will consult his or her legal representative, if he or she had elected to have one, after he or she would have been informed of his or her constitutional right. The accused will then be in a position to proceed. The prosecutor will put the charge to the accused, after which the accused will indicate to the court that he or she understood the charge. He or she will then plead to the charge in terms of section 106 of the CPA. After pleading, the plea is usually confirmed by the legal representative who will either give a plea explanation in terms of section 115[39] of the CPA or make admissions in terms of section 220[40] of the CPA or simply remain silent.[41]

Once that has been done, the state will call its first witness. The prosecutor will lead this witness. Thereafter, the defence will have the opportunity to cross-examine the witness in length. The defence may also cross-examine the witness on the statement that made to the police by the said witness. Should there be a question regarding authenticity of the statement, a trial within a trial will be held to iron out any discrepancies. The court will also have the opportunity to question the witness on certain aspects that arose in the testimony of the witness. This process fulfils the right that an accused may challenge the evidence against him or her.[42] Once the State is done with adducing evidence, it will close its case and the defence will have the opportunity that to adduce evidence in his or her favour. The accused may testify in his or her defence or may elect to remain silent. He or she may also call witnesses to advance his or her defence. He or she and his or her witnesses can be cross examined by the prosecutor and questioned by the court. Once that is done, the defence will close its case,

39 This lays out the basis of the accused's defence. This can be done verbally or in writing.

40 These are formal admissions on fact. It will simplify the length of the case, where the state will not have to prove the facts admitted to by the accused.

41 The writer hereof is in the employ of Legal Aid South Africa and this part is written and indicative of the personal experience of the writer.

42 Section 35 (3)(i).

whereby the court may wish to call its own witnesses. If not, the state will proceed with its closing arguments, followed by the defence. After consideration of all adduced evidence in court, the court will make a decision of whether the State proved its case beyond reasonable doubt or not. In which case the accused will be found guilty or not.[43]

Indeed, a trial process could be lengthy, expensive and in all circumstances, be very intimidating. Whereas an admission of guilt is very simple and literally takes less than 30 minutes. Yet both procedures reach a final outcome. The most considerable difference is that the accused is found guilty by the court, after all the evidence has been adduced and the accused has had the opportunity to adduce his own evidence. Whereas with an admission of guilt fine, the payment is made with only the information that is contained in the J534, that is available. No further information is supplied and no evidence is given to the court to be scrutinized. There is no indication that the accused was properly informed of his rights and the consequences of paying the fine. Therefore, as quick and easy as it may seem, many vital steps are skipped, all for the sake of finality.

2.6 RIGHTS OF AN ACCUSED PERSON

The Constitution of the Republic of South Africa, due to past indecencies and oppression, recognised that an accused has the right to be presumed innocent until proven guilty. Section 35(3) of the Constitution sets out the rights of an accused person in detail. It states, among other rights, that the accused must be informed of the charge with sufficient detail to answer it,[44] to have a public trial before an ordinary court,[45] to choose and be represented by a legal

43 See note 40 above.
44 Section 35(3)(a) of the Constitution.
45 Section 35(3)(c) of the Constitution.

practitioner, and to be informed of this right promptly,[46] to adduce and challenge evidence,[47] and not be compelled to give self-incriminating evidence.[48] These rights are accompanied by other rights that are enshrined in the CPA. As will be evident later, an accused person who pays an admission of guilt fine is not always informed of his or her rights in terms of the Constitution.[49] Yet, an accused who pays the admission of guilt fine after a court appearance is in a much better position as opposed to an accused that has not had the leisure of being informed of his rights by the court. This is the situation where an accused pays the admission of guilt fine prior to any court appearance.

2.6.1 Inherent Rights Waived

There are inherent rights that an accused person has in terms of the common law, the CPA and the Constitution. The minute an accused person decides to not proceed with his or her trial and pay an admission of guilt fine, he or she forfeits certain rights. These rights forfeited include: a) challenging the information, evidence or the alleger (so called confrontation of your accuser); b) being tried in an open court; c) to be placed in possession of information that will enable you to prepare your case or defence; d) the right to have legal representation and importantly the right to a fair trial.

Section 35(1) further gives an arrested person the right to be informed of remaining silent and not making admissions that will incriminate himself. This is also covering the admission of guilt fine, as the conclusion of the admission of guilt fine is a conviction and sentence. The

46 Section 35(3)(f) of the Constitution.
47 Section 35(3)(i) of the Constitution.
48 Section 35(3)(j) of the Constitution.
49 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 24.

importance, therefore, of being informed of your rights promptly cannot be emphasised enough. It ought to be second nature for police officials who deal with accused persons on a daily basis. Dlodlo J stated that the then J534, as it read when the judgement was delivered in 2012, "may not pass the constitutional muster."[50] By informing the accused of his rights, i.e. the right to not give self-incriminating evidence etc., the accused person would be able to make an informed decision pertaining to whether he will pay the fine or not.

A number of issues remain unanswered when dealing with the payment of an admission of guilt fine. Who is the person responsible for informing the accused of his or her rights? At which stage must he or she be informed of these rights? On the summons served on the accused, the rights of the accused are not cited. Nor are these rights cited in the written notice given by a police official to the accused. It is therefore the duty of a peace officer or police official, normally at the police station, to inform the accused of his constitutional rights. The duty of the officer is not limited only to inform the accused person of his rights, but he should also inform him of the consequences of paying the admission of guilt fine. Similarly, when an accused pleads guilty in court, the accused is or should be informed prior to the payment of the fine, of his rights and the legal consequences flowing from such a payment. This is obviously the administrative part of the law, which needs to be adhered to in order for justice to prevail. When the prescribed procedures are not followed, then the fairness of the whole process is tainted and unjust.

50 *S v Parsons* (1) SACR 38 (WCC) at para 6f.

The part of informing the accused is of paramount importance to ensure that the accused does not make a mistake or that incorrect inferences are drawn. In *S v Price*[51], the accused who was an 18-year-old male person at the time, was summoned on a charge of assault. It was alleged that he had shot the complainant with a plastic gun. An official at the police station advised the accused that this was a trivial offence and that he could pay an admission of guilt fine to finalise the matter.[52] No other detail is available or whether the accused had been informed of the charges that he faced; what his rights were; or that he was made aware of any other dispute resolutions available to him and the consequences that flowed from his decision. As a result, the accused paid an admission of guilt fine.

Though the procedure is simple and is designed to expedite the procedure, justice still needs to be served and the accused still needs to know that he still has certain rights. When an accused person decides to pay the admission of guilt, he waives certain rights as stated above. Furthermore, the accused still retains the right to be represented from the moment that he is arrested, summoned or served with a written notice.[53] The Legislature, gave a period of service for the summons and the written notice. Furthermore, it has made included subsection 2 paragraph (a) and (b)[54] in order to allow the accused person to make an informed decision pertaining to the payment of the fine. The presiding officer receiving the papers in terms of subsection 7 of the Act regulates it. It is not only the constitutional rights that are waived by the accused once the decision to pay an admission fine is made. Other alternative

51 2001 (1) SACR 110.
52 *S v Price* 2001 (1) SACR at 110 para g – h.
53 Section 73 of the CPA.
54 Section 57 of the CPA.

dispute resolutions available to the accused also fall away with such payment. These measures will be briefly referred to.

2.6.2 Alternative Dispute Resolution

An accused also has other options of finalising the case with less serious consequences as those accompanying the payment of an admission of guilt. These other options are known as alternative dispute resolutions. These are informal proceedings, which is a preferred way of solving matters, which is in accordance of *Ubuntu*. It avoids the need for lengthy trials. There is no obligation on the state to first attempt these options. It could be beneficial to both the defence and the state. The options are available as provided for in the Prosecution Policy Directive and include representations; diversions and informal mediation.[55]

2.6.2.1 Representations

Representations could be an informal or formal document addressed to the prosecutor, without prejudice, to consider the withdrawal of the criminal matter against the accused. The representations could be based on either the merits of the case or it could be on humanitarian grounds. It may also be for the consideration of diversion, a lighter sentence or even to request the State to embark on section 105A plea negotiations. Part 6 of the Prosecution Policy Directives, gives the State the discretion whether to withdraw or proceed with prosecution, after assessing the details in the documentation supplied. The effect thereof, is

55 Prosecution Policy Directive issued by Director of Public Prosecution on the 01 June 2015.

that the matter is withdrawn and the accused does not get a previous conviction as contemplated in section 271 of the Act.

An example of a successful representation is contained in *S v Loff.*[56] In this matter, the court held that representations could be made to the Senior Public Prosecutor and the matter could be sent to a suitable diversion programme, if the representations are successful. Consequently, the conviction and sentence that resulted from the payment of an admission of guilt fine was set aside on condition that representations would be made. This evaluation is very important in that it emphasises the seriousness of the consequences of paying an admission of guilt fine. The payment of such fine should be discouraged, when there are other less disruptive measures available.

2.6.2.2 Diversion

Diversion is a process that could be followed to avoid litigation in part or in whole.[57] The word divert is self-explanatory and have the effect that a criminal matter is dealt with in another manner. There are certain requirements before an accused will be allowed to go the diversion route. The accused must take responsibility for the criminal offence; there must be a *prima facie* case against the accused and the accused must not have any criminal record.[58] The case of *S v Houtzamer*[59] is one of the possible cases that could have been sent for a diversion programme. The court mentioned that the accused had thrown the dagga/marijuana on the

56 *S v Loff* unreported matter heard in the Western Cape High Court under case number 18132/2018 (WCC).

57 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE *Criminal Procedure Handbook* Juta, 2009 at 70.

58 Section 52 of the Child Justice Act 75 of 2008.

59 *S v Houtzamer* 2015 (B7968969/08) [2015].

ground, before being searched by the police officer. This could be indicative that the accused was willing to take responsibility of the dagga/marijuana and would thus be suitable candidate for diversion.

Chapter 6 of the Child Justice Act, for instance, deals with provisions for diversion of minor matters.[60] The chapter is limited to child offenders, however, in practise, adult diversion is largely used, using the same principles as those outlined in the Child Justice Act. Adult diversion is dealt with under Part 7 of the Prosecution Policy Directives.[61] When dealing with the diversion of minors certain provisions specify the type of programme that a child must attend. The type of programme will depend on the level the child offender falls under. Importantly, section 59 sets out the effect of diversion.[62] In a nutshell, it states that the child offender, if diversion is successful, will not have a criminal record and the state will not prosecute again under the same facts.

The only thing that is required is for the programme to be complied with. The programme that referred to is a programme that has been selected by the social worker, which will be suitable to the accused and the offence so committed. The programme may be, but not limited to, community service; anger management classes; drug and alcohol abuse classes and committal to a rehabilitation centre. If, however a matter is diverted in terms of section 77 or 78 of the CPA, then the diversion is temporary, until such an accused is declared sane.

