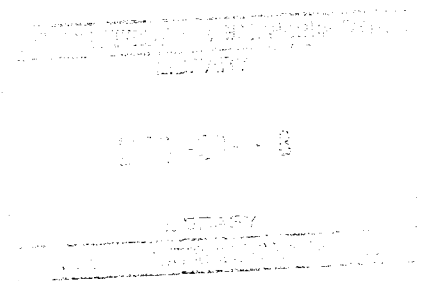


REPUBLIC OF SOUTH AFRICA

CRIMINAL PROCEDURE AMENDMENT BILL

*(As amended by the Portfolio Committee on Justice and Constitutional Development)
(National Assembly) (The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)



[B 57B—2002]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Criminal Procedure Act, 1977, so as to introduce leave to appeal and petition procedures in respect of decisions of lower courts; to provide that certain appeals against decisions by the lower courts and the High Courts relating to children may be noted without having to apply for leave to appeal; to provide that certain appeals must be considered on the written argument of the parties; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 302 of Act 51 of 1977, as amended by section 11 of Act 105 of 1982, section 22 of Act 59 of 1983, section 8 of Act 109 of 1984, section 13 of Act 26 of 1987, section 15 of Act 5 of 1991 and section 2 of Act 33 of 1997

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1. Section 302 of the Criminal Procedure Act, 1977 (hereinafter referred to as the principal Act), is amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) The provisions of paragraph (a) shall—

- (i) be suspended in respect of an accused referred to in the first proviso to section 309(1)(a) who has duly noted an appeal in terms of section 309(2) against a conviction or sentence and has not abandoned the appeal; 10
- (ii) be suspended in respect of an accused who has [appealed against a conviction or sentence] duly noted an appeal in terms of section 309(2) against a conviction or sentence, after being granted leave to appeal in terms of section 309B or 309C, and has not abandoned the appeal; and 15
- (iii) [shall] cease to apply [with reference to such] in respect of an accused when judgment in the appeal is given.”.

Amendment of section 309 of Act 51 of 1977, as amended by section 17 of Act 105 of 1982, section 8 of Act 107 of 1990, section 51 of Act 129 of 1993, section 13 of Act 75 of 1995, section 2 of Act 33 of 1997, section 2 of Act 76 of 1997 and section 38 of Act 105 of 1997

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2. Section 309 of the principal Act is amended—

(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:

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“(a) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to [section 309B] leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or

order to the [provincial or local division] High Court having jurisdiction: Provided that if that person was, at the time of the commission of the offence—

- (i) below the age of 14 years; or
 - (ii) at least 14 years of age but below the age of 16 years and was not assisted by a legal representative at the time of conviction in a regional court; and
 - (iii) was sentenced to any form of imprisonment as contemplated in section 276(1) that was not wholly suspended,
- he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).”; and

(b) by the substitution for subsection (3A) of the following subsection:

“(3A) (a) An appeal under this section must be disposed of by a High Court in chambers on the written argument of the parties or their legal representatives, unless the Court is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the Court regarding the appeal.

(b) [An appeal under this section may] If the Court is of the opinion that oral argument must be submitted regarding the appeal as contemplated in paragraph (a), the appeal may nevertheless be disposed of by [a High Court] that Court in chambers on the written argument of the parties or their legal representatives, if the parties [agree thereto] or their legal representatives so request and the Judge President so agrees and directs in an appropriate case.”.

Substitution of sections 309B, 309C and 309D of Act 51 of 1977

3. The following sections are substituted for sections 309B, 309C and 309D of the principal Act, respectively:

“Application for leave to appeal

309B. (1) (a) Any accused, other than a person contemplated in the first proviso to section 309(1)(a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.

- (b) An application referred to in paragraph (a) must be made—
 - (i) within 14 days after the passing of the sentence or order following on the conviction; or
 - (ii) within such extended period as the court may on application and for good cause shown, allow.

