

Admission of guilt and criminal records: Severe enough to warrant legal aid?
Fisheries crimes as a case in point.

1. Introduction

In South African law a person may get a criminal record in one of three ways – when entering a plea of guilty when prosecuted, upon conviction after a plea of not guilty, and when an admission of guilt fine is paid.¹ There are two ways in which a previous conviction can be secured as a result of the payment of an admission of guilt fine, either as a result of a written notice issued by a peace officer in terms of section 56 of the Criminal Procedure Act (CPA)² or as a result of a written notice issued by a public prosecutor in terms of section 57A(1) of the CPA when an accused appears in court, but before he or she enters plea.

There are numerous agencies or job categories that are responsible for law enforcement with thousands of employees that can be appointed as peace officers and who are empowered to issue admission of guilt fines. Examples include members of the South African Police Services,³ municipal police officers,⁴ fisheries control officers,⁵ inspectors appointed in terms of the various provincial liquor and gambling Acts,⁶ environmental management inspectors (EMI's),⁷ environmental health practitioners⁸ and a host of employees in job categories declared as peace officers by the Minister of Justice and Constitutional Development.⁹ Apart from this wide array of law enforcement agencies employing peace officers, recently the powers of municipal law enforcement officers were increased considerably, extending the power to issue written notices to appear in court

¹ *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 (4) SA 738 (A).

² Criminal Procedure Act, 51 of 1977.

³ South African Police Services Act, 68 of 1995.

⁴ Section 64F of the South African Police Services Act, 68 of 1995. This category includes what is commonly known as metro police.

⁵ Section 9 of the Marine Living Resources Act (MLRA), 18 of 1998.

⁶ See inspectors appointed in terms of section 73(4) of the Western Cape Liquor Act, 4 of 2008.

⁷ Appointed in terms of the National Environmental Management Act (NEMA), 107 of 1998.

⁸ Environmental health officers can be appointed in terms of numerous legislative instruments. In the local government sphere alone, there are more than 10 possibilities. See du Plessis, A (2015) *Environmental Law and Local Government in South Africa*. Cape Town. Juta: 514 and Paterson, A and Kotzé, L (2009) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, Cape Town. Juta.

⁹ GN R209 in GG 3143 of 16 February 2002 declared in terms of section 334(1)(a) of the Criminal Procedure Act. Examples include immigration officers appointed under section 3 of the Aliens Control Act, 6 of 1991, provincial traffic inspectors appointed by any of the 9 provinces, nature conservation officers, security officers employed at provincial hospitals, municipal law enforcement officers, traffic officers and traffic wardens appointed by a local authority in terms of section 3 of the Road Traffic Act, 29 of 1989, officers appointed in terms of section 14(1) of the National Parks Act, 57 of 1976, inspectors appointed in terms of section 98(1) of the Telecommunications Act, 103 of 1996, road transport inspectors appointed under section 3 of the Cross-Border Road Transport Act, 4 of 1998, forestry officers appointed in under section 69(1)(b) of the Forest Act, 122 of 1984, authorised officers and inspectors appointed under the Civil Aviation Act, 74 of 1962, certain officers appointed in terms of the Minerals Act, 50 of 1991, inspectors appointed in terms of the Security Officers Act, 92 of 1987 and certain officers appointed in terms of the Airports Company Act, 44 of 1993. This list is not exhaustive, but illustrative. Also see GN R1463 in GG 27113 of 17 December 2004 and GN 780 in GG 3800 of 10 October 2014.

with the option to pay an admission of guilt fine to a higher number of offences.¹⁰ This, together with the amplified focus on the development of the blue economy and the protection of marine living resources, and the concomitant increase in fisheries-related law enforcement activities, has increased, or has the potential to increase, the number of written notices issued and the number of previous convictions associated with it markedly.¹¹

It is generally proclaimed by peace officers and the public alike, that if the police did not take a person's fingerprints upon conviction or the payment of a fine, no criminal record will result. This is not necessarily true and, as will be illustrated, there are many people that have criminal records that they don't know about. Most people choose the option to pay a fine to secure their release and avoid a night in a police cell, but they don't realise that it has severe consequences.¹² When a fine is paid, the accused is deemed to have been correctly convicted and such conviction is regarded as a conviction for all statutory and common law offences. It is so serious that, for instance, it would serve as the basis for the termination of a lease which contains a clause to the effect that should a lessee be convicted of any offence, the lease would be terminated.¹³ It could also result in a person not being able to obtain a visa for travel purposes or to emigrate, and if a person works in a financial institution, a criminal record is grounds for instant dismissal.¹⁴

The impact of criminal records has been recognised by the legislature and the courts alike. Section 271A-E of the Criminal Procedure Act introduced the law on the expungement of criminal records and in *S v Gilgannon*¹⁵ it was held that "[a] criminal record is an impediment to opportunities such as employment, travel and many other areas of life."

