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GENERAL MINUTE: 3/2012

TO ALL PUBLIC PROSECUTORS IN THE WESTERN CAPE

**DIRECTIVES FOR PROSECUTIONS IN THE WESTERN CAPE IN TERMS OF THE  
LAW AMENDMENT (SEXUAL OFFENCES AND RELATED MATTERS) ACT, ACT  
32 OF 2007, WITH REGARD TO SECTIONS AFFECTED BY THE FULL BENCH  
DECISION OF DPP: WC VERSUS ARNOLD PRINS**

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## INTRODUCTION

On 11.05.2012 a Full Bench of the Western Cape High Court ruled in the unreported matter, *DPP WC versus Prins* (A523/11), that section 5(1) of Act 32 of 2007 does not disclose a punishable offence. The ruling was based on the legal principle *nullem crimen, nulla poena sine lege* (no crime, no punishment without a law or penal provision).

The *Prins* matter will be appealed to the Supreme Court of Appeal on an urgent basis and Counsel was appointed to attend to the matter. The appeal also includes a request to the Court to deal specifically with the status of partly- heard and finalized cases.

**THE SECTIONS IN ACT 32 OF 2007 WHICH REMAIN UNAFFECTED BY THE PRINS MATTER**

The following sections include penalty clauses and thus are not affected by the Prins matter; sections 3, 4, 17, 18, 19, 20, 23, 24, 25, 26, 38, 45, 46, 47, 48, 50, 52, 54, 55, 71 of Act 32 of 2007 as read with section 55. A full list of these offenses is attached hereto as Annexure A.

However, please note that sections 18, 19, 20(2), 24, 25 and 26(2) can only be utilized if a firearm was used during the commission of the offence.

**THE SECTIONS IN ACT 32 OF 2007 AFFECTED BY THE PRINS MATTER**

The sections which are affected by the Prins matter are sections 5 – 16, 21 and 22 of Act 32 of 2007 and further read with section 55 because it does not contain penalty clauses. A full list of these offenses is attached hereto as Annexure B.

Please note that as discussed supra, sections 18, 19, 20(2), 24, 25, 26(2) are only affected if no firearm was used.

**THE EFFECT OF THE JUDGEMENT**

None of the offences listed in Annexure B may be prosecuted pending the outcome of the Appeal to the Supreme Court of Appeal.

**NEW CASES REGISTERED IN TERMS OF THE AFFECTED SECTIONS OF ACT 32 OF 2007 WHERE THE SOUTH AFRICAN POLICE HAVE NOT YET MADE AN ARREST**

The South African Police must be requested to not arrest any person until a decision by the Supreme Court of Appeal is made on the legal point.

All new dockets must be referred to the relevant Senior Public Prosecutors who must peruse the dockets to see if any other substantial charge(s) can be utilised to substitute the offences listed in Annexure B. If no substitution can occur the Senior Public Prosecutor must retain the docket for decision until clarity is obtained on the legal point. If investigation is outstanding in these dockets, instructions must be given to complete such investigation and upon completion returned to the Senior Public Prosecutor for decision.

**CASES CURRENTLY ENROLLED RELATING TO AFFECTED SECTION OF ACT 32 OF 2007 WHERE THE ACCUSED HAS NOT PLEADED AND THERE ARE NO OTHER SERIOUS CHARGES**

The charges against the accused must be withdrawn, unless a substantive common law offence or other statutory offence covers the criminal act.

**PARTLY HEARD MATTERS RELATED TO AFFECTED SECTIONS OF ACT 32 OF 2007 WHERE THERE ARE NO OTHER SERIOUS CHARGES (RAPE ETC)**

The prosecutor must apply for the matter to be postponed in the interest of justice for at least two (2) months pending the decision by the Supreme Court of Appeal. In motivation for such a postponement the attention of the Court must be drawn to the approach in other divisions of the High Court as set out in the two unreported decisions from the Free State and Kwazulu- Natal High Court where the court reached a different conclusion on the same legal point.

See :

**The State versus Joseph Booï, unreported, Free State High Court, Review Case 14/2010, Cillier J and Hancke J on 12 August 2010**

**The State versus Thokozani Nhloso Mchunu, unreported, Kwazulu- Natal High Court, Case CC168/11P, Rall AJ, 15.9.2011**

○ In terms of the *stare decisis* principle, prosecutions in other jurisdictions will continue as usual.

It must also be emphasized that if the appeal to the Supreme Court of Appeal should succeed on the technicality of this legal point, the accused cannot be prosecuted again, as the acquittal would have been a final judgment.

If the postponement is granted, issues regarding bail and release on warning should be considered on a case to case basis with due regard to the safety of the public.

○ If the presiding officer refuses to grant the postponement, the state must not lead any further evidence on the offenses listed in Annexure B. The presiding officer must then close the State's case. The prosecutor must however, place on record that it is not leading any further evidence on these offenses as a result of the decision given in the Prins matter.

No authorizations to stop prosecutions in these matters will be granted.

**PARTLY HEARD MATTERS RELATED TO AFFECTED SECTIONS OF ACT 32 OF 2007 WHERE THERE ARE OTHER SERIOUS CHARGES (RAPE ETC)**

The trial must continue on the serious charges and no further evidence must be lead with regard to the affected sections.

**HIGH COURT INDICTMENTS**

No accused will be indicted for any of the affected provisions until clarity is obtained with regard to the legal point.

**APPEALS WITH REGARD TO AFFECTED SECTIONS OF ACT 32 OF 2007**

- Application must be made to have the appeal postponed *sine die* in the interest of justice pending the decision by the Supreme Court of Appeal.

The same approach must be taken with regard to matters currently enrolled *supra*.

A register must be kept in respect of all cases affected by this Judgment.

Receipt of this minute must be acknowledged in writing.

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R J DE KOCK

**DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE**