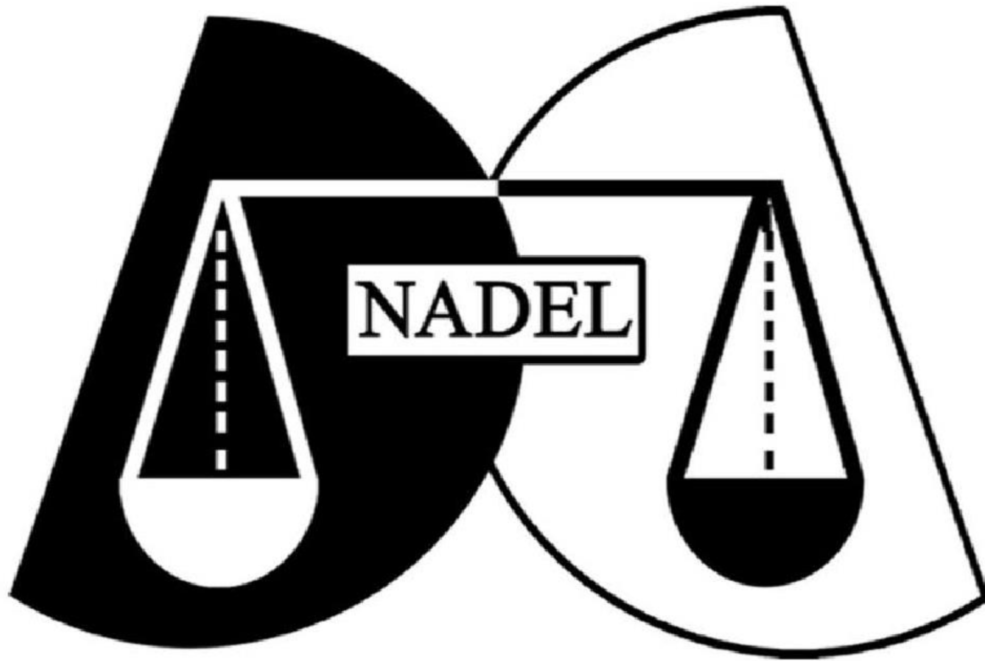
National Association of Democratic Lawyers



Equality & Justice

Manual: Rescissions, Appeals and Reviews

PREPARED IN FEBRUARY 2019

BY LILLA CROUSE

Adjunct Professor, Public Law, Nelson Mandela University
Member of the Eastern Cape Society of Advocates
& the General Council of the Bar Club Chambers
12 Bird Street
Central
Port Elizabeth
TEL: 041 811 6000
EMAIL: lilla.crouse@gmail.com

CONTENTS:

1. Aim of training p3
2. Desired outcomes p3
3. Different options to attack an adverse order p3
4. Rescissions p4
    1. High Court rescissions p4
    2. Magistrates' Court rescissions p7
    3. Some other important considerations about rescissions p8
5. Special entry p9
6. Review p10
7. Appeal p12
    1. Appealability p12
    2. Practical advice before an appeal p13
    3. Leave to appeal p14
    4. Further evidence on appeal p16
    5. Extension of grounds of appeal p16
    6. Petition p17
    7. Condonation p17
    8. Appeal record p17
    9. Heads of Argument p24
    10. Hearing p26
    11. After the judgment p28

AIM OF TRAINING:

This one-day course offers practical know-how for legal practitioners whose client is faced with an adverse order that the client wants overturned. The course aims to enable attendees to gain practical knowledge about appeals, reviews and rescissions, and how to embark on each of these processes. Emphasis is placed on leave to appeal applications and petitions. The aim is to provide sufficient information so that a practitioner will be able to successfully embark on the correct process in the correct court. The aim is further to make practitioners aware of the common pitfalls and provide training in drafting the necessary notices, pleadings, and heads of argument.

DESIRED OUTCOMES:

Practitioners are able to:

- Determine when the correct route to overturn an adverse order or decision is rescission, review/special entry or appeal;
- Distinguish between Rule 31, Rule 42 and common law rescissions;
- Understand when and how to embark on having a special entry made;
- Understand when and how to prepare a review application;
- Understand appealability;
- Understand the leave to appeal process;
- Prepare and obtain an appeal record and lodge same;
- Draft Heads of Argument;
- Know how to prepare for an appeal hearing.

WHAT TO DO WITH AN ADVERSE ORDER THAT NEEDS TO BE ATTACKED:

When a client asks this question, the legal practitioner must decide whether to appeal, to seek a review or a special entry, or to do a rescission application.

As a rule of thumb, an appeal is embarked upon when another court can decide the issues on the record of what happened in court during the initial hearing of the matter. On the other hand, a review or a special entry is requested when the other court must make a decision on something that falls outside the record. A rescission is brought if the adverse order was granted at a time when the complaining party was either not in court or did not put his/her version before court. The primary object of granting a rescission application is to restore the chance to air the real dispute between the parties.

Although we know this answer in theory, in practice the execution may be daunting, as the grounds for appeal and review may overlap. However, courts generally guard against entertaining an appeal disguised as a review.

We will therefore discuss each of these procedures under separate headings, and in the process try to give as much practical guidance as is possible.

RESCISSIONS:

Unlike a review or an appeal, a rescission application is brought in the same (motion) court where the first default order was granted. However, it is not necessary that the judge who granted the default judgment must hear the rescission application - more often than not it would not be the same judge.

A rescission application is brought under the same case number as the default judgment. The application consists of a notice of motion and an affidavit, with such annexures as may be appropriate. The application will first be served on all the parties and then lodged at the court. If any party wishes to oppose the rescission application, they should serve and file a notice of opposition and an answering affidavit within the allocated time. If the affidavit is filed outside the prescribed period, then a condonation application must be included in the opposing papers. Thereafter the applicant may file replying papers, if so advised. A date for hearing must be requested and heads of argument served and filed. The time periods and order of these steps are determined by rules of practice of that specific court.

High Court rescissions:

In the High Court, a rescission application may be brought under Uniform Rule 31, Uniform Rule 42 and/or under the common law. Each of these will be discussed briefly, and thereafter some general comments will follow.

Rule 31(2)(b) rescission:

Rule 31(2)(a) reads: “*Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet. (b) A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.”*

In the heading of your pleadings, the defendant will be identified as “Applicant/Defendant” and the Plaintiff as “Respondent/Plaintiff”, if the default order was granted in an action. However, if the default order was granted in motion proceedings, it is better to refer to the parties as in the first application and explain this in the affidavit. Otherwise you may follow suit as in an action, but in court or in your affidavit refer to the parties rather by name after identifying the parties as confusion could result. Be very careful in the affidavit not to confuse the parties.

The 20 days are calculated as court days, meaning that Saturdays, Sundays, public holidays and *dies non* are excluded.

Rule 42(1) rescission:

Rule 42(1)(a) reads: "*The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary [a]n order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.*"

A person may have not been a party to the original order, but would have *locus standi* if he has a sufficiently direct and substantial interest in the subject-matter of the judgment or order which would entitle him to intervene in the original application upon which judgment was given or order granted.

A judgment granted against a party in his absence cannot be considered to have been granted erroneously, as contemplated in Rule 42(1)(a), because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment.

Harms states:

> *"An order is erroneously granted if it was legally incompetent for the court to have made such an order, if there was an irregularity in the proceedings or if the court was unaware of facts, if known to it, would have precluded it from a procedural point of view from making the order. When a simple summons lacked averments to support the cause of action the judgment based on it is without foundation and consequently erroneously granted. The error need not appear* ex facie *the record. But this does not mean that if a party is procedurally entitled to judgment it could be said that the judgment had been granted erroneously because the court was unaware of a defence which the defendant could have raised but did not. Consequently, an* iustus error*, even if induced by a non-fraudulent misrepresentation by the successful litigant, does not entitle a party to have the judgment set aside."* (footnotes and references omitted)

There is no time period within which to lodge such an application, but the understanding is that a reasonable period is envisaged. In *Kisten N.O and others v Absa Bank Limited and Others (AR179/15) [2016] ZAKZPHC 72 (23 August 2016)* a full court ruled in a Rule 42(1)(a) application that both the delay in bringing the rescission application and the purported acquiesced in the order militated against the granting thereof. This shows that a court retains its discretion irrespective of a finding under Rule 42(1)(a).

The SCA found in a Rule 42(1)(a) application: *"…. a court, when exercising a discretion to rescind an order given by default, must weigh against the delay the prospect of success of the application…."*

Although there was a delay of two years, the SCA found in *ABSA LTD v Moore and another 2016 (3) SA 97 (SCA)* that rescission must be granted as fraud was

committed. The applicants however could also not be criticized by the delay as they were actively trying to counter the fraud.

It is therefore clear that a court retains its discretion to grant a rescission, and can in the exercise of its judicial discretion take into consideration the delay in bringing a rescission application and the conduct of that party before the bringing the rescission application.

Common law rescissions:

In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* the SCA found:

> "[11] I turn now to the relief under the common law. In order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (*De Wet and Others v Western Bank Ltd (supra*)). The authorities emphasise that it is unwise to give a precise meaning to the term 'good cause'. As Smalberger J put it in *HDS Construction (Pty) Ltd v Wait*: 'When dealing with words such as ''good cause'' and ''sufficient cause'' in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 - 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'With that as the underlying approach the Courts generally expect an applicant to show good cause *(a)* by giving a reasonable explanation of his default; *(b)* by showing that his application is made *bona fide*; and *(c)* by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra*, *Chetty v Law Society, Transvaal*)." (footnotes omitted)

In *Harris v Absa Bank Ltd t/a Volkskas,* per Moseneke J, as he then was, stated:

> ***"****[4] This application for rescission of judgment was brought under the I common law. The applicant, being the party which seeks relief, bears the onus of establishing 'sufficient cause'. Whether or not 'sufficient cause' has been shown to exist depends upon whether: (a) the applicant has presented a reasonable and acceptable explanation of her default; and (b) the applicant has shown the existence of a bona fide defence, that is one that has some prospect or probability of success. See Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764J, 765A - D. [5] The test whether 'sufficient cause' has been shown by a party seeking relief, is dual in nature, it is conjunctive and not disjunctive. An acceptable explanation of the default must co-exist with evidence of reasonable prospects of success on the merits. In Chetty v Law Society (supra) Muller JA explained this Rule thus: 'It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain for the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.' [6] The common law requires 'sufficient cause' to be shown before a default judgment may be set aside. Rule 31(2)(b) of the Uniform Rules of Court requires 'good cause' to be established before the rescission of a default judgment may be granted. The phrases 'good cause' and 'sufficient cause' are synonymous and interchangeable. See Silber v Ozen Wholesalers (Pty) Ltd1954 (2) SA 345 (A) at 352H - 353A. The absence of 'wilful default' does not appear to be an express requirement under Rule 31(2)(b) or under the common law. It is, however, clear law that an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in wilful disregard of Court rules,*

processes and time limits. While wilful default may not be an absolute or independent ground for refusal of a rescission application, a display of wilful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause."

<u>Magistrates' court rescissions</u>:

Section 36 of the Magistrates' Courts Act 32 of 1944 sets out the circumstances in which judgments may be rescinded. It provides:

> *"(1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), suo motu – (a) rescind or vary any judgment granted by it in the absence of the person against whom the judgment was granted; (b) rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties; (c) correct patent errors in any judgment in respect of which no appeal is pending; (d) rescind or vary any judgment in respect of which no appeal lies.'*
> *(2) If a plaintiff in whose favour a default judgment has been granted has consented in writing that the judgment be rescinded or varied, a court may rescind or vary such judgment on application by any person affected by it.*
> *(3) (a) Where a judgment debt, the interest thereon at the rate granted in the judgment and the costs have been paid in full, whether the consent of the judgment creditor for the rescission of the judgment has been obtained or not, a court may, on application by the judgment debtor or any other person affected by the judgment rescind that judgment. (b) The application contemplated in paragraph (a)—(i) must be made on a form which corresponds substantially with the form prescribed in the rules; (ii) must be accompanied by reasonable proof that the judgment debt, the interest and the costs have been paid; (iii) must be accompanied by proof that the application has been served on the judgment creditor, at least 10 court days prior to the hearing of the intended application; (iv) may be set down for hearing on any day, not less than 10 court days, after service thereof; and (v) may be heard by a magistrate in chambers.*
> *(4) A court may make any cost order it deems fit with regard to an application contemplated in paragraph (a).''*

Rule 49 of the Magistrates' Courts Rules ("rescission and variation of judgments") regulates the procedure governing applications for rescission of judgements. It reads:

> *" (1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of subrule (5).*
> *(2) It will be presumed that the applicant had knowledge of the default judgment 10 days after the date on which it was granted, unless the applicant proves otherwise.*
> *(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim.*
> *(4) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who does not wish to defend the proceedings, the applicant must satisfy the court that he or she was not in wilful default and that the judgment was satisfied, or arrangements were made to satisfy the judgment, within a reasonable time after it came to his or her*

> *knowledge.*
> *(5)(a) Where a plaintiff in whose favour a default judgment was granted has agreed in writing that the judgment be rescinded or varied, either the plaintiff or the defendant against whom the judgment was granted, or any other person affected by such judgment, may, by notice to all parties to the proceedings, apply to the court for the rescission or variation of the default judgment, which application shall be accompanied by written proof of the plaintiff's consent to the rescission or variation.*
> *(b) An application referred to in paragraph (a) may be made at any time after the plaintiff has agreed in writing to the rescission or variation of the judgment.*
> *(6) Where an application for rescission or variation of a default judgment is made by any person other than an applicant referred to in subrule (3), (4) or (5), the application must be supported by an affidavit setting out the reasons why the applicant seeks rescission or variation of the judgment.*
> *(7) All applications for rescission or variation of judgment other than a default judgment must be brought on notice to all parties, supported by an affidavit setting out the grounds on which the applicant seeks the rescission or variation, and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so.*
> *(8) Where the rescission or variation of a judgment is sought on the ground that it is void ab origine or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.*
> *(9) A magistrate who of his or her own accord corrects errors in a judgment in terms of section 36(1)(c) of the Act shall, in writing, advise the parties of the correction.*

In so far as the rule refers to 20 days, regard must be given to Magistrate's Rule 60(5), which provides for condonation for non-compliance with the rules:

> '*Any time limit prescribed by these rules, except the period prescribed in rule 51(3) and (6), may at any time, whether before or after the expiry of the period limited, be extended – (a) by the written consent of the opposite party; and*
> *(b) if such consent is refused, then by the court on application and on such terms as to costs and otherwise as it may deem fit.'*

Some other important considerations about rescissions:

- Unlike with an appeal, an application for rescission does not automatically suspend the order. Therefore, a separate application for suspension of the order must be brought if it is needed to protect your client. Be aware that since the good sense judgment of Notshe AJ in *Khoza and Others v Body Corporate of Ella Court* 2014 (2) SA 112 (GSJ) the law was changed. Rule 49(11) was repealed and section 18 of the Superior Court Act 10 of 2013 is now applicable.
- If the rescission is successful, no appeal lays against the rescission order as the parties merely go back to court to determine the real issues then: *HMI Healthcare Corporation (Pty) Limited v Medshield Medical Scheme & others* (1213/2016) [2017] ZASCA 160 (24 November 2017): *"The plaintiff's claim remains intact. Nothing has been decided about it. All that has happened is that the defendant has been given an opportunity of answering it; and the setting aside of the default judgment for that purpose is reparable in the final stage."*
- However, see the judgment by Plasket J (with whom Nepgen AJP agreed) in the matter of *De Kock t/a LC Palms v Ndenze and another on 7 March 2014*

under case number 2190/2012 (attached as Annexure A) where a successful review application was brought against the rescission of a judgment.

Exercise: Look at the attached Notice of Motion and founding affidavit (attached as Annexure B) in a rescission application and consider what was done correctly and what was done incorrectly.

SPECIAL ENTRY:

A High Court judge's decision cannot be taken on review. If a judge commits a "reviewable" error in a criminal trial, a practitioner would ask that judge to make a special entry in terms of section 317(1) of the CPA, which reads:

> *'If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may either during his trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court…'*

The purpose of a special entry is to raise an irregularity in connection with or during the trial as a ground of appeal against conviction under section 318(1) of the Act.

The special entry procedure is designed to cater for irregularities which affect the fairness of a criminal trial. The latter section provides, *inter alia*, that if a special entry is made on the record, the person convicted may appeal to this Court against his conviction on the basis of the irregularity stated in the special entry. The SCA has held that the sole purpose of a special entry is to record an irregularity that does not appear on the record. Once a special entry is made, the only court that can hear the matter is the SCA.

The special entry must be formulated, preferably in writing before seeking the entry. If in writing, it resembles a ground of appeal in an Application for LTA.

The accused may either apply for a special entry during his or her trial or within 14 days after "conviction". Conviction here must be interpreted as "at the end of the whole trial" meaning after a sentence was passed, as a special entry may also be made in respect of the sentencing process. The best time for bringing a special entry is at the time of seeking leave to appeal, but it can be sought at any time prior to or after conviction. Even if a special entry is sought (or granted) before the finalisation of the trial, it does not mean that the trial is halted or suspended. The trial must still be completed until after a sentence before the matter is taken to the SCA.

S v Okah Justice Cameron stated as follows:

> *"[54] The threshold for granting special entries is far lower than that required for granting leave to appeal. Leave to appeal requires reasonable prospects on appeal. By contrast, section 317(1) spells out that any irregularity or illegality must be entered on the*

record— "unless the court to which . . . the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court."

[55] In Xaba, the Appellate Division interpreted this to mean "that the power of a trial judge to refuse to make a special entry of an alleged irregularity on the record is confined within very narrow limits". That Court affirmed its earlier decisions in Nzimande and Nafte, which held that a special entry should be made even where there are scant prospects of success on appeal— "[i]f the incident of procedure which it is sought to make the subject of a special entry is in any way capable of being regarded as an irregularity or illegality, however little argument there may be advanced in support of it, and however little merit the presiding Judge may consider there is in the application."

[56] These principles are sound, and this Court embraces them. They mean that, in assessing Mr Okah's application for special entries, this Court must consider (1) whether the subjects of the special entries are "in any way capable" of being interpreted as irregularities, and if so, (2) whether the irregularities should be excluded from the record because the application is in bad faith, frivolous or absurd, or because granting the application would amount to an abuse of court processes.

[57] Consequently, even if the subject of a special entry is an irregularity, a trial court could still rightly dismiss the application if one or more of the section 317 exceptions were to apply. If, however, a trial court makes a special entry under section 317, an accused may as of right note an appeal under section 318, and leave to appeal is automatically afforded.(footnotes omitted)

REVIEW:

Please note that automatic reviews in terms of the CPA, and reviews after other non-judicial decisions made in terms of Rule 53 and PAJA fall outside the scope of this discussion and this manual.

The essential question in review proceedings is not the correctness of the decision under review, but its validity.

As already stated, there is no review to be levied against a High Court judge's decision. (If a ground of review would arise during a civil trial, a request for recusal could be raised, bearing in mind the costs of a re-trial. A request for the recusal of a judge will, however, not assist after the final order has already been made)

A review application from the Magistrate's Court is governed by Section 22 of the Superior Courts Act and Rule 53 of the Uniform Rules, but also by the common law.

Section 22 reads:

> ***"Grounds for review of proceedings of Magistrates' Court.***—
> *(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—*
> *(a)absence of jurisdiction on the part of the court;*
> *(b)interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
> *(c)gross irregularity in the proceedings; and*
> *(d)the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*
> *(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."*

Rule 53 (as was amended on 22 May 2015) reads as follows:

"53 Reviews
(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —
(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.
[Paragraph (b) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]
[Subrule (1) substituted by GN R2004 of 15 December 1967 and by GN R317 of 17 April 2015.]
(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.
(3) The registrar shall make available to the applicant the record despatched to him or her as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.
[Subrule (3) substituted by GN R317 of 17 April 2015.]
(4) The applicant may within ten days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit.
[Subrule (4) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987
and by GN R317 of 17 April 2015.]
(5) Should the presiding officer, chairperson or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he or she shall —
(a) within fifteen days after receipt by him or her of the notice of motion or any amendment thereof deliver notice to the applicant that he or she intends so to oppose and shall in such notice appoint an address within 15 kilometres of the office of the registrar at which he or she will accept notice and service of all process in such proceedings; and (b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he or she may desire in answer to the allegations made by the applicant.
[Subrule (5) substituted by GN R317 of 17 April 2015 and by GN R317 of 17 April 2015.]
(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.
(7) The provisions of rule 6 as to set down of applications shall mutatis mutandis apply to the set down of review proceedings."

A High Court is reluctant to review a Magistrate's finding, except for cases where an injustice or irregularity is alleged to have occurred. When a party relies on "gross irregularity", that party must also show prejudice.

Up until December 2018, when an accused complained against the setting into operation of a suspended sentence, a review application was the procedure to use. The SCA has now ruled that an appeal is the correct procedure to follow.

<u>The review process is as follows</u>:

A review application is commenced with a Notice of Motion and an affidavit. The Notice of Motion looks a little different from the usual form, in that the Respondent is called upon to deliver the record of proceedings to the Registrar and the Applicant is granted the opportunity to supplement his/her founding papers, before the Respondent files his/her opposing papers. The Respondent must give notice that the record is lodged at the registrar. Thereupon the Applicant will determine what is necessary for a proper review of the issues and file such a record.

It often happens that a Respondent files his/her answering affidavit, either without first filing the record or before the Applicant has been given the opportunity to supplement his/her founding papers. This would constitute an irregular step and must be dealt with in terms of Uniform Rule 30. It would of course be senseless to use Rule 30 in circumstances where the Applicant was not intending to file a supplementary affidavit after the record was filed.

It is prudent to deal with the following aspects in the founding affidavit (but if you neglect to at this time, you may also deal with it in the supplementary affidavit. Be warned, however, that your application stands to be dismissed if you deal with it in the replying affidavit):

- Applicant's particulars;
- Each Respondent's particulars; (All parties plus the decision maker must be included)
- Reason the Applicant has locus standi;
- Reason the Court has jurisdiction;
- Proper identification of the judgment and order to be reviewed- date, case number. Attach the judgment and the order;
- Reasons why the order stands to be reviewed, look at common law grounds and if you are stuck also look at the grounds in PAJA. Identify the ground and lay the factual basis for it;
- Order that is sought (think this through before your final draft of the NOM);
- If it is necessary to seek a suspension of the order, motivate it fully and draft the NOM in an A and B part. The A part is to be heard on an urgent basis;
- If necessary, deal fully with condonation and/or delay.

In review applications it is particularly necessary to prepare a functional index. Please see a copy of such an index attached hereto as Annexure C.

APPEAL:

Appealability:

In *Zweni v Minister of Law and Order* it is stated that a judgment or order is appealable as a general principle, if the decision:

- is final in effect and not susceptible to alteration by the court that made it;
- is definitive of the rights of the parties; and,
- has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings

But the *Zweni* principles are not cast in stone, and even where a decision does not bear all the above attributes it may nevertheless be appealable for some other reason, such as where the order disposes of any issue or any portion of the issue in the main proceedings or where the appeal 'would lead to a just and reasonably prompt resolution of the real issue between the parties'.

The test in Zweni has been expanded by adapting the general principles on the appealability of interim orders in the interests of justice to accord with the equitable and more context-sensitive standard of the interests of justice. But, this does not mean that it is the sole consideration or that one no longer takes into account the principles in *Zweni*.

Each case has to be considered on its own facts, including whether a judgment disposes of the main or real issues between the parties.

"The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case."

Together with Zweni and its extension remains the important general principle that a piecemeal determination of issues in litigation must be avoided. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same court and at one and the same time.

Pitelli v Everton Gardens Projects CC: "*An order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable, but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it, and it is thus not final in its effect. In some cases an order that is granted in the absence of a party might be rescindable under rule 42(1)(a), and if it is not covered by that rule, as Van der Merwe J correctly found, it is in any event capable of being rescinded under the common law.*"

Also remember the appeal is against an order, not against a judgment. However, the reasons set out in the judgment are used to show why the order is wrong.

Practical advice before an appeal:

- Never attempt to embark upon an appeal without a special power of attorney;
- Ensure that you have a written instruction (signed by your client) to proceed with the appeal, which instruction should contain:
  - The estimated costs involved;
  - The estimated time before the hearing and before the judgment;
  - An acknowledgment that the appeal is decided in what has happened in the previous court;
  - (in criminal matters) that he/she is aware that the sentence may be increased even though the client is not appealing the sentence;
  - Possible outcomes of the appeal and whether there are any other options available thereafter.

To determine merits and as a point of departure, firstly make sure you understand the order, thereafter consider the judgment firstly as a whole and thereafter read it a few times to consider why the order is wrong. Mark each wrong factual finding and each wrong legal finding. Your memory is fallible, if you think a finding is wrong, double check the record and/or the law and write the correct fact or law down, with reference to the page and paragraph number. If you find court cases indicating the judge must be wrong, use your noter-up to ensure that that specific case has not been overruled, also check on SAFLII. Law changes all the time!!!!! If the judgment refers to a court case or legislation, read that to ensure that the principle was correctly applied by the judge.

In my opinion, it is highly unethical to embark on an appeal without any merit.

Leave to appeal:

Once the decision is made to embark on an appeal, you need to determine whether leave to appeal is necessary or whether your client has an automatic right of appeal.

In civil Magistrates' Court cases, it is not necessary to obtain leave to appeal, it is merely necessary to file a Notice of Appeal. In certain circumstances, in terms of the Criminal Procedure Act an automatic right of appeal is also granted. A Notice of Appeal in these courts includes the grounds on which you are going to Appeal. Please see a copy of a Notice of Appeal as attached as Annexure D.

The (fairly new) Superior Courts Act came into operation on 23 August 2013. The Act is not retrospective in application. Its provisions are therefore not applicable to cases which commenced prior to 23 August 2013. Its provisions are also not applicable in so far as the Criminal Procedure Act are applicable to appeals. The Superior Courts Act made at least three significant changes for cases that commenced after 23 August 2013. A leave to appeal after a 2-bench appeal and leave to appeal against the refusal of petition emanating from the Magistrates' Court were, in both instances, previously

sought from the court that made those decisions, but now LTA is sought from the SCA. The Act also now allows for a reconsideration after the SCA has refused LTA.

In terms of section 309 of the Criminal Procedure Act an appeal lays only against a conviction, a sentence or an order. If the Criminal Procedure Act is applicable, then one must seek leave to appeal within 14 days. These days are calculated by including Saturdays, Sundays and public holidays. Roughly calculated, "14 days" means 2 weeks.

If the Criminal Procedure Act is not applicable, then LTA must be sought from the decision of a single judge within 15 days in terms of Uniform Rule 49(1)(b) (these days are calculated excluding Saturdays, Sundays and public holidays. So roughly calculated it means 3 weeks).

An original special power of attorney must be filed at Court at the time of filing an Application for LTA or noting an appeal. If possible, keep an original also in your file.

In terms of the Superior Court Act, leave to appeal may only be granted where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success; or that there is some other compelling reason why the appeal should be heard. This latter option includes conflicting judgments on the matter under consideration, but not when the decision sought on appeal is of no practical effect.

Sections 309B(2)(a) and 316(2)(a) of the Criminal Procedure Act and section 17(2)(a) of the Superior Courts Act deals with who should hear an application for leave to appeal. The basic rule is that it should be the presiding officer whose decision is taken on appeal, unless he is not available.

If LTA is granted by the Trial Judge in a criminal matter, it is not necessary to file a Notice of Appeal thereafter.

Practical exercise: Drafting an Application for LTA

If LTA is refused, the Applicant may petition to the next court. Although it is colloquially called "a petition", it is just an application consisting of a notice of motion and an affidavit.

In criminal matters, the petition must be filed within 21 ordinary days (inclusive of Saturdays and Sundays and public holidays) and in civil matters and other matters not dealt with in the Criminal Procedure Act within one month. The days in the Criminal Procedure Act must be interpreted as including the first and excluding the last day. The month is an ordinary month (less one day) and not by counting days. So, if your order against which you want to appeal was made on 5 February, then your petition must be filed on 4 March, unless that is a non-court day. Non-compliance can be condoned. Condonation will be discussed hereunder.

A petition is an easy document to draft, and if you have done one, you will be able to do others. Be wary of precedents of petitions which are still doing their rounds, which do not consist of a NOM and an Affidavit and which refer to "Your petitioner". That procedure has been abolished for more than 40 years now.

Please refer to Annexure E for a precedent of a petition. A petition must contain the judgment and the order against which an applicant seeks to appeal. SCA judges in particular are very busy, and it is essential to make sure that you do not unnecessarily pad your petition.

If LTA is granted on petition, it is necessary to file a Notice of Appeal. The reason for this is that both the High Court and the SCA, on granting a petition, would not give reasons for the order. It is necessary to give the Trial Court notice that LTA was granted and to give the presiding officer the opportunity to supplement the reasons for his decision. This Notice of Appeal is served on the Registrar or clerk of the Trial Court, the opponents and on the Registrar of the appeal court. Make a note on your file if your petition is granted to ensure that the Notice of Appeal is served and filed, otherwise the appeal may have to be postponed.

Further evidence on appeal

Sometimes after the finalisation of a case, new evidence comes to light that, had the trial court been aware thereof, could have altered the outcome of that case.

The first scenario is the situation where the new evidence comes to hand before the Leave to Appeal Application before the trial court is finalised. You will then include your application to lead further evidence at the time of seeking leave. You will in fact lead the evidence or file an affidavit with this evidence.

The second scenario deals with situations where leave to adduce further evidence was refused **or** where the evidence only comes to the fore after Leave to Appeal was refused or after a full court appeal has already been dismissed. You will then seek leave to lead further evidence from the SCA, when you seek LTA.

The third scenario deals with the situation where the practitioner is faced with new evidence, which he wants the court of appeal to have regard to during the appeal, and such evidence comes to light or is discovered only after Leave to Appeal was granted. You will then seek leave from the Appeal Court to lead further evidence, and in the alternative pray for an order that the matter be referred back to the Trial Court to first hear the new evidence before the appeal is decided.

The following must be proven:

- That there is a reasonably acceptable explanation for the failure to present the evidence before the conclusion of the trial;
- That the evidence to be adduced on appeal is of such quality that it will presumably be accepted as true by the court of appeal;
- That if believed, the evidence can reasonably be expected to lead to a different verdict or sentence.

As reaching finality in legal matters is an important consideration, courts do not often grant an application to lead further evidence.

Extension of grounds

If, at a stage after the Notice of Appeal was filed or after Leave to Appeal was granted, you realise that you have not included a ground of appeal, you must give notice thereof to the presiding officer in the court a quo, to your opponent and to the appeal court. Ordinarily you would file a "Notice of Further Grounds of Appeal". This is so that the presiding officer can consider whether he/she wants to supplement his/her leave to appeal judgment. If this is not done, the appeal judges may not want to hear the Appeal. (See Notice attached as Annexure F.)

However, if a presiding officer has considered all your grounds for leave to appeal and ruled that there is no reasonable prospect to one or more grounds, or if the presiding officer limits the leave to appeal to only certain grounds, you will have to seek an extension of the grounds from the court you would have petitioned to. (see copy of such an extension of grounds application)

Minister of Safety and Security and others v Mohamed and another 2012 (1) SACR 321 (SCA) state that the appeal court has no jurisdiction to extend grounds of appeal upon which leave to appeal was granted. If the appellant is dissatisfied with grounds of appeal upon which leave to appeal is granted, he/she has to petition directly to the Supreme Court of Appeal for extension on such grounds of appeal.

Petition refused:

When a petition to the High Court is refused, the SCA is then approached for special leave. The situation under the new Act is less cumbersome than before, but it is still cumbersome. Under the old Act, in matters that commenced before 23 August 2013, LTA had first to be obtained from the two judges who refused the petition before going to the SCA. The LTA application is then heard by the SCA. The only order the SCA can make is to grant or refuse LTA, and then the matter must go to a 2 bench for the appeal hearing. It is an expensive process and should be rectified by the Legislature.

If the SCA refuses a petition after a High Court has refused LTA, then in certain circumstances the President of the SCA may be requested to reconsider the matter in terms of section 17(2)(f) of the Superior Courts Act. SCA Practice directive 1/2018 dated 5 November 2018 is attached hereto as Annexure G. If the President thinks a reconsideration is necessary, the matter is argued in open court before 3 or 5 judges who then either grant or refuse LTA.

The CC has just decided that there is no appeal against a dismissal of a section 17(2)(f) reconsideration. However, the Applicant may seek LTA against the dismissal of the petition.

Condonation:

When a party is out of time with any step, condonation must be sought. An applicant must show good cause. The dichotomy to be considered is the Applicant's right to have the merits of their case tried in open court on the one hand, and the defendant's right not to be unduly prejudiced by the delay on the other hand. The applicant must address, firstly, the reason for the delay, and secondly, the merits in the main case. The court exercises a discretion by taking into account the nature of the relief sought,

the extent and cause for the delay, the prejudice or effect of the delay on the other litigants and the administration of justice, the reasonableness of the explanation for the delay and prospects of success of the matter.

Practical exercise: Flow diagram in respect of LTA (ppp)

Appeal Record:

Magistrates' Courts and the High Courts are courts of record. The presiding officer must therefore make sure that the proceedings in the court are properly recorded. In civil appeals the duty to prepare the record for appeal purposes rests on the Appellant. But in criminal matters this responsibility rests on the clerk of the Magistrates' Court / Registrar of the High Court.

After leave to appeal is granted, the clerk of the court/registrar must prepare the record of the case. In cases where no leave to appeal is necessary, the Clerk of the Court must prepare the record even though the notice of appeal is out of time.

In the appeal from the civil magistrate's court, the appellant must lodge the record within 60 days after filing of the Notice of Appeal. There are no such periods for filing criminal appeals from the Magistrates' Court. However, be cautious as certain courts have their own periods, such as the Gauteng Division.

Uniform Rule 49(7)(a) provides that:

> *"At the same time as the application for a date for the hearing of an appeal in terms of subrule (6) (a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if-*
> *(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or*
>
> *(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal."*

Magistrates' Court Rule 66 (9) provides:

> "*(9) Where a magistrate or the court is satisfied that an accused is unable to pay the costs of obtaining a copy of any record or of any transcript thereof or is able to pay only part of such costs, such magistrate or court may, at the request of the accused, direct the registrar or clerk of the court to deliver a copy of such record or transcript to the accused free of charge or at such reduced charge as the magistrate or court may determine."*

SCA rule 8(10) - 8(11) provides:

> "(10) Any person convicted of any offence who intends to appeal to the Court and-

(a) has the right so to appeal; or

(b) intends to make application to the Court for leave to appeal,shall be entitled, upon request, to obtain from the registrar of the court from which that person intends to appeal, such number of copies of the record or extracts from it as may be necessary, on payment of the prescribed fees: Provided that- (i) if such a person is unable to pay the prescribed fee; and (ii) the copies are necessary for the aforesaid purposes,that person shall be entitled to obtain the same without payment of any fees.

(11)*(a)* Any question arising as to the inabilty of a person referred to in subrule (10) to pay the prescribed fees or as to the number of copies or as to what extracts are necessary shall be decided by the registrar of the court *a quo*.

(b) If the registrar's decision is confirmed by a judge of that court, it shall be final."

Practical:

- *It is very important that you foster a good relationship with the clerk of the court/registrar and the transcription company.*
- *It is also important for rural courts (that do not often have appeals) to make sure that copies of the whole court file are made prior to it being dispatched to the High Court.*

Usually the process works as follows:

In criminal matters, you will inform the registrar that leave to appeal was obtained. The rule that instructed the appellant in a criminal matter to file a formal notice was repealed, however it would be good if you still do it. Include in the notice the appellant's home address, or if he is in prison, his prison registration number and the address of the correctional facility. The registrar will provide you with a copy of the record. If the record is provided free of charge to the appellant, you can leave everything in the hands of the registrar. If not, you should follow the same procedure as with civil matters.

In civil matters, you will inform the registrar that LTA was granted by filing a Notice of Appeal. Ask that a disk be cut from the recording system and that it be forwarded to the transcription company. For this to be done, you may need the date/s on which the matter was heard in court (or at least the date on which it was finalised) and also the court room in which the matter was heard. Ask that the transcription company provide you with a quote. Only thereafter give them a written instruction or a purchase order to proceed. If they have to do the transcription urgently, the typing is more expensive. So, make sure that this is not necessary by commencing with the administration immediately after leave to appeal was granted and diarising the necessary steps.

I recommend that you uplift the civil court file immediately after obtaining leave to appeal and immediately compile an index of the pleadings and documents that must be included in the appeal record, and also an index of the documents to be removed from the record. Remind yourself that you want to protect judicial resources (and trees) and refrain from including unnecessary documents.

I recommend that you then send these indexes to your opponent and request that the Respondent agree in writing to the documents to be included and to be removed. These letters are handed to the transcription company to be included in the appeal record. The reason for doing this is to ensure that the transcription company gets the record correctly done on the first attempt.

Also ask the transcription company to email you their indexes prior to binding and ensure that the indexes contain all the transcription for all court days on which the matter was heard, and also all the necessary pleadings and documents. I recommend that you also ask the transcription company to send you a draft cover page of the appeal record. The SCA, especially, is very strict on the wording of their front covers, but in any other court the judges will be upset if this is not correct. (See attached as Annexure H a copy of how the SCA wants their front covers to look.) It takes a lot of time, effort and money to correct already bound appeal records. Rather get it right the first time.

Especially for the SCA, handwritten notes must be re-typed and documents not in English must be translated.

Ensure that where colour photographs were used during the trial, the judges each have a colour copy. This is very expensive, so agree with the Respondents that the other records will not contain colour copies.

Once the appeal records are received, you must ensure that the clerk of the court or the Registrar (depending on the court from which the appeal emanates) at least mark one copy as a true copy of the proceedings. I usually ask that more than one be so certified. Thereafter you formally serve a copy or two of the appeal record on each of your opponents. This notice resembles a filing notice. For some reason the State Attorney sometimes refuses to accept the second copy.

For SCA civil matters, the record must also contain a disc with an electronic copy of the whole record. This is usually included in a sleeve in the first or the last volume of the appeal record.

The number of appeal records to be filed at the different court are as follows:

2 bench appeal: 3 appeal records

Full court: 4 appeal records

SCA: 6 appeal records

CC: 26 appeal records (I always thought it to be 25 but these days they insist on an original plus 25).

In all courts, except for the SCA, the record is only printed on one side of the page.

When you deal with an SCA appeal ensure that you read SCA Rule 8 on how the record should look. Despite the rule stating that the record should only be printed on one side, the practice directives differ and the Registrar will not accept an appeal record printing on only one side of the page.

When you deal with a CC appeal ensure that you read CC Rule 20.

<u>Costs implications if unnecessary documents are included in the record</u>

Mothupi v MEC, Department of Health Free State the SCA stated as follows:

> *"[22]That is not the end of the matter. The appeal record in this court has been grossly inflated by the inclusion of unnecessary material, including the argument that was addressed to the court a quo, the*

application for leave for special leave to appeal lodged in this court, and the duplication of a number of documents. At least 60% of the record was totally superfluous and prepared at unnecessary cost. This too must be laid at the door of the appellant's attorney. [23] This court has never hesitated to make an attorney who has acted in such a way liable for unnecessary costs – see eg Jeebhai and others v Minister of Home Affairs and another 2009 (4) SA 662 (SCA). Counsel for the appellant indeed conceded that the attorney should personally bear portion of the costs occasioned by his ineptitude and failure to comply with the rules. In my view, it would be appropriate to make him bear the costs of the condonation application relating to the heads of argument and 60% of the costs of the record."

The SCA then made the following order:

"The respondent is to pay the costs of the appeal, including the costs of two counsel. This order will exclude (i) the costs of the application for condonation for the late filing of the appellant's heads of argument, and (ii) 60% of the cost of preparing the appeal record, which costs are to be paid de bonis propriis by the appellant's attorney."

<u>Missing record or partially missing record:</u>

No proper reconsideration can take place on a faulty record. In *S v Chabedi* Brand JA put it this way:

"[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible." (see, eg, S v Collier 1976 (2) SA 378 (C) at 379A - D and S v S 1995 (2) SACR 420 (T) at 423b - f)."

The following guidelines for reconstruction of the criminal appeal records was extracted from court cases:

- As a point of departure, there is no uniform rule of reconstruction of a lost / inadequate record. This lack of uniformity may be attributable to the fact that a method which is available, fair and practical in one case, may not be so or may be capable of being improved on in a different situation, hence the emphasis on and importance of best available evidence.
- The reconstruction of a lost or destroyed record of judicial proceedings is the responsibility of the clerk of the criminal court.
- The clerk of court must attempt to reconstruct the record according to the best and most reliable method.

