date the law shall be taken to be that which it was not.

Test for retrospectivity: The legislation is prospective but it imposes new results with regard to past events. It attaches new consequences for the future to an event which took place before the legislation was enacted and it creates a new obligation or imposes a new duty in regard to events already past.

BASIS AND RATIONALE FOR PRESUMPTION

The need for accessibility, precision and general application flow from the concept of the rule of law⁷. A person should be able to know of the law, and be able to conform his or her conduct according to the law. Basis of the presumption is elementary considerations of fairness which dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.

RETROSPECTIVITY AND INTERFERENCE WITH VESTED RIGHTS

Retrospectivity and interference with vested rights are two different concepts⁸ and is inappropriate to confuse them. Question of interference with vested rights is a matter separate from the issue of retrospective operation. Joubert JA suggested that a statute that applies prospectively but intends to interfere with vested rights be designated as "mixed prospective statute" rather than retrospective statute⁹. It is not objectionable to mix them, it

⁵ National Director of Public Prosecutions v Carolus and others, 2000 (1) SA 1127 (SCA) para 34-35 Farlam AJA

⁶ Bareki No and Another v Gencor 2006(1) SA 432 (T) De Villiers J

⁷ Mokgoro J in President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) at para [102]

⁸ Adampol (Pty) Ltd v Administrator, Transval, Joubert JA and Hoexter JA

⁹ Boe Bank Limited v Tshwane Metropolitan Municipality, 2005 (4) SA 336 (SCA) at para 14 per brand JA

often lead to same result¹⁰. This, however, is not of great moment, as both canons lead in the same direction¹¹.

WHEN & HOW THE PRESUMPTION APPLIES

In every case, the inquiry must be into the language of the enactment and the purpose and intent of the Legislature which emerges therefrom¹². If ordinary grammatical meaning of the words is apparent, and produces no obvious absurdity, repugnance or inconsistency, inquiry ends there¹³. However strong though the presumption against retrospectivity may be, it is nothing more than an aid in interpretation and must yield to the intention of the legislature as it emerges from any particular statute.

Unless contrary appears either expressly or by necessary implication, it is a presumption of our law that the legislature intends to regulate future matters only¹⁴. Pre-repeal business must generally speaking be dealt with, unless a contrary legislative intention is apparent, as if no repeal had been enacted¹⁵. Where intention is clear, determine extent and scope. Where provision is expressly stated to be retrospective, accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation.

PRESUMPTION IN FAVOUR OF RETROSPECTIVITY

Clarification where there is doubt, i.e., where a subsequent law is merely explanatory or confirmatory; Devenish (interpretation by Legislature). Where a statute deals with procedural matters and where an enactment benefits the subject. Williamson J in Ex parte Christodolides 1959 3 SA 838 (T) 841A wrote:

*"First of all, a Statute which deals with a topic or subjects which has been a matter of some doubt and which is intended to clarify and settle that doubt does operate retrospectively. Secondly, a Statute which is intended to operate for the benefit of a subject is also so interpreted". Retrospectivity will not be afforded to a law merely because it confers 'special favours'*¹⁶.

BEST APPROACH

De Villiers J proceeded by first looking at whether the statute in question was retrospective in the true sense in order to determine whether the presumption against retrospectivity applies in that case¹⁷. Having decided that the legislation is not retrospective in the real

¹⁰ National Iranian Tanker Co v MV Pericles GC1995 1 SA 475 (A) at 483H-J Corbett CJ

¹¹ Cape Town Municipality v F Robb & Co Ltd 1966 (4) SA 345 (C) at 350-351D

¹² Euromarine International of Mauren v The Ship Berg and Others 1986 (2) SA 700 (A) at F 709I-710E

¹³ Thirion J in Kruger v President Insurance Co Ltd, 1994 (2) SA 495 (D) at p503

¹⁴ Transnet Ltd v Ngcezula 1995 (3) SA 538 (A)

¹⁵ Chairman, Board on Tariffs & Trade v Volkswagen of SA (Pty) Ltd 2001 (2) SA 372 (SCA) p380

¹⁶ Van Der Merwe v Mutual & Federal Insurance Co Ltd 1997 (1) SA 78 (C) p82

¹⁷ Bareki No and Another v Gencor Ltd and Others

sense, he then proceeded to consider whether the legislation in question was retrospective in the weak sense and applied the presumption against retrospectivity with regard to the unfairness of the legislation in question.

In our common law there is a presumption against retrospectivity. It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication. This presumption is consistent with the fair trial provisions of the Constitution, and was approved by the Constitutional Court in *Veldman*.¹⁸ By making the amendment of subsections (10) and (12) of section 316, retrospective, will not necessarily interfere with the vested rights of the accused.

In our view, if the Bill is to have retrospective effect, it would enhance the rights of the accused to—

- (a) access to justice and enhancing organisational efficiency.
- (b) a speedy trial (a right enshrined in our Constitution), by avoiding the delay caused by having to wait for the record of the proceedings, which results in grave injustices to appellants, who are, in many cases, detained in prison and have to wait for an inordinately long time for their matters to be finalised.
- (c) a fair trial, by allowing the SCA Judges to decide and conclude matters, which does not necessitate the full record of proceedings.
- (d) savings in costs involved in obtaining the record, which are often completely without justification, especially, for instance, if the appeal is against the sentence only.

CONCLUSION

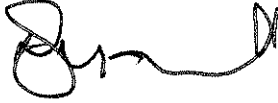
We are of the opinion that the proposed amendment to the Bill is consistent with the Constitution because the Bill affords the judge considering the matter with the discretion to call for a copy of the record of the proceedings in a situation where the accused has a legal representative and for some reason, did not give the matter the attention it deserved.

Retrospectivity is nothing more than an aid in interpretation and must yield to the intention of the legislature as it emerges from any particular statute. Retrospectivity, in this instance, should be permissible because the requirement to submit the full record in all cases is going to fall away and whether it falls away when the Bill is implemented or if it is

¹⁸ *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC) at paras 26-7. See also *Van Vuren v Minister for Correctional Services and Others* [2010] ZACC 17; 2010 (12) BCLR 1233 (CC) at para 52; and *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at paras 37-8.

backdated to September 2010 is not material. The retrospectivity in this instance if clear and precise would be constitutionally sound.

Yours sincerely

A handwritten signature in black ink, appearing to be 'A Small', written in a cursive style.

**A Small
For: CHIEF STATE LAW ADVISER**