(2) (a) Any application in terms of subsection (1) must be heard by the magistrate whose conviction, sentence or order is the subject of the prospective appeal (hereinafter referred to as the trial magistrate) or, if the trial magistrate is not available, by any other magistrate of the court concerned, to whom it is assigned for hearing.

(b) If the application is to be heard by a magistrate, other than the trial magistrate, the clerk of the court must submit a copy of the record of the proceedings before the trial magistrate to the magistrate hearing the application: Provided that where the accused was legally represented at a trial in a regional court the clerk of the court must, subject to paragraph (c), only submit a copy of the judgment of the trial magistrate, including the reasons for the conviction, sentence or order in respect of which the appeal is sought to be noted to the magistrate hearing the application.

(c) The magistrate referred to in the proviso to paragraph (b) may, if he or she deems it necessary in order to decide the application, request the full record of the proceedings before the trial magistrate.

(d) Notice of the date fixed for the hearing of the application must be given to the Director of Public Prosecutions concerned, or to a person designated thereto by him or her, and the accused.

(3) (a) Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal.

(b) If the accused applies orally for such leave immediately after the passing of the sentence or order, he or she must state such grounds, which must be recorded and form part of the record.

(4) (a) If an application for leave to appeal under subsection (1) is granted, the clerk of the court must, in accordance with the rules of the court, transmit copies of the record and of all relevant documents to the registrar of the High Court concerned: Provided that instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the High Court concerned may nevertheless call for the production of the whole record.

(b) If any application referred to in this section is refused, the magistrate must immediately record his or her reasons for such refusal.

(5) (a) An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.

(b) An application for further evidence must be supported by an affidavit stating that—

- (i) further evidence which would presumably be accepted as true, is available;
- (ii) if accepted the evidence could reasonably lead to a different decision or order; and
- (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

(c) The court granting an application for further evidence must—

- (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
- (ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.

Petition procedure

309C. (1) In this section—

- (a) 'application for condonation' means an application referred to in the proviso to section 309(2), or referred to in section 309B(1)(b)(ii);
- (b) 'application for leave to appeal' means an application referred to in section 309B(1)(a);
- (c) 'application for further evidence' means an application to adduce further evidence referred to in section 309B(5)(a); and
- (d) 'petition', unless the context otherwise indicates, includes an application referred to in subsection (2)(b)(ii).

(2) (a) If any application—

- (i) for condonation;
- (ii) for further evidence; or
- (iii) for leave to appeal,

is refused by a lower court, the accused may by petition apply to the Judge President of the High Court having jurisdiction to grant any one or more of the applications in question.

(b) Any petition referred to in paragraph (a) must be made—

- (i) within 21 days after the application in question was refused; or
- (ii) within such extended period as may on an application accompanying that petition, for good cause shown, be allowed.

(3) (a) If more than one application referred to in subsection (1) relate to the same matter, they should, as far as is possible, be dealt with in the same petition.

(b) An accused who submits a petition in terms of subsection (2) must at the same time give notice thereof to the clerk of the lower court referred to in subsection (2)(a).

(4) When receiving the notice referred to in subsection (3), the clerk of the court must without delay submit to the registrar of the High Court concerned copies of—

- (a) the application that was refused;
- (b) the magistrate's reasons for refusal of the application; and
- (c) the record of the proceedings in the magistrate's court in respect of which the application was refused: Provided that—
 - (i) if the accused was tried in a regional court and was legally represented at the trial; or
 - (ii) if the accused and the Director of Public Prosecutions agree thereto; or
 - (iii) if the prospective appeal is against the sentence only; or
 - (iv) if the petition relates solely to an application for condonation, a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (6)(a), suffice for the purposes of the petition.

(5) (a) A petition contemplated in this section must be considered in chambers by a judge designated by the Judge President: Provided that the Judge President may, in exceptional circumstances, at any stage designate two judges to consider such petition.

(b) If the judges referred to in the proviso to paragraph (a) differ in opinion, the petition must also be considered in chambers by the Judge President or by any other judge designated by the Judge President.

(c) For the purposes of paragraph (b) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three judges.

(6) Judges considering a petition may—

- (a) call for any further information, including a copy of the record of any proceedings that was not submitted in terms of the proviso to subsection (4)(c), from the magistrate who refused the application in question, or from the magistrate who presided at the trial to which any such application relates, as the case may be; or
- (b) in exceptional circumstances, order that the petition or any part thereof be argued before them at a time and place determined by them.

(7) Judges considering a petition may, whether they have acted under subsection (6)(a) or (b) or not—

- (a) in the case of an application referred to in subsection (2)(b)(ii), grant or refuse the application; and
- (b) in the case of an application for condonation, grant or refuse the application, and if the application is granted—
 - (i) direct that an application for leave to appeal must be made, within the period fixed by them, to the court referred to in section 309B(1); or
 - (ii) if they deem it expedient, direct that an application for leave to appeal must be submitted under subsection (2) within the period fixed by them as if it had been refused by the court referred to in section 309B(1); and
- (c) in the case of an application for leave to appeal, subject to paragraph (d), grant or refuse the application; and
- (d) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted the judges may, before deciding the application for leave to appeal, remit the matter to the magistrate's court concerned in order that further evidence may be received in accordance with section 309B(5).

(8) All applications contained in a petition must be disposed of—

- (a) as far as is possible, simultaneously; and

(b) as a matter of urgency, where the accused was sentenced to any form of imprisonment that was not wholly suspended.

(9) Notice of the date fixed for any hearing of a petition under this section, and of any place determined under subsection (6) for any hearing, must be given to the Director of Public Prosecutions concerned, or to a person designated by him or her, and the accused.

Explanation of certain rights to unrepresented and certain other accused

309D. (1) (a) An accused contemplated in the first proviso to section 309(1)(a) or who is unrepresented at the time he or she is convicted and sentenced, must be informed by the presiding officer of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.

(b) An accused whose sentence is subject to review in the ordinary course in terms of section 302(1)(a), must be informed by the presiding officer that the provisions pertaining to such review—

(i) shall be suspended if he or she appeals against that conviction or sentence; and

(ii) shall cease to apply once judgment in the appeal has been given.

(2) An accused [who is unrepresented and whose] contemplated in subsection (1)(a) in respect of whom an application in terms of the proviso to section 309(2) or 309B is refused, must be informed by the presiding officer of his or her rights in respect of the proceedings contemplated in section 309C and legal representation and of the correct procedures involved to give effect to these rights.

(3) If an unrepresented accused has been convicted and sentenced—

(a) to any form of imprisonment that was not wholly suspended; or

(b) to any form of punishment which in view of the presiding officer may lead to substantial injustice for the accused,

and he or she indicates to the presiding officer his or her intention to apply for leave to appeal in terms of section 309B(1)(a) or for leave to petition in terms of section 309C(2)(a), the presiding officer must refer the accused to the Legal Aid Board referred to in section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969), for the purpose of allowing him or her an opportunity to request legal representation to assist such accused in his or her application.”.

Amendment of section 315 of Act 51 of 1977, as substituted by section 20 of Act 105 of 1982, as amended by section 10 of Act 107 of 1990 and section 39 of Act 105 of 1997

4. Section 315 of the principal Act is amended by—

(a) the substitution for subsection (1) of the following subsection:

“(1) (a) In respect of appeals and questions of law reserved in connection with criminal cases heard by a [provincial or local division] High Court, the court of appeal shall be the [Appellate Division of the] Supreme Court of Appeal [(in this Chapter referred to as the Appellate Division)], except in so far as [subsection] subsections (2) and (3) otherwise provides.

(b) Any appeal or question of law referred to in paragraph (a) must be disposed of in chambers on the written argument of the parties or their legal representatives, unless the Judge President or the President of the Supreme Court of Appeal, as the case may be, is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument regarding the appeal or question of law.

(c) If the Court is of the opinion that oral argument must be submitted regarding the appeal as contemplated in paragraph (b), the appeal may nevertheless be disposed of in chambers on the written argument of the parties or their legal representatives, if the parties or their legal representatives so request and the Judge President or the President of the

Supreme Court of Appeal, as the case may be, so agrees and directs in an appropriate case.”;

(b) the substitution for subsection (2) of the following subsection:

“(2) (a) If an application for leave to appeal in a criminal case heard by a single judge of a [provincial or local division] High Court (irrespective of whether he or she sat with or without assessors) is granted under section 316, the court or judge or judges granting the application shall, if it, he or she or, in the case of the judges referred to in [subsection (8)] subsections (12) and (13) of that section, they or the majority of them, is or are satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the Supreme Court of Appeal, direct that the appeal be heard by a full court.

(b) Any such direction by the court or a judge of a [provincial or local division] High Court may be set aside by the [Appellate Division] Supreme Court of Appeal on application made to it by the accused or the [attorney-general] Director of Public Prosecutions or other prosecutor within 21 days, or such longer period as may on application to the [Appellate Division] Supreme Court of Appeal on good cause shown, be allowed, after the direction was given.

(c) Any application to the [Appellate Division] Supreme Court of Appeal under paragraph (b) shall be submitted by petition addressed to the [Chief Justice] President of the Supreme Court of Appeal, and the provisions of section 316[(6), (7), (8) and (9)] (8), (9), (10), (11), (12), (13), (14) and (15) shall apply *mutatis mutandis* in respect thereof.”; and

(c) the substitution for paragraph (a) of subsection (5) of the following paragraph:

(a) ‘court of appeal’ means, in relation to an appeal which in terms of subsection (3) is heard or is to be heard by a full court, the full court concerned and, in relation to any other appeal, the [Appellate Division] Supreme Court of Appeal.”.

Substitution of section 316 of Act 51 of 1977, as amended by section 21 of Act 105 of 1982, section 15 of Act 26 of 1987 and section 12 of Act 62 of 2000

5. The following section is substituted for section 316 of the principal Act:

“Applications for condonation, leave to appeal and further evidence

316. (1) (a) Any accused, other than an accused contemplated in paragraph (c), convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order.

(b) An application referred to in paragraph (a) must be made—
 (i) within 14 days after the passing of the sentence or order following on the conviction; or

(ii) within such extended period as the court may on application and for good cause shown, allow.

(c) If an accused was convicted of any offence by a High Court and that accused was, at the time of the commission of the offence—

(i) below the age of 14 years; or
 (ii) at least 14 years of age but below the age of 16 years and was not assisted by a legal representative at the time of conviction; and
 (iii) was sentenced to any form of imprisonment as contemplated in section 276(1) that was not wholly suspended,

he or she may note such an appeal without having to apply for leave in terms of paragraph (a).

(2) (a) An application referred to in subsection (1) must be made to the judge whose conviction, sentence or order is the subject of the prospective appeal (hereafter in this section referred to as the trial judge): Provided that if—

(i) the trial judge is not available; or

(ii) in the case of a conviction before a circuit court the said court is not in sitting, the application may be made to any other judge of the High Court concerned.

(b) If the application is to be heard by a judge, other than the trial judge, the registrar of the court must submit a copy of the judgment of the trial judge, including the reasons for the conviction, sentence or order in respect of which the appeal is sought to be noted to the judge hearing the application.

(c) The judge referred to in paragraph (b) may, if he or she deems it necessary in order to decide the application, request the full record of the proceedings before the trial judge.

(3) (a) No appeal shall lie against the judgment or order of a full court given on appeal to it in terms of section 315(3), except with the special leave of the Supreme Court of Appeal on application made to it by the accused or, where a full court has for the purposes of such judgment or order given a decision in favour of the accused on a question of law, on application on the grounds of such decision made to that court by the Director of Public Prosecutions or other prosecutor against whom the decision was given.

(b) An application to the Supreme Court of Appeal under paragraph (a) shall be submitted by petition addressed to the President of the Supreme Court of Appeal—

- (i) within 21 days after the judgment or order against which appeal is to be made was given; or
- (ii) within such extended period as may on application and for good cause shown, be allowed.