- Where the record is inadequate for appeal purposes, both the State and the accused have a duty to try and reconstruct the record from secondary sources.
- The record must be adequate for proper consideration of the appeal; it need not be a perfect recording of everything that was said at the trial.
- The accused is entitled not only to know what was written as a reconstruction of lost material but is also entitled to participate in the process of reconstruction. The accused and legal representative are entitled to say what, according to them, the evidence on a particular point was or what the evidence generally was.
- Magistrates' notes may amount to a concurrent record of any electronic recording and can be an acceptable foundation for an appeal.
- A summary of the evidence made by a magistrate from memory and with the help of the police docket in a re-drafted judgment wherein he made credibility finding, is not sufficient.
- In compliance with the best secondary evidence rule, information on what was testified or said during the trial can be obtained and should be sought from every source which can contribute, not only from the magistrate's notes but also from role players like the interpreter, prosecutor, defence legal representative as well as a guardian of the accused who was present at court.
- If the record or part thereof is missing, the magistrate has *"(the duty) to direct the clerk of the court to inform all interested parties, being the accused or his legal representative, and the prosecutor, of the fact of the missing record; to arrange a date for the parties to reassemble, in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate is to place it on record that the parties have reassembled for the purpose of the proposed reconstruction; the parties are to express their views, on record, that each aspect of reconstruction accords with their recollection of the evidence tendered at trial; and ultimately to have such reconstruction transcribed in the normal way' During the reconstruction process the constitutional rights of an accused, particularly his right to a fair trial, must be respected. Thus the accused has to be informed that the record or part of it is missing and has to be reconstructed. In addition he has to be informed of his right to participate in the reconstruction process, his right to legal representation in such a reconstruction process and his right to have the reconstruction process interpreted should he require the services of an interpreter."*
- The object is to obtain the best available evidence to prove what was testified in court and which led to the conviction and sentence of the accused.
- It would be proper in the course of reconstructing to attend to the question of whether the evidence of a particular witness was in accordance with his police statement or deviated from it. Once it is common cause between the State and the defence that there was no deviation from the statement to the police, the statement itself has a measure of reliability as to what the witness testified in court.
- The attorney's notes made during trial are as relevant as the notes of the prosecutor or a social worker or other witness who was present in court.
- Inferences can be made from the context. An available answer may adequately reveal what a missing question was.
- Important information can be gleaned from the magistrate's judgment on conviction and sentence if he recited the evidence and his discussion of the evidence and cross examination of witnesses were fairly detailed.
- The reconstructed record, irrespective of the method of reconstruction chosen based on the best available evidence rule, its contents and correctness, must be

attested to on affidavits as a true reflection of the record. This must be done by the presiding officer, the accused, his/her legal representative, the prosecutor, the stenographer, interpreter, social worker and all other court officials who were present during the trial.

Where no reconstruction is possible

Where it is impossible to reconstruct the record or where the missing parts contain material evidence which cannot be reconstructed, the proceedings ought to be set aside. It should be remembered that in circumstances of such a technical success on appeal, the Appellant may be charged again.

However, the appeal will not always succeed in these circumstances, an Appellant might not be granted the necessary leave to appeal or, where he/she cannot adequately explain a delay in prosecuting an appeal and the record is missing.

The Constitutional Court stated in S v *Phakane* stated

> *"[38] The failure of the State to furnish an adequate record of the trial proceedings or a record that reflects Ms Manamela's full evidence before the trial court in circumstances in which the missing evidence cannot be reconstructed has the effect of rendering the applicant's right to a fair appeal nugatory or illusory. Even before the advent of our constitutional democracy, the law was that, in such a case, the conviction and sentence or the entire trial proceedings had to be set aside. In S v Joubert the then Appellate Division of the Supreme Court said:*
>
> *"If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there had not been a failure of justice."*
>
> *[39] As to when it can be said that an incomplete record will result in the infringement of an accused's right to a fair appeal, in S v Chabedi the Supreme Court of Appeal said: "[T]he requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal." This passage was quoted with approval by this Court in Schoombee.*
>
> *[40] In the present case the Full Court did not have before it a record on the basis of which it could fairly assess whether the trial court's conviction of the applicant was correct. The trial record available to the Full Court was simply not adequate for a proper consideration of the applicant's appeal. Therefore, the applicant's right of appeal was frustrated by the fact that material evidence was missing from the record.*
>
> *Conclusion*
>
> *[41] In the light of all the above I conclude that the Full Court was wrong to hold that the applicant's right to a fair appeal entrenched in section 35(3) of the Constitution had not been infringed by the State's failure to ensure that an adequate record of his trial proceedings was available for his appeal. In my*

view, his right to a fair appeal has been so compromised that his appeal could not be fairly determined. That being the case, the proper remedy is to set aside the trial proceedings in their entirety."

Eastern Cape Division made the following order in the unreported matter of JUMA:

1. *the chief clerk of the Regional Court, East London, is requested to investigate and establish whether a transcript was in fact produced following the request to Veritas or other service provider by the court a quo on 12 May 2010 and if so, why a further copy thereof cannot be provided to the appellant;*
2. *if the option in paragraph (2) yields no positive result, the clerk is requested to identify the court operators who were responsible on each of the dates when the relevant recordings were made in the separate courts, as well as the person(s) concerned with the storage of the mechanical recording envelopes and storage devices at all relevant times;*
3. *each person so identified is to file an affidavit setting out the manner in which he/she discharged his/her duties and exercised control of the electronically recorded evidence on the relevant dates, or relevant period as the case may be, and why in their opinion the data in respect hereof cannot now be found;*
4. *if the staff of the Department of Justice were not themselves responsible for overseeing the electronic recordings on the relevant dates, then a report should be obtained by the clerk of the court from the relevant contractors concerning the retrieval of the evidence led on these occasions and to elicit from them why in their opinion they say the data cannot be found;*
5. *if necessary the clerk of the court must request an affidavit from a specialist at "Help Desk" to confirm that attempts have been made to retrieve the missing recordings on the main server or motherboard(s) as the case may be, and to indicate why these attempts have not been successful;*
6. *in any event the clerk of the court is directed to supplement the record with reference to a complete set of exhibits tendered during the trial.*
7. *in the event of the electronic data being found to be permanently lost or destroyed, the legal representatives of the parties must meet and then, in conjunction with the clerk of the court, endeavour to reconstruct the record to the best of their ability with reference at least to the notes of Messrs Mvinjelwa and Mbiyo who each representative is directed to make contact with respectively. If by these efforts they are unable to produce a reasonably re-constructed record the appellant's attorneys are to file an affidavit setting out the exhaustive steps which were taken in this regard, why they say the attempts have proved to be unhelpful, and what alternative remedy the appellant then intends to pursue in the circumstances;*
8. *In any event the appellant is directed to make application for condonation for his failure to timeously provide a proper appeal record and to prosecute the appeal without delay;*
9. *The appellant shall not be entitled to re-enroll the appeal for hearing unless and until the measures indicated above have been meaningfully addressed; and*
10. *The registrar of this court is requested to furnish a copy of these reasons and directives to the chief clerk of the regional court, for his/her response and attention to the matters raised herein by no later than one month after receipt.*

Heads of argument (HOA):

Worksheet to be prepared

One of the purposes of HOA is to persuade the court to trust your submissions. Trust is developed *inter alia* through form and contents of your HOA and also through reputation. A practitioner must be scrupulously honest about the facts and the law. When a judge reads your HOA, the judge must be convinced that you have given the matter a lot of thought and lean towards thinking that your submissions are correct.

Before you commence with drafting, you need to know the whole record, and the law. (If you have done the trial, you probably would have done a case analysis and you can start there). While I read the record and pleadings, I make notes of each thought that comes up in my mind. Thereafter I do a mind map. This assists me to see what fits together, where and how to think about a beginning, the facts, the law and a conclusion. Thereafter, I think of how I will characterise the main issues that must be decided, or the so-called framing aspect. Whilst doing this whole exercise, you may realise that there are factual issues you need to reconsider or legal research you need to do. After having done all of this, it is good if you can allow the issues to stew a day or two in your mind for more clarity. Often, however, you will be under pressure and this will not be a luxury you can afford. This is also a good time to discuss the issues with someone.