60 Child Justice Act 75 of 2008.
61 Child Justice Act 75 of 2008.
62 Child Justice Act 75 of 2008.

2.6.2.3 Informal Mediation

Informal diversion is contemplated in Part 7 paragraph f of the Prosecution Policy Directives, June 2015.[63] Mediation is defined as:

> [a] form of alternative dispute resolution in which an independent third party (mediator) assists the parties involved in a dispute or negotiation to achieve a mutually acceptable resolution of the points of conflict. The mediator, who may be a lawyer or a specially trained non-lawyer, has no decision making powers and cannot force the parties to accept a settlement.[64]

The main purpose of mediation is reconciliation and compromise. The parties must therefore be willing parties. In the case of *S v Price*[65], the accused was willing to accept responsibility of shooting the pellet gun. Though the accused may have had a reasonably possibly true defence, the matter could also have been finalised by way of an informal mediation. This option is available to third parties and not to state entities. For instance, if an accused is arrested for possession of drugs or driving with excessive alcohol in his blood or breath, the complainant in that matter is the state. Such a matter where the state is involved the matter cannot be mediated. There are however, other options, as those listed above. Though the law enforcement officer is the complainant, he or she acts in his or her capacity as a law enforcement officer. Therefore, as a government representative he or she cannot be part of an informal mediation process.

2.7 PAYMENT OF AN ADMISSION OF GUILT FINE - NOT PAYMENT OF BAIL

"Everyone is equal before the law and has the right to equal protection and benefit of the law"[66]. This is a very important right in law, especially criminal law, as it expands its horizon

63 Prosecution Policy Directive issued by Director of Public Prosecution on the 01 June 2015.
64 Martin EA (5th Edition) A Dictionary of Law Oxford, 2003 at 311.
65 *S v Price* 2001 (1) SACR.
66 Section 9(1) of the Constitution.

to benefits of the law and alternative measures available to an accused person. In substantiation of the above is section 35(3)(1) of the Constitution which states that

> [e]very accused person has a right to a fair trial, which includes [among] other rights] the right to be informed of the charge with sufficient detail to answer it.

Consequently, the right to a fair trial commences the moment the person is arrested and is accused of the alleged offence. Yekiso J also points out that the right to a fair trial is not a right that is only restricted to the actual trial, but is also a right that is enjoyed by every arrested person.[67] The court held that:

> [t]he right to fair trial is extended to an accused person from the inception of the criminal justice process, which would mean on arrest, until its culmination up to and including the trial itself: as it is often said from the gatehouses of the criminal justice system (that is in the interrogation stage) as well as in the mansions (that is in the trial court).[68]

Part of the fair trial rights of an accused is his right to apply for bail.[69] However part of the problem with the payment of an admission of guilt fine is that the accused are under the impression the payment is for bail. It should be made abundantly clear to accused that the payment of the fine is not a payment for bail. Public prosecutors are vested with the duty to prosecute an accused person for the alleged crime.[70] The process by which legal proceedings in respect to criminal matters are dealt with is known as prosecution.[71] This prosecution commences the moment the accused is arrested, summoned or issued with a written notice.

67 *S v Esposito* [2006] ZAWCHC 52 (31 October 2006).
68 Snyman CR, (4th Ed) *Criminal Law* Lexis Nexis, 2002 at para 17.
69 Section 35 of the Constitution, See also Steytler.
70 Section 179 (2) of the Constitution.
71 Martin EA (5th Edition) A Dictionary of Law Oxford, 2003 at 390.

This then means that, police officials must inform the accused of this vital right regarding bail.[72]

A police official is in terms of section 57(1)(b) of the CPA, confirmed by section 56(1), the first State official that an accused will deal with.[73] He or she assumes all the responsibility of informing the accused of the offence, his right and the consequences of such an offence.

2.8 BAIL

It is common cause that police officials have the power to set bail for an accused person in terms of section 59 of the CPA. Section 59 is applicable to all offences, except for those offences listed in Part II and Part III of schedule 2.[74] Under this section, the police official determines the amount, and without consultation with the public prosecutor, sets an appropriate amount. Once this payment is made, in cash, the accused is given a receipt with an appearance date and the court in which he needs to appear in.[75] In essence; the accused will attend court whilst he or she is not in the confines of jail or prison. The case has not been finalised. The accused may even be issued with a notice to appear, where in terms of section 56(2) he or she will have to be released from custody immediately. There is no mention that the accused person will first have to make any payment when given a section 56(1) notice.[76] In fact, the intention of the Legislature is clear in this instance: that when you are issued with

72 See section 35 of the Constitution.
73 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE *Criminal Procedure Handbook* Juta, 2009 at 102.
74 Section 59(1)(a) of the CPA.
75 Section 59(1)(b) of the CPA.
76 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 27.

a section 56 notice, the effect is that you are warned to appear in court. Something that is commonly known as “free bail”.

Conversely, when an admission of payment is made, the accused is released and given a receipt that shows that payment was made. However, the effect thereof is different, in the sense that the matter has now been finalised. He at all times deals with a police official who practically has his life and liberty in his hand. The option of paying a fine and being released is not determined on whether the accused pays the fine on the day to be released. The notice is issued having both the option to pay for admission of guilt fine, on or before court appearance. In addition, it has the court appearance date. So theoretically, a police official should not wait for the accused person to pay the admission of guilt fine before releasing him or her.

A lay person, will not know the difference between the two. The majority of the people who pay or have paid an admission of guilt fine are under the mistaken belief that they have paid bail. The error that the amount paid was for bail could be attributed to the fact that the accused is released from custody when the payment was made.[77] This will be further discussed in Chapter three paragraph 3.3, where it will be indicated that it is a common trend with police officers to first accept the fine before releasing an accused person. This is concerning as the effect of paying an admission of guilt is very harsh. Especially to someone who has a defence and who is under the mistaken impression that he or she was paying bail.

77 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 25.

In an affidavit of the unreported case *S v Loff*[78], the applicant sets out clearly how she had been treated on the 16 February 2011 at the Parow police station. The applicant stated that she had been arrested on a charge of theft, a first offender, and that she found herself in the lowest point in her life.[79] Saldanah J, in para 4, further mentions that the accused was informed by a police official that she can pay a fine of R300.00 and will be immediately released; which she paid without any hesitation. There is no indication that the accused person's rights had been explained, nor is there an indication that the consequences of the fine had been explained. The consequences of her paying the admission of guilt become a setback, in that she was dismissed from her employment and she had difficulty in obtaining any employment thereafter. It was only later that she learnt that the reason for her not getting employment was because she had a criminal record. The court ordered that the conviction and sentence be set aside and for the state to consider a suitable diversion programme, after receipt of relevant representations. It is unfortunate that the court also did not expand on the rights of a person paying such a fine on the mistaken belief that payment was for bail.

The one thing that is a highlight in this case that a persons' mental state plays a big role in the payment of the admission of guilt fine. It is therefore important that the police official explains the effects properly. It further is an indication that police officers just want to expedite matters.

78 *S v Loff* unreported matter heard in the Western Cape High Court under case number 18132/2018 (WCC).

79 *S v Loff* unreported matter heard in the Western Cape High Court under case number 18132/2018 (WCC).

Furthermore, it is evident a lay person is unable to make a distinction between the payment of an admission of guilt fine and police bail. It could be difficult to comprehend the difference as was in the case of *S v Gilgannon.*[80] The accused paid a sum of R300.00, at the police station thinking that it was for bail purposes, thereafter still appointed an attorney to appear for him at court on the return date that was stipulated in the written notice. It only transpired in court, on the "return date" that the matter was finalised on the day the R300.00 had been paid. That amount was in fact for a fine and not bail. Concluding that the police officials blurred the two distinct procedures and that neither constitutional rights nor the consequences of paying the fine had been explained to the accused.[81] This is not the only case that deals with the injustices of paying for a fine without knowing what the consequences will be. In fact, the next chapter will be unfolding the consequences that result from paying an admission of guilt fine as well as what the judiciary has to say regarding the role of police officers upon proceedings with admission of guilt fine payments.

80 *S v Gilgannon* [2013] ZAGPJHC 226.
81 *S v Gilgannon* [2013] ZAGPJHC 226 at para 9.

CHAPTER THREE:

The legal consequences of the payment of an admission of guilt fine

"Stress / trauma/ criminal record/ rape/ reputation/ safety/ release me!"

3.1 INTRODUCTION:

"For every action there is a… reaction".[1] This statement may be a *cliché*, but it is true. As in criminal law, the phrase *nullum crimen, nulla poena sine lege*[2] means that there is no crime without punishment. There is a consequence for every criminal act. The punishment faced by an accused will vary depending on the prevailing circumstances and the facts of each case. It can be accepted that the payment of an admission of guilt fine is part of a process in order to finalise trivial cases quickly.

The consequence of the payment of an admission of guilt fine are similar to any other case that would have been finalised by ordinary trial proceedings. The consequences for cases are almost the same as they are dealt with in the normal course of the criminal justice system. Yet an accused who pays an admission of guilt fine, prior to a court appearance is in a disadvantaged position compared to an accused who pleaded in court. A person who appears in court, has the sentencing options explained to him, as well as the effects of pleading guilty. It could be done either by his or her legal representative or the presiding officer.

1 Newtons Third Law. https://www.physicsclassroom.com/class/newtlaws/Lesson-4/Newton-s-Third-Law.

2 There is no crime without law; there is no punishment without law: direct translation of the Latin principle.

This chapter examines the consequences of paying such a fine. It further assesses whether our South African courts are protecting the rights of people paying admission of guilt fines in the same manner as other accused are protected.

3.2 THE RESULT OF PAYING AN ADMISSION OF GUILT FINE:

The purpose of section 57 of the CPA is to expedite criminal cases, which are trivial in nature. It is indeed a good procedure, for accused persons who truly are guilty, have no defence and who do not wish to go through lengthy trials with numerous court appearances. It is preferable that such matters are being finalised by the payment of an admission of guilt fine. The accused is convicted and sentence immediately, when the fine is paid. In the process, the accused eludes the payment of an attorney and unnecessary travelling costs to and from court. Such an accused is also relieved from the financial stresses caused by a lengthy trial and the on-going mental stress of a trial. This position is recognised by our courts and the legislature.

In *S v Parsons*[3] the court stated that when an accused person is informed that the payment of a fine would be easier than attending court, it becomes an attractive option to an unsophisticated accused. No person prefers being in court and there could be a number of reasons for this. Where a person is aware of the consequences of such a payment and has undoubtedly consoled himself with the outcome, it could be a good thing. An admission of guilt fine payment was not enacted to be used in a malicious manner and definitely not to induce an accused to be released from custody. It is wrong to create the impression that such a payment is for bail, as discussed in the previous chapter.

3 *S v Parsons* 2013 (1) SACR at 40 (para 4 h and 5 i).

3.3 CONSEQUENCES OF PAYMENT OF AN ADMISSION OF GUILT FINE

The consequences of paying an admission of guilt fine are that a person is deemed to be convicted and sentenced as per normal criminal proceedings. The accused then attains a criminal record against his or her name. Moreover, several inherent rights are waived as a result of the payment of an admission of guilt fine. However, what is more shocking and disturbing, is that a person who pays an admission of guilt fine, could be unaware of the consequences. It could be that such a person is waiting on for a trial date because he or she had assumed that it was a payment for bail. Only to be unpleasantly confronted with the consequences of having a criminal record because of the payment.

3.3.1 Conviction and sentence

In criminal proceedings, the rule of law is clear and the state is *dominus litus*.[4] The prosecutor decides which cases he intends to prosecute and once that decision is made, the prosecutor has the duty to prove its case beyond a reasonable doubt.[5] Therefore, it is only after this burden of proof has been discharged that an accused is found guilty and convicted. It is the court that decides whether the accused is guilty or not, based on the evidence that has been presented. In *S v V*[6] the court emphasised that "[i]t is trite that there is no obligation upon an accused person, where the State bears the onus, to convince the court".[7] Similarly, when an accused person pleads guilty,[8] the court still has the discretion to either accept or reject the plea. The court in terms of S112 (1)(b) is obligated to explain the elements of the offence so

4 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE Criminal Procedure Handbook Juta, 2009 at 64.

5 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE Criminal Procedure Handbook Juta, 2009 at 66.

6 *2000 (1) SACR 453 (SCA).*

7 *S v V 2000 (1) SACR 453 (SCA) at 455.*

8 Section 112 of the CPA.

that the accused is aware of what he is pleading on. In support of this obligation the court in *S v Baron*[9] held that "*ń sorgvuldige verduideliking ann die beskuuldigde van die bestanddele van die misdaad waarop hey skuldig gepleit het is dus noodsaaklik"*.[10] When payment of an admission of guilt fine is made, the accused does not have the benefit of having his or her case being assessed in open court and no evidence is being delivered. The accused is found guilty based on the allegation in the notice and his signature acknowledging the true events as per the state allegation contained in the J534 form.

Once the accused signs and the fine is paid, the matter is finalised. Consequently, through this process, the accused is deemed to have been convicted and sentenced, as if it were done at the court with the necessary jurisdiction.[11] The case of *S v Zinn*[12] is the leading case which states that three main factors ought to be taken into account when the court considers an appropriate sentence. The factors are; the crime, the criminal and the interests of society. Snyman further explains that the court meant that the "crime" refers to the seriousness of the offence; "the criminal" refers to the personal circumstances of the accused and the "interest of society" whether society needs to be protected from the accused or whether the accused could be rehabilitated back into society.[13] The court takes certain aspects into account to determine an appropriate sentence. In terms of section 57 of the CPA, the fine amount must not be more than the amount determined in the Government Gazette and the amount that might have been decided by a court. In *R v B*[14] a matter was sent on review. This

9 *1978 (2) SA 510 (C).*
10 S v Baron 1978 (2) SA 510 (C) 512 G at 512 (para G).
11 Section 57(6) of the CPA.
12 *S v Zinn* 1969 2 SA 537 (A) at 540.
13 Snynam CR, (4th Ed) *Criminal Law* Lexis Nexis, 2002 at 23.
14 *R v B* 1954 (3) SA 431 (SWA).

was because of the seriousness of the matter and the fine amount that was suggested by the prosecutor. The court held:

> In the present case, too the magistrate was unable from the charge sheet to assess correctly, what punishment should have been imposed. He could not have known why the accused behaved [that way or]… above all could he have known the intelligence, mental outlook, education or background of the accused…[15]

Already in 1954, the court recognised that the circumstances of the accused in such matters must be considered. It is unclear whether this was a decision made by the police or the prosecutor. Before a court can consider the three factors noted above, the defence or accused has the opportunity to adduce evidence in court, to place before court any mitigating factors that the court ought to take into account when sentencing. The personal circumstances of the accused could influence the court. He may even call witnesses in order to testify in his favour for a lighter sentence. This opportunity is not given to an accused when paying an admission of guilt fine. No consideration is given about the affordability of an accused by the police official. The fine must be paid in whole and cannot be deferred.

Furthermore, and most importantly, during an ordinary trial, once sentence proceedings are complete, the court is obligated to inform the accused of his right to appeal or review.[16] One can accept that this surely is not being done by the police official who wants to convince the accused just to pay and get the matter finalised. Ultimately, this emphasises the number of occasions an accused person, in court is informed of his rights. These numbers of occasions are not available to the payee of an admission of guilt fine.

It is therefore very clear from the above that the benefit of having your case decided in court, by someone who has a little more experience than yourself, is much more preferable than

15 *R v B* 1954 (3) SA 431 (SWA) at 432.
16 Section 35(3)(o) of the Constitution.

taking the so-called "quick fix" of paying an admission of guilt fine. The rights that are waived by the accused once the decision to pay admission guilt is made, are enormous.

3.3 2 Criminal record

Once a conviction is noted, it is the inevitable that a person will get a criminal record. To define it:

> [a] criminal record is an unavoidable consequence of a criminal conviction. Once convicted, whether after paying an admission of guilt fine or by a court in the ordinary conduct of its proceedings, an accused has no choice of avoiding a record of the criminal conviction.[17]

The CPA does not have a specific section dealing with a criminal record, or when a person gets a criminal record. It merely has a provision dealing with previous convictions, stipulated in section 271. This section states that:

> (1) The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.
>
> (2) The court shall ask the accused whether he admits or denies any previous conviction referred to in subsection (1).
>
> (3) If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted.
>
> (4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

The payment of an admission of guilt fine will thus form part of the previous conviction of an accused.[18] A record is kept for various reasons, which include, but are not limited to employment purposes, travelling and any other purpose. In criminal cases, it assists the court

17 *S v Rademeyer* (unreported case, GP case no A186/2017, (delivered on 12 April 2017) at para 45.
18 Section 271 of the CPA.

to determine which sentence should be imposed when the assessment of fairness and justness is done. A previous conviction is of particular importance when the court must consider an appropriate sentence for a second or subsequent offender. In *S v Miller,*[19] when it came to sentencing the court considered the accused's four previous convictions. One of the previous convictions in 1996 was an admission of guilt fine that was paid.[20] The conviction was however, not relevant as it was an assault case. It proves that an admission of guilt fine was taken into consideration and the accused was not regarded as a first offender.

A subsequent sentence will therefore be more severe because of the previous conviction. A previous conviction could therefore be the difference between imprisonment and any other alternative sentence as listed in section 276 of the CPA.

3.4 INFORMATION ABOUT A PREVIOUS CONVICTION OR A CRIMINAL RECORD

Upon arrest, a person's fingerprints are taken by the police[21] These prints are kept in a database as an indication that the accused has a pending matter. Once the matter is finalised, by way of a conviction, the accused's fingerprints are taken once again. In terms of section 36B(2)(b) a police official is given the power to have fingerprints:

> … taken of a person deemed under section 57 (6) to have been convicted in respect of any offence, which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subsection.

These fingerprints are then stored in terms of Chapter 5A of the South African Police Service Act,[22] and is maintained by the National Commissioner of the South African Police Services under the responsible Division or Department of the Service.[23] The stored details are then

19 2018 JDR 0416 (WCC).
20 *S v Miller* 2018 JDR 0416 (WCC) at para [126].
21 Section 36B (1) of the CPA.
22 Act 68 of 1995.
23 Section 36B (3) of the CPA.

proof of the previous conviction against the accused. Currently the division that is responsible for the storage, maintenance and administration of this information is the Criminal Record Centre and Crime Scene Management situated in Pretoria.[24] The database is known as the Automated Fingerprint Information System (AFIS), where the prints are entered into.

These records can only be given to persons of interest in relation to certain instances mentioned in subsection 4 of the SAPS Act. The fingerprints may be used to detect of crime, identify human remains or missing persons and to further investigate criminal offences and for prosecution purposes.[25] A company may request this type of information. They must however provide reasons why they are required the said information. This will for obvious reasons be to detect if a prospective employee has a criminal past or not. This information is also readily available to the Department of Home Affairs for purposes of visas. As stated above, the purpose of keeping record of a person's criminal record or previous conviction, is to indicate whether the person frequently commits offences or whether he is merely a first offender. The record remains entered against a person's name until it is either expunged or a presidential pardon is received. There is no automatic removal once a criminal record is entered against a person's name. Thus a person, who has paid an admission of guilt fine, has a criminal record against his name.

3.5 IMPEDIMENTS AS A RESULT OF A CRIMINAL RECORD

3.5.1 Travel

24 Police clearance Certificates: Applying for a Police Clearance Certificate https://www.saps.gov.za/services/applying _clearance_certificate.php (accessed on the 14 April 2019)

25 Also emphasised in section 36B (6)(b) of the CPA.

A criminal record may be an impediment to ones travelling aspirations. Certain countries require a security clearance certificate from the local police station. The police will then furnish that country with the criminal profile. South Africa, for instance is one of those countries that require such clearance.[26] Furthermore, when it comes to immigrants, a foreigner may be declared an undesirable person if such a person has been publicly charged or is likely to be publicly charged; and if the person has a previous conviction, where imprisonment was imposed without the option of a fine.[27] He is then regarded as an undesirable person and will in all likelihood not qualify to enter the country. Having been declared an undesirable person, an immigrant will not be in a position to apply for a visa; permit or admission into South Africa.[28]

In terms of South African law, citizens must obtain a police clearance certificate when such a person intends working abroad or migrate to another country.[29] It could be quite an inconvenience and great impediment if a person is unaware that when he paid an admission of guilt fine he attained a criminal record. This was experienced by Mr Tong[30], where he was unable to travel to South Korea for work purposes due to the criminal record.

3.5.2 Driving:

Another category of people that could be adversely affected is those who wish to become professional drivers. If someone intends or aspires to be one, a professional Drivers permit in

26 Police clearance Certificates: Applying for a Police Clearance Certificate https://www.saps.gov.za/services/applying _clearance_certificate.php (accessed on the 14 April 2019)
27 Section 30 (1)(a) of the Immigration Act 13 of 2002 (as amended in 2004).
28 Section 30 (1) of the Immigration Act 13 of 2002 (as amended in 2004).
29 Applying for a Police Clearance Certificate https://www.gov.za/services/trave-outside-sa/how-apply-police-clearnace-certificate-pcc
30 *S v Tong* 2013 (1) SACR 346 (WCC) at para 4.

terms of chapter 5 of the National Road Traffic Regulations[31] is required. However, in terms of regulation 117 (c) of that Act, a person shall be disqualified from obtaining or applying for a professional drivers' permit

> if the applicant has, within a period of five years prior to the date of application, been convicted of or has paid an admission of guilt on—
> driving a motor vehicle while under the influence of intoxicating liquor or a drug
> having a narcotic effect; driving a motor vehicle while the concentration of alcohol in his or her blood or breath exceeded a statutory limitation; reckless driving; or in the case of an application for a category "P" and "D" permit, an offence of which violence was an element

A person's ability to become a professional driver could be severely hampered if he has a previous conviction. Thus, a person who mistakenly paid an admission of guilt fine could be precluded from entering this profession.