(c) The accused or Director of Public Prosecutions or other prosecutor shall, when submitting in accordance with paragraph (b) the application for special leave to appeal, at the same time give written notice that this has been done to the registrar of the court against whose decision he or she wishes to appeal, and thereupon such registrar shall forward a certified copy of the record prepared in terms of subsection (7) for the purposes of such judgment or order, and of the reasons for such judgment or order, to the registrar of the Supreme Court of Appeal.

(d) The provisions of subsections (4), (10), (11), (12), (13), (14) and (15) shall apply *mutatis mutandis* with reference to any application and petition contemplated in paragraph (b) of this subsection.

(e) Upon an appeal under this subsection the provisions of section 322 shall apply *mutatis mutandis* with reference to the powers of the Supreme Court of Appeal.

(4) (a) Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal.

(b) If the accused applies orally for such leave immediately after the passing of the sentence or order, he or she must state such grounds, which must be recorded and form part of the record.

(5) (a) An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.

(b) An application for further evidence must be supported by an affidavit stating that—

- (i) further evidence which would presumably be accepted as true, is available;
- (ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and
- (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

(c) The court granting an application for further evidence must—

- (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and

- (ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.

(7) (a) If an application under subsection (1) for leave to appeal is granted and the appeal is not under section 315(3) to be heard by the full court of the High Court from which the appeal is made, the registrar of the court granting such application shall cause notice to be given accordingly to the registrar of the Supreme Court of Appeal without delay, and shall cause to be transmitted to the said registrar a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the Supreme Court of Appeal may nevertheless call for the production of the whole record.

(b) If an application under subsection (1) for leave to appeal is granted and the appeal is under section 315(3) to be heard by the full court of the High Court from which the appeal is made, the registrar shall without delay prepare a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be prepared of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the full court of the High Court concerned may nevertheless call for the production of the whole record.

(8) (a) If any application—

- (i) referred to in subsection (1)(b)(ii) (hereafter in this section referred to as an application for condonation);
- (ii) referred to in subsection (1)(b)(i) (hereafter in this section referred to as an application for leave to appeal); or
- (iii) referred to in subsection (5)(a) to adduce further evidence (hereafter in this section referred to as an application for further evidence),

is refused by a High Court, the accused may by petition apply to the President of the Supreme Court of Appeal to grant any one or more of the applications in question.

(b) Any petition referred to in paragraph (a) must be made—

- (i) within 21 days after the application in question was refused; or
- (ii) within such extended period as may on an application accompanying that petition, for good cause shown, be allowed.

(9) (a) If more than one application referred to in subsection (8)(a) relate to the same matter, they should, as far as is possible, be dealt with in the same petition.

(b) An accused who submits a petition referred to in subsection (8)(a), must at the same time give written notice thereof to the registrar of the High Court (other than a circuit court) within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he or she so presided.

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

- (a) application or applications that were refused;
- (b) the reasons for refusing such application or applications; and
- (c) the record of the proceedings in the High Court in respect of which the application was refused: Provided that—

- (i) if the accused was legally represented at the trial; or
- (ii) if the accused and the prosecuting authority agree thereto; or
- (iii) if the prospective appeal is against the sentence only; or
- (iv) if the petition relates solely to an application for condonation, a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (12)(a), suffice for the purposes of the petition.

(11) (a) A petition referred to in subsection (8), including an application referred to in subsection (8)(b)(ii), must be considered in chambers by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal.

(b) If the judges differ in opinion, the petition shall also be considered in chambers by the President of the Supreme Court of Appeal or by any other judge of the Supreme Court of Appeal to whom it has been referred by the President.

(c) For the purposes of paragraph (b) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three judges.

(12) The judges considering a petition may—

- (a) call for any further information, including a copy of the record of the proceedings that was not submitted in terms of the proviso to subsection (10)(c), from the judge who refused the application in question, or from the judge who presided at the trial to which any such application relates, as the case may be; or
- (b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them.