After doing the above exercise, you must consider the FORM of your HOA. If it is in a court where you do not regularly practice, you need to establish the applicable Court rules and abide. Eg, number of pages, extra notices, spacing, font, printing on one side or both side of the page and index.

HOA must have a structure consisting of at least a heading, a beginning, a middle and an ending and a list of authorities. In the beginning you must provide a roadmap of which aspects you intend to address and these then become your sign posts or headings.

The following are important aspects to remember:

- Paragraphs must contain numbers (word numbering best); be careful not to use too many sub-paragraphs, unless a thought will be better conveyed by the use of sub-paragraphs. (Never use a paragraph numbered as 2.1.1.3.35.)
- Simple language- no legalese or fancy words;
- Short sentences, no long paragraphs;
- Active voice instead of passive;
- Positive statement rather than negative;
- Avoid emotion—adverb and adjectives;
- Avoid figures of speech, metaphors, similes etc;
- Stay away from humour or sarcasm;
- Watch out for US spelling;
- Do not shy away from bad facts, deal with them;
- Be clear and do not repeat (If you are for the Respondent, never repeat the Appellants argument);
- When dealing with court cases, double check each citation. Ensure that you refer to a specific paragraph of the judgment. Rather than long quotations, use your own words. Never plagiarise;
- If you know of a court case that is against the submission you are making, you must inform the court of that case;
- Only use relevant authority, no need to lecture the bench of the law. Better to use the latest court case dealing with the matter than 100 others;

- Ensure that your headings are all in the same font and similarly underlined or bold.
- Don't be tempted to underline text which is not in headings;
- Proofreading is VERY important. No judge will trust you if your HOA are full of typos.

There are many wonderful articles written by well-known practitioners on how to draft Heads of Argument which are well worth reading.

November 2018 the SCA wrote the following email to practitioners:

"Due to confusion that occurred with filing of the heads of argument and the binding thereof, the issue was cleared up with the Judiciary and the following is how the heads of argument and practise note should be compiled and filed from now on.

Heads of argument bundle: The heads of argument should be bound with the chronology table [Rule10(3)(i)], Rule 10 and 10A Certificate and The heads should include a list of all the authorities cited in the heads.

Then in a separate bundle: Practice note plus a list of the authorities [Rule10(3)(e)(i)] to be quoted in support of the argument and shall indicate with an asterisk the authorities to which particular reference will be made during the course of argument.

A third bundle will only be needed for foreign authorities and legislation, if applicable which had been repealed.[Rule10(3)(e)(ii)] and a photocopy, or a printout from an electronic database, of those provisions of any statute, regulation, rule, ordinance or by-law directly at issue, inclusive of unreported case law, not readily available, shall accompany the heads of argument in a separate volume[Rule10(3)(f)]"

The hearing of an appeal:

Your purpose at the hearing is to persuade the court to accept your client's case. If the judges' *prima facie* view is for you, you strengthen that belief. But if it is against you, try to change that belief by dealing with the issues that the Court may have trouble with. Your purpose is to be honest about facts and law and to make the Judge think you have thought the issues through.

Your starting place in preparation is reading again and again until you know all there is to know about the record and the HOA. If you have not done a good / bad facts analysis and a timeline - now is the time to do it! Know where each fact is recorded in the papers (*flags work well / highlights*).

Make sure you have copies of all legal cases - or at least the headnotes and passages you and your opponent refer to in your respective HOA (*put these cases into chorological order and bind in a file*). Ensure that each case has been notered-up.

Re-consider your and your opponents' characterization as set out in the HOA. Continue by making sure that you understand what your opponent's argument is. Be able to summarise your opponent's argument in less than 100 words, re-read his/her HOA (including his characterization) and re-consider whether you understand his/her argument correctly.

Then do the same to your argument.

Thereafter write out why the court should follow your argument:

- in bullet points by using facts and law
- concentrate on your good facts/bad facts analysis – knowing how to deal with the bad facts is very important

YOU ARE NOW READY TO START THINKING OF WHAT YOU WANT TO SAY IN THE COURT

- Plan: What must be said to convince the Court to accept your viewpoint. I like mind-maps re structure: Introduction, argument, conclusion.
- Know the maximum time you may argue, and if your argument is written out, make sure you can deliver it in the allocated time, with time to spare. If not written out, consider the time aspect.
- Don't develop your opening until after you have prepared your whole argument, ensure the opening is an attention-grabber and that it is memorable and original.
- Never be longwinded in argument but do not leave important aspects out.
- Main argument: Determine the facts and law you want the court to hear and make sure that you prepare it in a format that you will be able to convey - even if the court interrupts you or if you want to die of heart or leg failure. Use an easy format, which is well structured (hopefully your HOA has this already).
- Decide beforehand what is the best way to deal with your opponent's argument– If you are for appellant decide whether it would be best to anticipate and/or to deal with it in reply.
- Your aim is to win the argument, not to make your opponent look bad. *Steer away from irrelevant issues or just person bashing.*
- Conclusion: Work something of your opening into your conclusion.
- Make sure that you write out and clearly state (or refer to your HOA) as to the specific relief/order you desire.
- Never lecture a judge on the law *(*but if you must – do it in a non-offensive manner!)
- Never (or hardly ever) read from court cases. Very few people can just listen, they need to see as well. So, if you do read, make sure the judge has a copy from what you read. When you refer to a court case, do it in a "digestible" manner. Rather than referring to the whole citation, refer to it as a number in your list of authority or by a name.
- If there are questions from the bench, be (and look) grateful for each question. Do not see it as an unwarranted interruption, but rather as a way to further persuade the judge and have him/her trust you. Usually questions are there to guide you and assist you and/or to give you an opportunity to address difficulties that the judge has. Answer them honestly and to the best of your ability If you don't know the answer say so, don't waffle. The question is: what

should you do once you have answered the question already and the judge is abusing you?

- Do not make a concession that your client has not specifically approved and never be bullied into a concession.

After judgment

Once the judgment is delivered, you need to read the judgment and consider whether it is necessary to take it further.

You are also obliged to ensure that your client knows the outcome and receive a copy of the judgment. Make sure that you have a signed consultation note that your client received the copy and understands the outcome.

If your client is imprisoned and the appeal is successful, you must ensure that the prison authority is informed. The onus is on the clerk of the court/the registrar to ensure that a warrant of liberation is sent to the prison, but it is ultimately your duty is to ensure that your client is released. An excellent stakeholder relationship with court and prison personnel will stand you in good stead here. If your client was not acquitted, but his sentence was reduced, you need to ensure that this comes to the attention of the records office in the prison and that your clients prospective date of release is correct on his prison card. Again, it is the clerk of the court/registrar's duty to ensure that an original court order is delivered to prison, but you need to ensure that it happens.

If it is a civil matter, you must also ensure that the costs order is enforced.

ANNEXURES:

A: Judgment by Plasket J in the matter of *De Kock t/a LC Palms v Ndenze and another on 7 March 2014 under case number 2190/2012*

B: Notice of Motion and founding affidavit in a rescission application

C: Copy of index for review applications

D: Copy of a Notice of Appeal

E: Precedent of a petition

F: Notice of further grounds of appeal

G: Practice directive 1/2018 dated 5 November 2018

H: Copy of how the SCA wants their front covers to look