3.5.3. Dealing in liquor

A criminal record will also affect would be entrepreneurs who wish to embark on trading in liquor. It is undisputed that employment is a problem. As such, people find ways of being entrepreneurs. The application of obtaining a liquor licence could be a frustrating process on its own. Ann additional requirement is that an applicant should not have a criminal record. A lay person will in all probability not be aware that such requirement exists. One can assume that in informal settlements where trading takes place without licences, this requirement and other pre-requisites are only made known once that person has been arrested. More often than not, the offences of trading and liquor without the required licence, is usually finalised by way of an admission of guilt payment.

31 National Road Traffic Act 93 Of 1996.

In S *v Tengana,*[32] the accused paid an admission of guilt fine on the charge of dealing in liquor without a licence.[33] Though this case dealt with the confiscation of the liquor, it indicates that it is possible for a person to pay an admission of guilt fine for dealing in liquor. However, one of the core pre-requisites of obtaining a liquor licence is that one should not have been convicted of the same offence.[34] More importantly, section 25(1)(b) specifies that a 10 year period must have lapsed before the person can actually make an application for a liquor licence. A period of 10 years has to expire, before such an application can be made. Even if a person knew the effects of such a transgression, this period on its own, is ridiculous.

3.5.4 Employment

Unemployment in South Africa is a huge problem and in a competitive country, a person with a tainted criminal record is at the back of the queue behind the rest of the competition. It is correct that not all job opportunities or job promotions consider a persons' criminal record. The requirements of a particular job will be listed on the vacancy advert and will be in the policy documents of that employer. However, one cannot shy away from the fact that many jobs consider that factor. A clear criminal record is a cardinal requirement similar to a certain level of education or length of experience. For instance, a person who has a previous conviction of theft or fraud may give an impression that he or she has a tendency of being dishonest; an assault conviction may be indicative that he or she has anger problems and a drug related convictions are indicative that the person may be an addict or a user.

32 *S v Tengana* 2003 (1) SACR 138.
33 Section 154 (1)(a) of the Liquor Act 27 of 1989.
34 Section 25 of the Liquor Act 27 of 1989.

An employer will most likely not appoint such a person based on that past conduct indicated on the SAP69s, which reflects his or her previous convictions. If a person applies to be a police official, it is a specific requirement that such a person must not have been convicted of any offence.[35] The chance of finding a permanent position is therefore severely compromised. Furthermore, the promotional opportunities will also be significantly reduced despite the fact that a promotion may be due to an individual. In terms of the appointment of the National Forensic Oversight and Ethics Board, the Minister will disqualify, remove or not appoint a person who has been convicted of any offence.[36] This illustrates that a person is unfit to hold a certain office if in possession of a criminal record, irrespective of being aware or unaware of having a criminal record entered against your name. The sad part is that one cannot even rely on discrimination based on a criminal record, because, this discrimination will probably pass the limitation test as set out in the Constitution.[37] Therefore, the only remedies available to persons with a criminal record are those mentioned and discussed in Chapter Four.

The above-mentioned is an indication of how immense the effect of attaining a criminal record could be. Especially when a person is unaware that they acquired a criminal record because of the payment of an admission of guilt fine. A person' rights are in this instance clearly violated and life as he or she knows it could be disrupted severely. It is correct that there are remedies available to a convicted, such as the expungement of a criminal record and referring the matter for review. However, these options are not as quick as the payment of an admission of guilt fine is. In fact, it could be a frustrating and expensive process. A person

35 How to become a reservist http://www.saps.gov.za/services/reservist.php (Accessed on the 14 April 2019)
36 Section 15W of the SAPS Act.
37 Section 36 of the constitution.

is caught off guard by the knowledge of the existence of a criminal record. Then, not to have at your disposal the funds or the time, to proceed with either an expungement or review, is even more of a hindrance. This study will further assess the remedies available to a convicted and sentenced by way of section 57(6) in Chapter 4.

3.6 THE COURTS AND ADMISSION OF GUILT FINES

Courts are in favour of the payment of an admission of guilt fine by means of finalising a criminal case.[38] However, the criticism is mainly focused in the manner in which an admission of guilt fines is processed. This includes the process from the commencement of prosecution up to the way in which the matter is finalised. There is dissatisfaction in the constitutionality of it all.

In *S v Tong*,[39] a matter which was taken on review, the court addressed some of the shortcomings of this system. The applicant had been arrested on a charge of possession of drugs on the 1 November 2008. The police official informed his father, that R300.00 may be paid for the applicant to be released from custody. An amount of R200.00 was paid. Certain unexplained documentation was signed by the accused and he was asked to provide a fixed address, after which he was released. The fine was paid by the father, who was unaware that what he was in fact paying a fine. He was under the impression that he was securing the release of his son pending a trial date. At that stage, he had assumed that he would be informed of his court date at a later stage.[40] Similarity, in the case of *Erasmus v MEC for*

38 *S v Shange* 1983 (4) 46 SA at 49D-E.
39 *S v Tong* 2013 (1) SACR 346 (WCC).
40 *S v Tong* 2013 (1) SACR 346 (WCC) at [2].

Transport Eastern Cape Province,[41] a friend of the Plaintiff paid R300.00 on behalf of and in the absence of the Plaintiff, unaware that it he was paying an admission of guilt fine.[42]

It only transpired in 2011, when the applicant applied for a job, that he realised that he had a previous conviction and that the R200.00 paid was in fact a payment for a fine and not bail. The matter was taken on review as the applicant alleged that nothing regarding an admission of fine was ever explained to him. He stated that he had a defence and had he known that the R200.00 was payment for a fine, he would not have made it.[43]

The paying of the admission of guilt fine, affected immensely on his employment opportunities. Even though he had received an offer to work in South Korea as a teacher, he required a visa to travel and could not obtain one, because of his criminal record.[44] This meant that the position was given to another candidate. His criminal record reduced his teaching opportunities to literally zero. Furthermore, his choice of his profession in the film industry, which he thought would bring about opportunities to travel abroad, was no longer a possibility. He was restricted in his movement and in his choice of trade, because of his criminal record.

The matter went on review as the Applicant averred that his rights and the consequences of the payment of an admission of guilt fine were never explained to him. The court requested from the Director of Public Prosecutions' (DPP) representative to supply certain information that would contradict the allegations as averred to by the Applicant. However, evidence

41 2011 (210/08) [2011] ZAECMHC 3; 2011 (2) SACR 367. This case was dealt with in the civil court as the plaintiff sued the State for unlawful arrest and detention.

42 Erasmus v MEC for Transport, Eastern Cape Province 2011 (210/08) [2011] ZAECMHC 3; 2011 (2) SACR 367 at [8].

43 *S v Tong* 2013 (1) SACR 346 (WCC) at para 3.

44 *S v Tong* 2013 (1) SACR 346 (WCC) at para 5.

showing that the correct procedure was followed and that the Applicant had been informed of his rights was not made furnished to the court. The court, relying on the case of *S v Mans*[45] and the case of *S v Parsons,*[46] stated that the basic and essential rights of the accused are prejudiced once an accused mistakenly makes a payment of an admission of guilt fine.[47]

The court held that the dire consequences of paying an admission of guilt fine should not be taken likely. Most disturbing is the fact that it was alleged that the release of the accused was the essential component used to effect the payment of the fine. The police coerced the accused in paying the fine, making him believe that he was paying for bail instead of a fine. This was a catalyst for the decision to pay the fine without any questions being asked. It could be argued why the accused or his father failed to ask the officer what they were paying for and when will the accused person be informed of his court appearance. One will have to understand first that the accused and his family, or any other related person, suffers from immediate psychological trauma once a person is arrested and thought process is not the same.[48] However, more importantly, they do not have the duty to ask all that information. The duty is on the police officer to inform the accused of all his rights and the consequences of such a payment.[49] This conduct of the police is in direct conflict with the presumption of innocence.

After considering all the evidence, the conviction and sentence was set aside by the High Court. The court outlined that the conviction itself was not in line with the principles of justice.

45 1990 (1) SACLR 75 (T).
46 Case number 111202 delivered on the 15 June 2012 (unreported case).
47 *S v Tong* 2013 (1) SACR 346 (WCC) at para 18.
48 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 13.
49 Section 35 of the Constitution.

The court stated that an accused person must be informed that when he elects to pay an admission of guilt fine, that he waives certain rights.[50] He must therefore be informed of the charge, what the payment of an admission of guilt fine is, what the consequences to paying such a fine are, the right to have a legal representative and the right to examine the evidence against him.[51] It was a further stated that all the above must be contained in the J534 form issued by the police officer. Prior to this judgement, it did not contain any space for officials to explain or indicate that the rights of the accused and the consequences of payment of such a fine have been explained to him.

It could have been difficult to amend the J534, as it is a formal document by the Department of Justice and Constitutional Development. The Department had to be involved in the amendment of the said document. According to Curlewis, [52]consultations between the department and the South African Police had been taking place, following the decision made by the court.[53] It seems as though there was some progress as a result of the consultations that took place. Following the decision taken in *S v Tong*, on the 28 September 2012 a letter was issued by the Provisional Commissioner of the South African Police Services, requiring that all police stations in the Western Cape have an annexure attached to the J534 indicating the accused's rights.[54] This was to ensure that the police officers keep in line with the decision taken in the above-mentioned case. The effect of this change was therefore applicable to cases that were heard after the letter was issued. Thus far, from the available research, no matter was concluded by way of section 57(6) after the September 2012 has surfaced for

50 *S v Tong* 2013 (1) SACR 346 (WCC) at para 15.
51 *S v Tong* 2013 (1) SACR 346 (WCC) at para 25.
52 Curlewis L 'Sugar-coating guilt - admission of guilt fines - no easy fix' Feb 2014 *De Rebus* at 28.
53 Curlewis L 'Sugar-coating guilt - admission of guilt fines - no easy fix' Feb 2014 *De Rebus* at 28.
54 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 20.

review. One can only draw an inference that possibly the police are making use of the amended version of the J534. However, that does not negate the obvious emphasis by the Rogers J in *S v Houtzamer*[55], who indicates the improbability of a police officer recalling an incident that took place a few years back, thus accountability being a problem on its own.

S v Houtzamer is a review matter that was finalised after the case of *S v Tong*, but which arose before the decision taken in the latter case.[56] The applicant had been arrested for possession of dagga.[57] He was issued with a J534 wherein it contained an appearance date and the option of paying an admission of guilt fine.[58] He was then informed by the officer that he will have to pay R200.00 in order for him to be released. It was at this point that he concluded that the officer was referring to bail and not an admission of guilt fine.[59] Moreover, the applicant had been in custody and his father, paid the R200.00 without conversing with the applicant, after he too had been told that the R200.00 was a way of securing his release.[60] Six years later, this matter was taken on review to the High Court. The applicant averred that he had no intention at the time of paying an admission of guilt and attaining a criminal record.