(13) The judges considering a petition may, whether they have acted under subsection (12)(a) or (b) or not—

- (a) in the case of an application referred to in subsection (8)(b)(ii), grant or refuse the application; and
 - (b) in the case of an application for condonation grant or refuse the application, and if the application is granted—
 - (i) direct that an application for leave to appeal must be made, within the period fixed by them, to the High Court referred to in subsection (8)(a); or
 - (ii) if they deem it expedient, direct that an application for leave to appeal must be submitted under subsection (8) within the period fixed by them as if it had been refused by the High Court referred to in subsection (8)(a); and
 - (c) in the case of an application for leave to appeal, subject to paragraph (d), grant or refuse the application; and
 - (d) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted the judges may, before deciding the application for leave to appeal, remit the matter to the High Court concerned in order that further evidence may be received in accordance with subsection (5)(c); or
 - (e) in exceptional circumstances refer the petition to the Supreme Court of Appeal for consideration, whether upon argument or otherwise, and the Supreme Court of Appeal may thereupon deal with the petition in any manner referred to in this subsection.
- (14) All applications contained in a petition must be disposed of—
- (a) as far as is possible, simultaneously; and
 - (b) as a matter of urgency, where the accused was sentenced to any form of imprisonment that was not wholly suspended.

(15) Notice of the date fixed for the hearing of any application under this section, and of any time and place determined under subsection (12) for any hearing, must be given to the Director of Public Prosecutions concerned and the accused.”.

Amendment of section 317 of Act 51 of 1977, as amended by section 22 of Act 105 of 1982 and section 13 of Act 62 of 2000

6. Section 317 of the principal Act is amended by—

(a) the substitution for subsection (1) of the following subsection:

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

(b) the substitution for subsection (5) of the following subsection:

“(5) If an application for condonation or for a special entry is refused, the accused may, within a period of [**twenty-one**] 21 days of such refusal or within such extended period as may on good cause shown, be allowed, by petition addressed to the [**Chief Justice**] President of the Supreme Court of Appeal, apply to the [**Appellate Division**] Supreme Court of Appeal for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, as the case may be, and thereupon the provisions of subsections [(7), (8), (9) and (10)] (11), (12), (13), (14) and (15) of section 316 shall *mutatis mutandis* apply.”.

Transitional arrangements

7. (1) The provisions of this Act do not apply in respect of any appeal pending before a High Court or the Supreme Court of Appeal on the date of the commencement of this Act.

(2) (a) Notwithstanding any amendments to the Criminal Procedure Act, 1977 (Act No. 51 of 1977), effected by this Act, the rules applicable to the Supreme Court of Appeal, the High Courts and the magistrates' courts in respect of appeals, as existing on the date of the commencement of this Act, shall, subject to any subsequent amendments thereto, continue to apply in respect of such appeals: Provided that any reference therein contained to a provision of the Criminal Procedure Act, 1977, that has been amended by this Act, must be construed as a reference to the corresponding provision of that Act as amended.

(b) The Rules Board for Courts of Law must revise and, when necessary, amend all rules in respect of appeals applicable to the Supreme Court of Appeal, the High Courts and the magistrates' courts in accordance with the provisions of this Act.

(c) Any draft rules contemplated in paragraph (b) must, within three months after the date of the commencement of this Act, be submitted to Parliament.

(d) Any amended rules must be approved by Parliament and thereafter be published in the *Gazette*.

Short title and commencement

8. This Act is called the Criminal Procedure Amendment Act, 2003, and comes into operation on 1 November 2003 or any earlier date as the President may determine by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE AMENDMENT BILL

1. PURPOSE OF BILL

The purpose of the Bill is to introduce “leave to appeal” and “petition” procedures in the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (“the Act”), so as to regulate appeals against decisions of the lower courts; to provide that certain appeals against decisions by the lower courts and the High Courts relating to children may be noted without having to apply for leave to appeal and to provide that certain appeals must be considered on the written argument of the parties.