¹⁰ GN R1114 of 18 October 2018.

¹¹ South African Government (21 June 2018) "Environmental Affairs on success of Operation Phakisa Initiative 5" <https://www.gov.za/speeches/environmental-affairs-success-operation-phakisa-initiative-5-21-jun-2018-0000> (accessed 19 April 2019).

¹² Tatham Wilkes (6 April 2018) "What are the consequences of paying an admission of guilt fine?"

<https://www.tathamwilkes.co.za/NewsResources/NewsArticle.aspx?ArticleID=2384> (accessed 19 April 2019).

¹³ *NGJ Trading Stores (Pty) Ltd v Guerreiro* *supra*.

¹⁴ Serrao, A (24 April 2013) "Signing 'guilt fines' can be costly" <https://www.iol.co.za/news/signing-guilt-fines-can-be-costly-1505580> (accessed 1 April 2019).

¹⁵ (2013) ZAGPJHC 226 (29 August 2013).

The result of the admission of guilt system is that there is a large group of people that pay admission of guilt fines without knowing or fully understanding the consequences of their decisions. They don't have access to legal advice, are often enticed to take these decisions and rue it later.

This paper will examine whether there is a duty on Legal Aid South Africa to provide some form of legal aid in matters where admission of guilt fines are paid in terms of section 57(1)(b) of the CPA after receipt of a written notice to appear in court in terms of section 56(1) of the CPA (section 56 notice). It will also propose mechanisms to do so in order to give effect to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems¹⁶ (UN Principles), the Constitution and Sustainable Development Goal (SDG) 16,¹⁷ more specifically Target 16.3 of the SDG: Promote the rule of law at the national and international levels and ensure equal access to justice for all.

The paper does not deal with admission of guilt fines paid after a summons¹⁸ was endorsed by the public prosecutor,¹⁹ or after appearing in court, but before entering a plea²⁰ and fines imposed for traffic offences.

2. The admission of guilt system

Section 56(1) of the CPA provides that if an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by a notice in the Gazette, such peace officer may hand to the accused a written notice which shall, inter alia, call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question.²¹ It may also contain an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence and that he may pay a stipulated fine in respect thereof without appearing in court.²² The notice must contain a certificate signed by the peace officer that he has

¹⁶Adopted by the United Nations General Assembly in December 2012.

¹⁷ There are 17 Sustainable Development Goals (SDG's) set by the United Nations General Assembly in 2015 for the year 2030. The SDGs are part of Resolution 70/1 of the United Nations General Assembly. Goal 16 focuses on peace, justice and strong institutions and has as purpose to "[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels." <https://sustainabledevelopment.un.org/sdg16> (accessed on 19 April 2019).

¹⁸ Issued in terms of section 54 of the CPA.

¹⁹ Section 57(1)(a) of the CPA.

²⁰ Section 57A of the CPA.

²¹ Section 56(1)(b) of the CPA.

²² Section 56(1)(c) of the CPA.

handed the original of such written notice to the accused and that he has explained to the accused the import thereof.²³

The peace officer must forward a duplicate original of the written notice to the Clerk of the Court which has jurisdiction²⁴ and the production to the court of the duplicate original will be *prima facie* proof of the issuing of the original to the accused and that such original was handed to the accused.²⁵

Section 57(1)(b) provides that where a written notice under section 56 is handed to the accused and the endorsement required in terms of section 56(1)(c) purports to have been made by a police officer, the accused may, without appearing in court, admit his guilt by paying the fine stipulated. Where a fine was paid, the money together with the summons or written notice to appear must be forwarded to the clerk of the magistrate's court which has jurisdiction. The clerk completes the criminal record book for admissions of guilt, whereupon the accused is deemed to have been convicted and sentenced by the Court in respect of the offence in question.²⁶ These administrative duties are provided for in the Code for Clerks of the Criminal Court²⁷, (the Code).

The Code²⁸ determines how clerks of the court must proceed when they receive admission of guilt fines up to where the admission of guilt register is submitted to the responsible judicial officer to examine the documents. In terms of section 57(7) of the CPA the judicial officer presiding at the court in question must scrutinize the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or the determination²⁹ for the amounts set for admission of guilt fines, he may set aside the conviction and sentence and direct that the accused be prosecuted.³⁰

Examples include *S v Perrang*³¹ where the accused paid an admission of guilt fine of R6000 for being in possession of 223 crayfish³² and *S v Ajouhren*³³ where an admission of guilt fine of R9000 was paid for being in possession of 454 undersized crayfish.³⁴ In *S*

²³ Section 56(1)(d) of the CPA.