Rogers J, who delivered the judgment, first made enquires to the Magistrate and the DPPs Office, to answer three questions. The first was about the delay in the prosecution of this matter, referring to the time it took the applicant to make the application for review, that it may prejudice the interests of justice and referring to the value of the evidence at this late

55 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 23.
56 *S v Tong* date of offence was 01 November 2008 and in S v Houtzamer date of offence is 30 June 2008. The former case was the first, of the two cases, to be brought before court for review in September 2012 and the later was before court in March 2015.
57 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 4.
58 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 3.
59 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 4.
60 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 4.

stage.[61] The second dealt with the error or omission by the peace officer. Whether such an error or omission should render the conviction null and void.[62] Lastly the court referred to the case of *S v Cedras,*[63] that the applicant must actually have a defence and the same must be seen in the presented papers in court.

In the said affidavit the court remarked that the applicant did not state whether he was in possession of the said dagga or, not. It is submitted that the defence of the accused or applicant at that stage of the proceedings was irrelevant, especially if he did not have any previous convictions. There are other alternative dispute resolutions that are afforded to an accused person, under the normal court system such as a diversion programme,[64] should he take responsibility of his actions. This option is mainly exercised for child offenders, in an attempt to avoid exposure to criminal system as much as possible.[65]

It is evident from the queries posed by the judge to the magistrate and the DPPs office that the court needed further information regarding what transpired when the accused paid the admission of guilt fine. The court queried whether the lack of appreciation of the accused of his rights, if proved, would be sufficient to set the conviction aside.[66] It is submitted that the court failed in this respect to consider one of the most cardinal rules of criminal law – that an accused must have appreciation of his act and he must act in accordance with such

61 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 6.
62 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 6.
63 *S v Cedras* 1992 (2) SACR 530 (C).
64 A diversion programme is a procedure used in criminal matters to attempt to avoid a criminal trial in whole or in part. It is a method that is available to persons who have no criminal record and to allow them to maintain that status. Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE *Criminal Procedure Handbook* Juta, 2009 at 70.
65 See Section 51 of Child Justice Act 75 of 2008.
66 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 7.

appreciation.[67] Therefore, there is a shift from the physical element to the mental element of the person. This too involves the psychological aspect of a first offender when he is arrested, charged and informed of such foreign concepts. Why should a person who never intended to plead guilty, be saddled with a criminal record, which will hinder him from doing and attaining certain things. However, court relied on the part of the annexure in the J534, which states that the accused is aware that he is guilty of the offence, which he has signed for. No matter the guilt of an accused, he is entitled in terms of the Constitution to bring challenges to the evidence of his accuser. Nowhere in the queries of the court does it seem that the court sympathises with the applicant. In fact, the main concern was the possibility abuse of Section 304 of the Act when it comes to matters stemming from section 57 of the Act. One shocking revelation, which came as a result of the court's queries, is the response of the Magistrate stating that:

> …in all the cases he has handled over the years, accused persons complaining about the deemed conviction say that they were merely ordered to sign the form without being told the reason or consequences.[68]

Theoretically, the mere signature by the accused is normally conclusively indicative that what the accused is signing has been explained to him or her. However, the magistrate emphasised that this is not always the case. That in fact in practice, this is not explained, an accused is merely told to sign. Therefore, on face value, one cannot merely assume that what the accused has signed was indeed acknowledged by the accused. Adversely this means that, even after the amendment of J534, a signature of an accused appearing on that form cannot be taken as an indication that the police have explained the rights of the accused and the possible consequences applicable. It would seem that the ignorance and the psychological

67 Snyman, CR *Criminal Law* Lexis Nexis, 2014 at 32.
68 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 12.

effect of being incarcerated, of a first offender is something that is preyed upon by police officers. They dangle "freedom" with the condition of having to pay a fine first.[69] Thus making it easy for a person to sign the J534 without making any enquiries.

> Regardless of the picture painted by the paper trail from the Police with regard to the issuing of the summons, it never happens in practice. Accused persons are never released to pay the admission of guilt later. The paying of the admission is being used to finalise the matter.[70]

This is not the procedure that was envisaged by section 57 and 56 of the CPA. According to section 56, an accused should not confuse a payment of an admission of guilt fine with bail, but this is happening. A Magistrate, who deals with the matters first-hand, confirms this. Therefore, it is not difficult to believe, that this is the actual practice in our police stations.

In S *v Madhinha* (discussed in detail in chapter 4) the accused was arrested on the 29 October 2010. He was taken to Bothasig police station where he was detained and was given a J534, which he subsequently paid the R500.00 for the fine.[71] Thulare J emphasised that practice of incarcerating an accused and then issue him with a J534 form was contrary to section 56 and South African Police Services Standing Order (G) 341 issued under Consolidation Notice 15/1999 in proviso 3(3)(b).[72] To curb this continuous ill-practice by police officers, the judge suggested another form of accountability by officers who detain persons and thereafter hand them a J534 by having the view that:

> …the time has arrived for the National Commissioner of Police (Commissioner) in the interests of the citizens and residents of this country, the integrity of the committed members of the SAPS, the reputation of the section 57 procedure and that of the administration of justice in general, to require a member of the SAPS who detains an accused in a matter where a written notice (J534) would have been appropriate and is in fact used after an initial detention, in writing to record such detention and their reasons, and to submit such monthly returns to the

69 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 13.
70 *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC at para 13.
71 *S v Madhinha* 2019 (1) SACR 297 (WCC) at para [7] –[8].
72 *S v Madhinha* 2019 (1) SACR 297 (WCC) at para [40] –[42].

> Commissioner for his consideration and intervention. The reasons must show why such arrest was necessary and unavoidable before the written notice was handed to an accused.[73]

3.7 EXPEDIENT SYSTEM: OPEN TO ABUSE?

The common thread in the above-mentioned cases is the persistent abuse of power from the police officers. The officials have the duty to inform and deal with the accused. It is at this time that an accused, particularly a first offender, could be easily coerced into signing a J534 form and paying an admission of guilt fine. This practise is not in the interest of just, no, it is for the sake of finalising matters speedily. One may assume that this is done merely for statistical purposes, to show that that particular jurisdiction has finalised a large number of matters.

However, this is to the detriment of the accused's rights, more importantly, the whole spirit of the criminal justice system, which has at its core, the fair rules for an accused's trial. The abuse is unfortunately not limited to when the police officer omits to explain rights and consequences to an accused. The costs of this are much bigger. It has the lasting effect, especially on an accused who is unaware of the criminal record. Nevertheless, it is conceded that not all things are well formulated and function to perfection. A court should conduct an enquiry when it entertains such matters and reviews. Chapter four addresses the methods that could remedy the detrimental position that an accused finds himself in after paying such an admission of guilt fine.

73 *S v Madhinha* 2019 (1) SACR 297 (WCC) at para [43].

CHAPTER FOUR

REMEDIES

"I did not know… what now?"

4.1 INTRODUCTION

In the previous chapter, the devastating consequences of attaining a criminal record were analysed. This chapter contains the avenues that are available to such an aggrieved accused. Although an accused, when paying the fine, maybe unaware of the dire consequences, one must accept that as soon as he realises the consequences of making the payment, he must be made aware of his options. It is the responsibility of the police to make these options known to the accused before payment. However, as previous case law confirms, this is not done. Therefore, regardless of when the accused finds out about the existence of a criminal record, there are remedies available to assist him.

In this chapter, the various options available to such persons will be explored. It includes taking the matter on appeal or review, the bringing of an expungement application or simply doing nothing.

4.2 PAYMENT NOT A PREVIOUS CONVICTION?

In *S v Madhinha*[1] the court held that criminal offences finalised by way of section 57(6) are not considered previous convictions in terms of section 271 of the CPA.[2] This decision has not yet been confirmed by the Supreme Court of Appeal. However, it is the only case thus far that has addressed this issue. The court relied on other authorities,[3] stating that a conviction only

1 *S v Madhinha (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018).*
2 At paragraph 44.
3 *Director of Public Prosecutions, Limpopo v Mokgotho (068/2017) [2017] ZASCA 159 (24 November*

follows after the state has proved beyond reasonable doubt that the accused person is guilty. The court held further that the accused must have appeared, convicted and sentenced in court.[4] It further stated the seriousness of a previous conviction and the aggravating factor it brings to sentencing proceedings is that it shows past criminal conduct or tendencies.[5]

In as much as an interpretation that an admission of guilt fine payment is not or should not be a criminal record, is welcomed, one cannot ignore the obvious previously cited decisions where it was held that an accused person attained a criminal record for paying an admission of guilt fine. For instance, the court referred to the case of *S v Parsons* and *S v Tong*, which dealt with similar matters, yet the court found that the fine payment was not a criminal record. The court indeed critiqued the previous court decisions, and suggested that the issue of a criminal record emanating from section 57(6) of the CPA is incorrect.

The decision of the court is definitely not agreed with. The court is placing a literal meaning to the appearance in court before conviction. The court did not invalidate all the criminal records attained by way of an admission of guilt fine; only those, which was made prior to a court appearance. When the court refers to section 57A, it recognises that a person may get a criminal record. The major difference between these two procedures is the forum in which the payment is made, i.e. if the accused made an appearance in court. The Court substantiates its reasoning that the accused has the advantages of having a legal representative, being properly informed of his rights and the conviction being recorded in the J546.[6] It is submitted

2017) *S v Madhinha* (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018) at para 26.

4 *S v Smullion* (Sullivan) 1977 (3) SA 1001 at 1004D-E.

5 *S v Madhinha* (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018) at para 29.

6 S v Madhinha (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018) at para 36.

that the court further erred to when it relied for a characterization of conviction on the case of *Director of Public Prosecutions, Limpopo v Mokgotho.*[7] This matter dealt with whether the State had discharged its onus to prove that the accused was guilty beyond reasonable doubt in a murder case. Where evidence was led in front of a presiding officer. However, this judgment does not negate that a payment of an admission of guilt fine is in fact a conviction. The Legislature is very clear in section 57(6) that an accused is deemed to have been convicted and sentenced, as if he had been guilty by a court.

It was also confirmed in *S v Rademeyer*[8] that an admission of guilt fine is also a conviction that has the inherent consequence of a criminal record. The court could have used the opportunity directing that all criminal records because of the payment if an admission of guilt fine prior to court appearance should be expunged. The court failed to give any direction to the legislature to effect any amendments.