2. OBJECTS OF BILL

- 2.1 The main object of the Bill is to introduce a sifting mechanism that will prevent the High Courts from being overburdened by unmeritorious appeals from the lower courts. The Bill attempts to achieve this whilst taking care to avoid the constitutional pitfalls that invalidated the previous “leave to appeal—procedure”, as set out in the judgment of the Constitutional Court in the case of *Steyn v the State* 2000(1) SA 1146 (CC).
- 2.2 Section 302 of the Act, among others, provides that proceedings for review in the ordinary course are suspended in respect of an accused who appeals against a conviction or sentence and that the provisions concerned shall cease to apply when judgment is given in the appeal. **Clause 1** aims to amend section 302(1)(b) of the Act so as to highlight the newly introduced distinction between the appeal procedures for certain children and all other accused persons.
- 2.3 **Clause 2** aims to amend section 309(1)(a) of the Act so as to provide that any person convicted of any offence in a lower court who wishes to appeal against the conviction or sentence must apply for leave to appeal against any conviction, sentence or order as contemplated in section 309B or 309C of the Act. The only exception provided for in this regard is that children who, at the time of the commission of the offence, were below the age of 14 years, or children between the ages of 14 and 16 years who were unrepresented at the time of their conviction in a regional court, who were sentenced to any form of imprisonment, may note an appeal without having to apply for leave to appeal as contemplated in the proposed new section 309B of the Act. Clause 2 further amends section 309(3A) of the Act so as to provide that appeals must generally be disposed of in chambers on the written arguments of the parties.
- 2.4 **Clause 3** substitutes sections 309B, 309C and 309D of the Act, among others, to introduce application for leave to appeal (in the magistrate’s court as provided for in section 309B) and petition procedures (in the High Court regulated in terms of section 309C) in respect of decisions by the lower courts.
- 2.5 As far as the leave to appeal procedure (section 309B) is concerned, the proposed new subsection (2)(b) provides that a transcribed case-record must be submitted in respect of an application for leave to appeal, where the application is heard by a magistrate other than the magistrate who tried the case. Subsection (2)(b) contains a proviso in terms of which it will be sufficient if copies of only the judgments are submitted in those cases where legally represented persons were convicted and sentenced in the regional courts. The proposed new subsection (4)(a) provides that if an application for leave to appeal is granted, copies of the record and of all relevant documents must be transmitted to the registrar of the court of appeal unless the accused and the Director of Public Prosecutions agree that only some parts of the record are relevant to the prospective appeal. The magistrate who refuses an application for leave to appeal must record his or her reasons for such refusal in terms of the proposed new subsection (4)(b).

- 2.6 With regard to the petition procedure contained in section 309C of the Act, the proposed new subsection (4) provides that transcribed case-records must be submitted in respect of all petitions to the High Courts for leave to appeal. This subsection further contains a proviso in terms of which a copy of the judgment, which includes the reasons for conviction and sentence, will be sufficient where a legally represented accused was tried in the regional court, if the accused and the Director of Public Prosecutions agree thereto, or if the prospective appeal is against sentence only, or if the petition relates solely to an application for condonation.
- 2.7 The amendment to section 309D of the Act aims to further regulate the obligation to explain certain rights to unrepresented accused in respect of appeal, legal representation and the correct procedures to give effect to these rights.
- 2.8 **Clause 4** aims to amend section 315 of the Act to, among others, provide that certain appeals must be disposed of in chambers on the written argument of the parties.
- 2.9 Section 316 of the Act regulates the leave to appeal and petition procedures in the High Court and is amended by **clause 5** so as to, among others, bring it line with the procedures contemplated in the lower courts as introduced by clause 3. **Clause 6** aims to introduce certain consequential amendments to section 317 of the Act and **clause 7** introduces certain transitional arrangements with regard to appeals in the Supreme Court of Appeal, the High Courts and the magistrates' courts.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Judges President, Chief Magistrates, Regional Court Presidents, National Director of Public Prosecutions and the legal profession were consulted.

4. IMPLICATIONS FOR PROVINCES

None

5. FINANCIAL IMPLICATIONS FOR STATE

The proposed amendments will contribute towards a more efficient management of the resources available to the Department.

6. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.