²⁴ Section 56(3).

²⁵ Section 56(4).

²⁶ Section 57(6).

²⁷ Department of Justice and Constitutional Development *Codified Instructions: Code: Clerks of the Criminal Court*. Chapter 6.

²⁸ Code: Paragraphs 72 and 73.

²⁹ See also *S v Karan* High Court Review 18808 WCHC special review judgment dated 26 March 2019.

³⁰ In terms of section 57(7) it is also possible that accused can be refunded where the amount of the fine exceeds the amount determined by relevant magistrate.

³¹ WCHC Case no. A850/2017.

³² The accused was found guilty under regulation 44(1)(a) to the MLRA.

³³ WCHC Case no A2800/2017.

³⁴ The accused was found guilty under regulation 51(1) to the MLRA.

v Simba³⁵ an admission of guilt fine of R800 was paid for being in possession of cannabis.³⁶ These matters came before the High Courts by way of special review. All of them involved the power of a judicial officer presiding at a magistrate's court to set aside a conviction and sentence in terms of section 57(7) of the CPA. In each case, the magistrate set aside the conviction and sentence, and directed that the accused be prosecuted in the ordinary course, whilst the control prosecutor contended that the magistrate was not entitled to do so.

The above cases are demonstrative of where convictions and sentences resulting from admission of guilt fines were set aside, resulting in subsequent prosecution. However, there are instances where it has been warned that the payment of admission of guilt fines are used as a "nonchalant quick-fix method" to expedite and finalise criminal proceedings.³⁷ The cases below illustrate that despite procedural safeguards, including the judicial oversight by magistrates in terms of section 57(7) of the CPA, there are matters that fall through the cracks.

3. Illustrative case law

The advantages created by the possibility to pay an "admission of guilt" fine seem obvious, but Curlewis³⁸ warns that the practical implications are not always understood and that this view could amount to "seeing only the tip of the iceberg". On the other hand, some are of the opinion that, in practical terms, it is unlikely that the payment of an admission of guilt fine will cause a person much trouble in the future, as it seems from anecdotal accounts from persons working at the local authorities or the police stations that such convictions are not entered into the SAP 69 register, or if it is, it does not appear on a criminal clearance check.³⁹ In reality, this practice has indeed resulted in trouble for some.

3.1 S v Parsons⁴⁰

In this case the accused paid an admission of guilt fine for "disturbing the peace" and she was convinced by the investigating police officer to pay the fine prior to the date that she was scheduled to appear before court. The accused stated that "I was issued with the fine but never was it explained to me that I would receive a criminal record. Had this

³⁵ WCHC Case no A2241/17.

³⁶ Case no. A2241/2017 involved a conviction under section 4(b) of the Drugs and Drug Trafficking Act, No. 140 of 1992.

³⁷ Curlewis, L. (1 April 2014) "Sugar-coating guilt: Admission of guilt fines – no easy fix" *De Rebus* Vol 2014 Issue 540: 24.

³⁸ Curlewis: 25.

³⁹ Marais, R. (1 September 2014) "Are you a convict? Admission of guilt fines and your criminal record." <https://www.linkedin.com/pulse/20140901162245-89407255-are-you-a-convict-admission-of-guilt-fines-and-your-criminal-record> (accessed on 16 April 2019).

⁴⁰ S v Parsons Review Case no C2791423 dd 15 June 2012 (WC).

been explained to me ... I would definitely have appeared ..." The fine was paid and the clerk of the court completed the criminal case book for admission of guilt with the result that the accused was deemed to have been correctly convicted.⁴¹

In determining whether the deemed conviction should be set aside, the court referred with approval to *S v Cedras*⁴² where the following principles and guidelines were articulated:

- (a) Are there considerations of equity and fair dealing which compel the Court to intervene to prevent a probable failure of justice?
- (b) The accused must show good cause for mistakenly or erroneously admitting guilt.
- (c) The accused must show that, were the charge to go to trial, she would have a probable or arguable defence.

In casu the police officer misrepresented the facts by stating that payment of the fine would result in the finalisation of the matter.⁴³ The court described such actions as "dangerously attractive" to an unsuspecting member of the public⁴⁴ and held that to draw a person's attention to the fact that a conviction shall be noted against his name is not only fair, but constitutionally obligatory.⁴⁵

The section 56 written notice that was used at the time did not contain any warning that payment of a fine translated into a conviction. According to the court, the correct procedure was for the police officer to warn the accused about the possible conviction record.⁴⁶ Consequently, the court was satisfied that the accused was wrongly led to admit guilt and wrongly convicted, with the result that the conviction and sentence was set aside.