4.3 THE RIGHT TO APPEAL OR REVIEW

'Every accused has a right to a fair trial, which includes the right … of appeal to, or review by, a higher court.'[9] The criminal justice system is a mechanism that functions on checks and balances. A convicted person who is not satisfied with the judgment or sentence is not without recourse. A number of questions arise when a person was convicted by signing a section 56 notice and paying a fine without appearance in court. Is Section 35(3)(o) applicable? Are there any other resources available to such persons? What about a person who is in actual fact guilty, but who was unaware that paying an admission of guilt fine prior

7 *Director of Public Prosecutions, Limpopo v Mokgotho (068/2017) [2017] ZASCA 159 (24 November 2017*).
8 *S v Rademeyer (unreported case, GP case no A186/2017, delivered on 12 April 2017)* at paragraph 45,
9 Section 35(3)(o) of the Constitution.

to court appearance would result in a conviction and a criminal record? It is submitted that section 35 (3)(o) is a remedy that is available to all accused persons, including convicted persons, irrespective of the procedure used to finalise the matter and for the offence he or she was convicted of.

4.3.1 Section 57(7) Review

Once an admission of guilt fine is paid, the section 56 notice is sent to the clerk of the court who will proceed with the administration of recording the acknowledgement and the payment to the said offence.[10] It is at this point that the accused person is deemed to have been convicted and sentenced. However, once the recording has been dealt with, the matter is forwarded to the local magistrate or judicial officer to examine and decide to confirm the conviction and sentence or not. This is done in terms of section 57(7) of the CPA and is purely an administrative process. Therefore, for every admission of guilt fine paid, the matter is sent to the magistrate for examination. The assessment done by this officer is only limited to the information provided to him. No other evidence is adduced. Ultimately, the role of the judicial officer is not to make a decision on fact, but to review the process, confirm or set it aside. Section 57(7) reads as follows:

> The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said

10 Section 57(6) of the Criminal Procedure Act 57 of 1977.

admission of guilt fine exceeds the said determination be refunded to the accused concerned.

Once the presiding officer is of the opinion that justice was not carried out, the matter will start *de novo* and the normal course of prosecution will proceed. The conviction will be set aside and the money paid will be refunded to the accused. This serves as a review process and could assist an accused who has made a mistaken payment and incorrectly acknowledged guilt. In certain instances, the magistrate will review a matter if he received an affidavit to that effect prior to confirming the decision. Otherwise, the magistrate only has the documents, and the information contained therein to decide. This process takes place in the absence of the accused. It is possible that the recording of the payment of admission of guilt fine and the review by the magistrate, does not take place on the same day that the accused made the payment. There is no stipulated time-period when the review must take place.

A recent case of *S v Simba and Similar Matters*[11] shows how the magistrate exercised its discretion as envisaged in section 57(7) and set the conviction and sentence aside. The matter was referred to the High Court for special review by request of the state. The state argued that the decision that was taken by the magistrate was incorrect and that he had no powers to make that decision to set the conviction and sentence aside. Engers AJ, concluded that the magistrate was well within his powers to set the conviction aside. It further held that the amounts set by the prosecutor had not been on par with the determination in that jurisdiction, and the overriding discretion of the prosecutor, as set out in section 57(4)[12] of the CPA, was not applicable.[13]

11 *S v Simba and Similar Matters* 2019 (1) SACR 90 (WCC) para [4].

12 No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing an admission of guilt fine on good cause shown.

13 S v Simba and Similar Matters 2019 (1) SACR 90 (WCC) at para [15] - [16].

The judicial officers' role in this whole process is at the moment somewhat problematic and unclear. After the confirmation of the conviction and sentence, there is no other function bestowed unto a presiding officer by the legislature. Which ultimately means that, the matter can only be referred to a higher court for review in terms of section 304 of the CPA. There are, however, two contradictory schools of thought on the function of the lower court when it comes to vested functionary powers of section 57(7).

The first school of thought states that the court is not *functus officio*. The court should be able to amend its own decision without the referral of the matter to a higher court. The second school of thought is that the presiding officer is *functus officio* and that the court is then unable to entertain the same matter. This is despite the availability of new facts being introduced, which may result in a different outcome. Ultimately, according to this view, the magistrate can only review the matter once. The moment the magistrate confirms the deemed conviction and sentence, then his role in terms of section 57(7) ends and cannot be revisited.

S v Shange[14] supports the first point of view. The process of section 57 is an administrative one. The higher court need not be involved should new facts arise, as the function that was performed by the presiding officer was not a judicial function but merely an administrative one.[15] Importantly it stated that the presiding officer is not *functus officio*. The court further held that there is no time frame placed as to when the review by the magistrate should take place. There is also no limitation of the number of documents that may be reviewed by the

14 1983 (4) SA 46 (N).
15 *S v Shange* 1983 (4) SA 46 (N) at 48 a-d and 49e.

court. Therefore, the magistrate may review new facts and need not send the matter to a higher court.[16]

The second view was expressed in *S v Van Wyk*.[17] The Mmagistrate in this case had confirmed the conviction and sentence for an assault common charge.[18] After the confirmation, a letter from the attorney of the victim or complainant stating that the victim had sustained serious injuries was received. The attorney requested the conviction to be set aside and that the accused face serious charges of assault with intent to do grievous bodily harm.[19] The Court stated that when a presiding officer in a *court a quo* confirms the conviction and the sentence, after assessment of the documents before it, then that presiding officer is *functus officio*.[20] The role of the magistrate is only limited to the documents it has examined and the process of review is only done once by that magistrate. Once that magistrate has confirmed the decision, it cannot reverse it. Prior to this case, *S v Hanekom* also stated that the magistrate is *functus officio*.[21] Confirming a decision made in *S v Hoema*[22] that a magistrate is *functus officio* and therefore cannot consider representations after its initial decision to either confirm or dismiss the conviction and sentence.[23]

16 *S v Shange* 1983 (4) SA 46 (N) also see *S v Mahabeer* 1980 (4) SA 491 (N).
17 *S v Van Wyk* 2000 (1) SACR 590 (T).
18 *S v Van Wyk* 2000 (1) SACR 590 (T) at 591 para b.
19 *S v Van Wyk* 2000 (1) SACR 590 (T) at 591 para b.
20 *S v Van Wyk* 2000 (1) SACR 590 (T) at 591 para d.
21 *S v Hanekom* 1984 (4) 108. The court in this case dealt with the confirmation of the wrong amount by the magistrate. The accused paid R50 as a fine, while the prosecutor had already reduced the fine to R30. The accused made a request for the R20 to be paid back. The court referred the matter to the High Court in terms of Section 304(4) as the court was now *functus officio*. The sentence was thus amended.
22 *1978 (2) SA 703 (T).*
23 *S v Hoema 1978 (2) SA 703 (T) at 704 para G*.

4.4. THE PRESIDING OFFICER IS *FUNCTUS OFFICIO*?

The role of the magistrate, during a payment of an acknowledgement of guilt fine, is not the same as in court when adjudicating over a trial. The presiding officer is in chambers and only makes a decision after he or she has examined the documents. There is no judicial function exercised per se, but it is more administrative.[24] The criminal conviction is recorded in a different book from what is usually used by a court during trial proceedings. In terms of Department of Justice and Constitutional Development, Justice Codified Instructions: Code: Clerks of the Criminal Court. Paragraph,[25] an admission of guilt registry is used and is known as a J117. Whereas, once the court finds an accused guilty, that is recorded in the J546.[26]

In *S v Marion*[27] the court was faced with two preceding judgments, *S v Mahabeer*[28] and *S v Harley*[29], which held that the presiding officer was not *functus officio*. The accused in this case had paid an admission of guilt fine, and later submitted an affidavit stating that he had been incorrectly charged.[30] The magistrate was unsure whether he had the power to deal with this matter, despite the two judgements stating that the presiding officer was not *functus officio*; and consequently the matter was sent to the high court for decision.[31]

The court stated that:

> …when the magistrate concerned in the present case decided not to interfere with the deemed conviction and sentence of the accused he became *functus officio*. Thereafter it is only this court, which has the power to set the conviction aside.[32]

24 *S v Madhinha (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018) at para 22*.
25 Department of Justice and Constitutional Development, Justice Codified Instructions: Code: Clerks of the Criminal Court paragraph 72.
26 Part IV of the
27 *1981(1) SA 1216 (T).*
28 *1980 (4) 491 (SA).*
29 *S v Harley 1979 an unreported case in the Transvaal Provisional Division.*
30 *S v Marion* 1981(1) SA 1216 (T) at 1217a.
31 *S v Marion* 1981(1) SA 1216 (T) at 1217b-d.
32 *S v Marion* 1981(1) SA 1216 (T) at 1219a.

The effect is that the review function of the *court a quo* stops once the confirmation is made. There is no second bite at the cherry by the court. It has made its decision and only a higher court can amend that decision. It therefore stands that should the accused or the State have any dispute, then an application must be made to a high court in terms of Section 304 of the CPA. A Eastern Cape court, *S v Mthiya 1991(1) SACR 615 (E*), relied on *S v Vermaak*[33] which stated that

> "…once the judicial officer has exercised his function in terms of s 57(7) of Act 51 of 1977, i.e decided to interfere with, or decided not to interfere with the conviction and/or sentence and [does] so in terms of the subsection… his functions have been exhausted."[34]

There are other recent cases such as the case of *S v Tengana*[35] that relied on the case of *S v Louw*[36], stating that a court cannot review a matter on new facts, after it has made a decision.[37] It made this decision by noting that the section is clear and limits the presiding officer only to the documents that have been submitted to the clerk that no other information ought to be considered.[38] The most recent case of *S v Madhinha*[39] does not even question the functionary powers of the *court a quo* when it comes to section 57(7). It held that the court is simply *functus officio* and review proceedings must be done in terms of section 304 of the CPA.[40]

This ultimately entails that the first part of reviewing a matter is limited to the first decision made by the magistrate. This view is not agreed with. Such a remedy is ineffective. Most of the documents will be looked at only once by a magistrate and if found to be in order, the

33 1991 (1) SACR 336 (E).
34 S Vermaak 1991 (1) SACR 336 (E) at 338(para a- b).
35 *S v Tengana* 2007(1) SACR 138 (C).
36 *S v Louw* 1982 (4) SA 556 (C).
37 *S v Tengana* 2007(1) SACR 138 (C) 141h.
38 *S v Louw* 1982 (4) 556 (C) at 561A.
39 (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018).
40 (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018 at para 39.

conviction and sentence confirmed. However, as seen from the numerous cases cited in this study, many accused were unaware of the consequences and came with the so-called new facts. If accused are allowed to introduce new facts on affidavit it could shorten the whole process drastically. By declaring the magistrate *functus officio* after one review, leaves an aggrieved accused with no other choice but to take the matter on review to the higher courts. Although the leading school of thought is that the presiding officer is *functus officio*, from the material that I engaged with, I respectfully submit that the presiding officer should not be *functus officio.* This will appeal beneficially to court time, financial expenditures that would have been incurred by taking the review to a higher court and speedy result or outcome of the review. The question that does arise is at which point will the court stop reviewing the new facts arising from a particular matter. However, even this can be easily remedied as per bail application on new facts.[41]

4.5 REVIEW IN TERMS OF SECTION 304 OF THE CPA

This is a post sentence remedy available to an accused or convicted person. This right is entrenched in the Constitution.[42] The legislature recognised the need for accused and convicted persons to have the option to challenge the decision that was taken by a *court a quo*. This section refers to appeal and review. The only remedy that is available to the persons convicted and sentenced under section 57 is a review. The court *a quo* that dealt with the matter has no authority to review the deemed conviction and sentence and the matter must be referred to a High Court.[43] An appeal is brought by an accused based on merits of the case

41 Section 65(2) of the CPA.
42 Section 35(3)(o) of the Constitution.
43 Section 304 of the CPA *S v Cedras* 1992 (2) SACR 530 (C) at 531g.

and the finding by the court. A review on the other hand is brought against procedural irregularities.[44] Therefore, since no evidence is led under oath, the only procedural remedy available to the accused is a review. Section 304 of the CPA states that:

> (1) If, upon considering the proceedings referred to in section 303 and any further information or evidence which may, by direction of the judge, be supplied or taken by the magistrate's court in question, it appears to the judge that the proceedings are in accordance with justice, he shall endorse his certificate to that effect upon the record thereof, and the registrar concerned shall then return the record to the magistrate's court in question.'

The accused or his representative will submit an affidavit setting out the reasons why the conviction and sentence should be interfered with. The affidavit is usually submitted to a high court accompanied by a covering letter from the Senior Magistrate of the court where the section 57 had been confirmed. The documents are received by a judge who may then proceed with enquires to the court in order to get to a reasonable and justified decision. It may even call for oral evidence to be lead. There is no period that has been set for a person to take a matter on review. As gleaned from previous cases discussed in this study, there has been a 3 to 5-year gap between the time an accused person paid the fine and when the matter was considered on review. Yet the courts are prepared to entertain and pronounce on such matters. In *S v Houtzamer*, the payment was made in June 2008 and the matter was only sent on review in September 2015.

When a case is sent for review, the court makes an assessment regarding the procedures. This assessment includes submitting queries to the magistrate, the police station commander and the office director of public prosecutions. In addition, it may request an affidavit to be filed

44 Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE (10th Edition) Criminal Procedure Handbook Juta, 2011 at 360.

by the accused and if necessary, may hear oral evidence before making a finding. The High Court, therefore gathers all the necessary evidence from the persons that were involved in order to reach a proper finding.

In *S v Cedras*[45] the court specified the prerequisites before a court can make a finding for reviews emanating from the payment of an admission of guilt fine. The court held: '…there are considerations of equity and fair dealing which compel the Court to intervene to prevent a probable failure of justice.'[46] The court stated further that the accused must show good cause as to why he or she paid the admission of guilt erroneously; this could include the aversion of a probable defence.[47]

On review, a court may set aside the conviction and sentence obtained because of the payment of a fine. As mentioned previously, the effect will be the removal of the criminal record and the refund of the payment. The review court could also confirm the conviction and sentence or could set the conviction and sentence aside subject to certain conditions. In the case of the latter, the matter will have to start *de novo* in the lower court or the accused be given time to make representations for diversion purposes.[48]

There are many successful cases where the review procedure was beneficial to the accused person, (see the cases referred to in Chapter 3). This, however, is not a cheap process. It, involves applications to the court, which requires money to be spent and legal fees to be paid. Unless assisted *pro bono* or *pro amico*, the services of a private attorney or advocate is

45 *S v Cedras* 1992 (2) SACR 530 (C).
46 *S v Cedras* 1992 (2) SACR 530 (C) at 531j.
47 *S v Cedras* 1992 (2) SACR 530 (C) at 532a-b.
48 *S v Loff* 2018 High Court reference number 18132/2018 (WCC) at 4.

required. Legal Aid South Africa has indicated that their practitioners cannot assist with review application in terms of section 304 for admission of guilt fine convictions.

4.6 EXPUNGEMENT

As stated in Chapter 3, the result of a payment of an admission of guilt fine is the attainment of a criminal record. This criminal record is entered as a previous conviction. In terms of section 271A, a previous conviction falls away, is only applicable to certain offences. and only takes effect after a 10-year term. In terms of this section –

> Where a court has convicted a person of-
>
> (a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but-
>
> (i) has postponed the passing of sentence in terms of section 297 (1)(a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297 (3); or
>
> (ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or
>
> (b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,
>
> that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.

A person has to wait a period of 10 years in order to have the previous conviction fall away. The meaning of fall away does not necessarily mean that the criminal record will seize to exist; it merely means that that particular conviction may not be taken into account by a court during sentencing.[49] A conviction and sentence in terms of section 57(6) does not fall within

49 *S v Zondi* 1995 (1) SACR18 (A).

this section. Section 271A is not a remedy that could be used by a person who finalised a matter by paying an admission of guilt fine. The requirements as set out in section 271A are not met. In the Criminal Procedure Amendment Act 65 of 2008, the Legislature inserted a provision to expunge a criminal record.[50]

Persons not convicted under offences other than those listed in section 271A (1) are not without recourse. Section 271B further lists offences where the legislature directs that after a 10-year period has lapsed and on application by the convicted person, a criminal record must be expunged. Section 57(6) offences will fall within subsection (1)(a)(iii) which states –

> Where a court has imposed any of the following sentences on, or has made any of the following orders in respect of, a person convicted of an offence, the criminal record of that person, containing the conviction and sentence or order in question, must, subject to paragraph (*b*) and subsection (2) and section 271D, on the person's written application, be expunged after a period of 10 years has elapsed after the date of conviction for that offence, unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine:
>
> (iii) a sentence in the form of a fine only, not exceeding R20 000;

Three issues regarding this section requires elaboration. Firstly, the consideration of expunging a criminal record is done when the conviction is more than 10 years old. Which implies that between day one and the last day of year ten, a person is held hostage by a criminal record that was attained erroneously. A decade is a huge part of person's life and in during that time, a person could lose out on a lot. These include employment, promotion, and travelling opportunities. A person is also prohibited from applying for certain licences. Secondly, the expungement does not happen automatically. The convicted person must bring application to have the record expunged. If not, the record remains. Though there is an

50 Section 271 B to 271 E of the CPA.

obligation to remove or to expunge the criminal record, there is no directive or system that will recognise that the 10-year period has lapsed, unless an application is brought.

If unaware of a record, it will remain entered against a layperson's name even after the 10 years has lapsed. A person could be so ignorant to the existence of the criminal record and will only be notified thereof when a police clearance certificate will be required. Thirdly, the two requirements are just the tip of the ice berg. Section 271D includes a further procedure to expunge criminal record. The expungement will only take effect the person, has received a certificate authorising the expungement.[51] This certificate is ONLY issued after a request for the expungement is made.[52] The application MUST be completed on a J744(E) form which sets out all the requirements for expungement. It is important to note that the Director General is a discretion to either grant or to deny the application. This is clearly contrary to what the legislature directs in subsection 2. The intent of the legislature is clear, that there are only requirements and both need to be satisfied. There should be no other discretion reserved for the Director General. Consequently, even expungement is no "quick fix".

A person would either have to proceed with an expungement application on his or her own (which is not advisable) or get a private attorney to assist. The legal fees for the whole process may cost up to R10 000.00. The convicted person must spend money to ensure that the record is expunged. Either way an accused who pays an admission of guilt fine, has no easy way of relieving herself or himself of the strenuous legal effects of paying an admission of guilt fine. It is therefore against this background that the legislature needs to look at the time

51 This certificate is issued by the Director General of Justice and Constitutional Development.

52 Section 271B2 of the CPA.

period for expungement of a criminal record. Therefore, as opposed to the prescribed 10-year period, have the record expunged after a shorter period; for example, after two years. In addition to that, the legislature should consider that expungement be automatic.

It is suggested that a simpler procedure should be adopted. An applicant should be able to approach the clerk of the court for such a certificate of expungement. Such a process will simplify and improve the lives of many. The next Chapter will deal with my opinion regarding the process of admission of guilt fine and importantly an avenue that ought to be considered for curbing the legal effects of a criminal record through an admission of guilt fine.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

"It does not have to be a life time punishment"

5.1 INTRODUCTION

As discussed in this study the payment of an admission of guilt fine is inexpensive. It is unlike a trial, which is far more expensive and is more exhausting on a person. The main reason for section 57 was to accelerate criminal proceedings. Unfortunately, the same principle does not apply to one major consequences of paying an admission of guilt fine, which is the attainment of a criminal record. The consequence suffered by an accused person who pays a fine in terms of section 57, should not be the same as the person who is found guilty by a judicial officer. The proceedings leading to both findings is completely different. This study delved into the roots of section 57, its effect and the remedies that is available thereto. None of those remedies gives an accused the relief that they require. The relief is definitely not as easy as what the payment of an admission of guilt fine is.

5.2 THE PROCESS OF REVIEW

This process is all-good and well for persons who were unaware of that they are in fact being convicted and thus getting a criminal record. However, this process is only available after the accused has become aware of the consequences. It could be that the accused have been blocked from either attaining a visa or getting employment. By then, the accused has already lost opportunities of getting a promotion, employment or travelling. It would be fantastic if an admission of guilt fine were not considered a criminal conviction.

Holistically this research has shown light in admission of guilt fine payments. A procedure which is being overlooked, yet has the same consequences as those of a traditional trial matter. A fine when paid results in lifetime punishment, especially for lay persons and indigent persons. In a Democratic society it cannot be emphasis enough the core value of being informed of your rights; to allow you to make a decision fully informed of the rights waived; opportunities passed and the anticipated consequences. As discussed above, the consequences are not felt immediately, they remain and last as long as the criminal record exists, which in this instance is a minimum of 10 years, to people who are aware of the criminal record. As a result, thereof, the following recommendations ought to be considered by the Legislature.

5.3 RECOMMENDATIONS

5.3.1 Payment of an admission of guilt fine prior to court appearance does not amount to a criminal record

The legal effects of payment of an admission of guilt fine, especially by persons who were unaware that it was a conviction and consequently a criminal record, is a life-time sentence on a person. What has been introduced by Judge Thulare in the *Madhinha* case is much needed change in our criminal justice system. The effect that an admission of guilt fine payment would be equivalent to an admission of guilt fine for traffic fines, where no criminal record is attained as a consequence for paying ones' traffic fines. The effect of this is that a bitter taste will still remain with the accused, as the person would've paid a sum of money for

his or her actions. The effect being the same as one of the ADR options. This is therefore the first recommendation to curb the effects of payment of admission of guilt fine.

5.3.2 Automatic expungement of criminal record

To have a criminal record for a matter that was finalised in a matter of minutes is unjustified and unreasonable. It will be of no benefit to anyone or the criminal justice system. For that reason, an automatic expungement of a criminal record attained through section 57 or section 57A ought to be applicable. Ultimately, it would mean that after a certain period of time, not exceeding a term of two years, if the accused has not been convicted of an offence where imprisonment with or without the option of a fine was applicable, the accused criminal record will be automatically expunged. The effect of this will be to take away the process of having to make an application for expunging the record. Such a provision would enable the person to regain his or her freedom once again and be able to move forward without being hindered by a criminal record.

One may find it hard to reconcile with this automatic expungement of criminal records, and may have questions pertaining to the practical implementation of the process. Change comes in dialogue and codification. This will then be followed with procedure as to how these rules will be implemented. Fortunately, in South Africa the Legislature in section 271C of the Act offers automatic expungement of a criminal record with offences relating to laws that were enacted in the Apartheid era. How then can it not be practical to proceed with the making of automatic expungement for such offences.

BIBLIOGRAPHY

Primary Sources

CASE LAW

- *Director of Public Prosecutions, Limpopo v Mokgotho (*068/2017) [2017] ZASCA 159 (24 November 2017).
- *Erasmus v MEC for Transport, Eastern Cape Province 2011* (210/08) [2011] ZAECMHC 3; 2011 (2) SACR 367.
- *Maroulis v The State* (240/2008*)* [2008] ZASCA 161 (27 November 2008).
- *Nhlapo v S* (A480/2011) [2012] ZAGPJHC 81; 2012 (2) SACR 358 (GSJ) (30 April 2012).
- *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 (1) SA 51 (O*).*
- *Patel v National Director Of Public Prosecutions and Others* 2018 (2) SACR 420 (KZD) *Provincial Commissioner, Gauteng: SAPS v Mnguni* (890/11) [2013] ZASCA 2 (22 February 2013).
- *Police & Prisons Civil Rights Union on behalf of Fukweni and SA Police Service* (2018) 39 ILJ 2069 (SSSBC).
- *R v B 1954* (3) SA 431 (SWA).
- *S v Baron 1978 (2) SA 510 (C)*.
- *R v Duma* 1958 (3) SA 882 (N).
- *S v Cedras* 1992 (2) SACR 530 (C).
- *S v Claasen* [2012] ZAFSHC 231.
- *S v Esposito* [2006] ZAWCHC 52 (31 October 2006).
- *S v Gilgannon* [2013] ZAGPJHC 226.
- *S v Hanekom* 1984 (4) 108.
- *S v Harley* 1979 an unreported case in the Transvaal Provisional Division.
- *S v Hlangothe* 1979 (4) SA 199 (B).
- *S v Hoema* 1978 (2) SA 703 (T).

- *S v Houtzamer* 2015 (B7968969/08) [2015] ZAWCHC 25.
- *S v Kholoane* (570/2010) [2011] ZAFSHC 213; 2012 (1) SACR 8.
- *S v Loff 2018* High Court reference number 18132/2018 (WCC).
- *S v Louw* 1982 (4) SA 556 (C).
- *S v Luyt* 1982 (4) SA 359 (C).
- *S v Mahabeer* 1980 (4) 491 (SA).
- *S v Madhinha* (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018).
- *S v Malatji and another* 1998 (2) SACR 622.
- *S v Mans* 1990 (1) SACR 75 (T).
- *S v Marion* 1981(1) SA 1216 (T).
- *S v Miller* 2018 JDR 0416 (WCC).
- *S v Mokwele* [2015] ZAGPPHC 14.
- *S v Mthiya* 1991(1) SACR 615 (E).
- *S v Mutobvu* 2013 (2) SACR 366 (GNP).
- *S v Parsons* 2013 (1) SACR 38 (WCC).
- *S v Price* 2001 (1) SACR 110.
- *S v Raath* (unreported PD decision, case number A507/2006, 29 May 2006).
- *S v Rademeyer* (unreported case, GP case no A186/2017, delivered on 12 April 2017).
- *S v Shange* 1983 (4) SA 46 (N*).*
- *S v Simba and Similar Matters* 2019 (1) SACR 90 (WCC).
- *S v Smullion* (Sullivan) 1977 (3) SA.
- *S v Tengana* 2007 (1) SACR 138 (CPD).

- *S v Tong 2013* (1) SACR 346 (WCC).
- *S v V 2000 (1) SACR 453 (SCA).*
- *S v Vermaak 1991 (1) SACR 336 (E).*
- *S v Van Wyk 2000 (1) SACR 590 (T).*
- *S v Zinn 1969 2 SA 537 (A).*
- *S v Zondi 1995 (1) SACR18 (A).*
- *Samuels v S (A55/13), 9/1227/13) 2016 ZAWCHC 33; 2016 (2) SACR 298 (WCC) 2016.*

LEGISLATION

- Child Justice Act 75 of 2008.
- Criminal Procedure Act 56 of 1955.
- Criminal Procedure Act 51 of 1977.
- Criminal Procedure Amendment Act 86 of 1996.
- Immigration Act 13 of 2002 (as amended in 2004).
- Judicial Matters Amendment Act 66 of 2008.
- Legal Aid South Africa Act 39 of 2014.
- Liquor Act 27 of 1989.
- Proclamation no 30 of 1935.
- Promotion of Access to information Act 2 of 2000.
- The Constitution of the Republic of South Africa, 1996

Secondary Sources

BOOKS

- Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE (9th Edition) *Criminal Procedure Handbook* Juta, 2009.
- Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SE (10th Edition) *Criminal Procedure Handbook* Juta, 2011.
- Burchell J and Milton J *Principles of Criminal Law* Juta, 2005.
- *Commentary on the Criminal Procedure Act* Revision Service 40, 2008.
- Currie & De Waal *Bill of Rights Handbook* Juta 2016.
- Du Plessis JR and Kok L An Elementary introduction to the study of South African Law Juta, 1989.
- Du Toit, De Jager, Paizes, Skeen and Van der Merwe Commentary on the Criminal Procedure Act (loose-leaf, updated) JUTA [Practice oriented commentary on the Criminal Procedure Act.].
- Kavanagh K (10th Edition) *South African Concise Oxford Dictionary* Oxford University Press, 2009.
- Law J and Martin EA *Dictionary of Law* Oxford, 2009.
- Martin EA (5th Edition) *A Dictionary of Law* Oxford, 2003.
- Schmidt & Rademeyer Law of Evidence 4th edition (2003) LexisNexis.
- Schwikkard PJ and Van der Merwe SE (3rd Edition) *Principles of Evidence* Juta, 2008.
- Snyman CR (4th Edition) *Criminal Law* Lexis Nexis, 2002.

- Snyman CR (6th Edition) *Criminal Law* Lexis Nexis, 2014.
- Steytler N Constitutional Criminal Procedure Lexis Nexis 1998.
- Terblanche S A Guide to Sentencing in South Africa LexisNexis South Africa (2016).
- The Supreme Court Act and the Magistrates Court Act and Rules Juta, 2012.
- Zeffert & Paizes The South African Law of Evidence 2nd (2003) edition LexisNexis.

JOURNAL ARTICLES

- Curlewis, L 'Section 57 and 57A of the Criminal Procedure Act 51 of 1977 – use them with discretion' 2008 (Apr) Society News, no 124.
- Curlewis, L 'Sugar-coating guilt - admission of guilt fines - no easy fix' 24 Jan/ Feb 2014 De Rebus, 24.
- Mujuzi JD The Expungement of Criminal Records in South Africa: The Drafting History of the Law, the Unresolved Issues, and How They Could be Resolved *Statute Law Review*, 2014.
- Muntingh L 'The law and the business of criminal record expungement in South Africa' 2011 Civil Society Prison Reform Initiative, no 18.
- Muntingh L The State of South Africa's Prisons - Ten Years after the Jali Commission *South African Crime Quarterly* 2016.
- Witbooi E and Snijman P "Law enforcement responses facilitated by a fisheries crime approach: The South African example" (2017) 1 JOLGA.

INTERNET SOURCES

- Expungement of Criminal Record available at http://www.justice.gov.za/expungements.html (Accessed on the 05/01/2018)
- Criminal Procedure and Punishment available at http://ipproducts.jutalaw.co.za/nxt/gateway.dll/ccpa/3/127/134/135?f=templates$fn=documentframeset.htm$q=%5Band%3A%5Bstem%3A%5Borderedprox,0%3Aadmission%20of%20guilt%5D%5D%5D$x=server$3.0#LPHit1 (Accessed on the 05 January 2018)
- How to get a criminal record cleared available at https://www.lawforall.co.za/get-criminal-record-cleared/ (Accessed on the 6 November 2018)

- Admission of guilt fine law society available at https://www.lssa.org.za/upload/files/Brochures/LSSA%20AOGF.pdf. (Accessed on the 05 January 2019)

- Muntingh & Giffard The Effect of Sentencing on the Size of the South African Prison Population. Civil Society Prison Reform Initiative. Available at https://acjr.org.za/resourcecentre/The%20impact%20of%20sentencing%20on%20the%20size%20of%_20the%20prison%20population.pdf. (Accessed on the 05 January 2019)

- Faeza The challenge of having a criminal record available at https://www.news24.com/MoveMag/Archive/the-challenge-of-having-a-criminal-record-20170728. (Accessed on the 05 January 2019)

- Hartleb T Number of job applicants with criminal records increases available at https://www.news24.com/SouthAfrica/News/Number-of-job-applicants-with-criminal-records-increases-20150713. (Accessed on the 05 March 2019)

- Police clearance Certificates: Applying for a Police Clearance Certificate available at https://www.saps.gov.za/services/applying_clearance_certificate.php (Accessed on the 14 April 2019)

- How to become a reservist available at http://www.saps.gov.za/services/reservist.php (Accessed on the 14 April 2019)

- Admission of guilt – Review – Conviction and sentence in terms of s57(6) of the Criminal Procedure Act 51 of 1977 – Not verdict but automatic consequence of administrative act- Review in terms of s304(4) of Act appropriate way to bring review of proceedings available at https://criminalpleadings.wordpress.com/2019/03/14/admission-of-guilt-review-conviction-and-sentence-in-terms-of-s-576-of-criminal-procedure-act-51-of-1977-not-verdict-but-automatic-consequence-of-administrative-act/ (Accessed on the 24 April 2019)

- Applying for a Police Clearance Certificate available at https://www.gov.za/services/trave-outside-sa/how-apply-police-clearnace-certificate-pcc (Accessed on the 29 April 2019)

THESIS.

- Muntingh L An Analytical Study of South African Prison Reform after 1994. unpublished Doctoral thesis UWC 2012.

OTHER

- Department of Justice and Constitutional Development, Justice Codified Instructions: Code: Clerks of the Criminal Court

- Legal Aid South Africa: Legal Aid Manual.

- National Prosecuting Authority of South Africa: Prosecution Policy Directive issued by Director of Public Prosecution on the 01 June 2015.