3.2 Tong v The State⁴⁷

In *Tong v S* the applicant was arrested in 2008 for possession of cannabis in contravention of section 4(b) of the Drugs and Drugs Dependency Act⁴⁸ after he was found in a street in the vicinity of a packet containing cannabis (which gave rise to a presumption of possession). He was informed by the police that he could facilitate his release by paying an admission of guilt fine. The appellant's father paid an admission of

⁴¹ *S v Parsons* par [3].

⁴² *S v Cedras* 1999 (2) SA 530 (C) at 532.

⁴³ *S v Parsons* par [4].

⁴⁴ *S v Parsons* par [5].

⁴⁵ *S v Parsons* par [5].

⁴⁶ *S v Parsons* par [6].

⁴⁷ *Calvern Tong v The State* Case no 1287 in the High Court of South Africa (Western Cape High Court) 7 September 2012 (*Tong*).

⁴⁸ Act 140 of 1992.

guilt fine of R200,00 and the applicant was asked to sign various documents. He was not offered legal representation and the police did not explain the process to him. Upon his release, he was also not informed that he paid an admission of guilt fine. He was not consulted and did not agree to pay a fine. He was asked for an address and assumed that he would receive a notice to appear in court, which he never did.

In 2011 he applied for a work visa to take up a teaching position in South Korea and was surprised to find out that he had a criminal record as a result of this case, which disqualified him from any teaching placement. He was also unable to pursue any opportunities that may require him to travel abroad and the records of his case at the magistrate's court have been destroyed.⁴⁹ Tong averred that he was severely prejudiced as he was not afforded the opportunity to defend himself in court and that he would have elected to do so.

In this matter the difficulty was that there were allegations with no evidence to the contrary, most importantly the allegations that the police did not explain the applicant his rights before the fine was paid and the possible impact of paying such fine.⁵⁰ The court was of the opinion that the payment of an admission of guilt fine is premised on the fact that the payer of the fine would have been fully apprised of his rights and the consequences before electing to do so.⁵¹ The exercise of such a choice amounts to the waiver of several procedural rights which an accused would enjoy at a trial, such as the right to be sentenced only upon proof beyond reasonable doubt that he did commit the alleged offence. A number of constitutional rights are also infringed upon, namely the rights to dignity, freedom, security of the person, employment, privacy, freedom of movement and residence and the right to a fair trial.

The court referred to *NGJ Trading Stores (Pty) Ltd v Guerreiro*⁵² where the fact that the payment of an admission of guilt fine is regarded as a conviction was considered so serious that it could serve as a basis for the termination of a lease which contains a clause to the effect that should a lessee be convicted of any offence the lease would be terminated. Despite these risks, the court also described the system of payment of guilt fines as an indispensable and important component of the South African criminal justice system, which lessens the burden on the already overloaded system.⁵³

⁴⁹ Tong par [5].

⁵⁰ Tong par [10].

⁵¹ Tong par [14].

⁵² 1974 (4) SA 738 (A).

⁵³ Tong par [23]

What makes matters worse in the *Tong*-case was the fact that the police docket could not be traced,⁵⁴ with the result that the Director of Public Prosecutions could not properly respond to the applicant's allegations that the police did not explain his rights before he paid the admission of guilt fine. The applicant also submitted that the payment of an admission of guilt fine was used by the police as a bargaining tool to effect his release from custody. In effect the applicant was not given the choice⁵⁵ to pay a fine before a certain future date. The police effectively enforced payment. The court found this unlawful, especially in a situation where the applicant had not effectively waived his choice to consider to pay at a later date or to contest the matter.⁵⁶

3.3 S v Rademeyer⁵⁷

Rademeyer was accused of shoplifting and at the police station she was served with a document called "Notice of Rights in Terms of the Constitution" (SAPS 14A).⁵⁸ It was issued in terms of section 35 of the Constitution. The SAPS 14A contains the following information:

- "(1) You are being detained for the following reason: Shoplifting.
- (2) As a person who is detained you have the following rights:
 - (a) you have the right to consult with a legal practitioner of your choice or should you so prefer, to apply to the Legal Aid Board to be provided by the State with the services of a legal practitioner,
 - (b) ...

In the middle of SAPS 14A, is a portion called "Certificate by Detainee", which states as follows:

I, (name of detainee) hereby certify that I have been informed in English of my rights in terms of the Constitution as set out above by (name of person who informed the detainee) and that I understand the contents thereof.

Date: 2014/09/08 Time: 12:30 Place: Pretoria

It was signed by the detainee and a person who explained her rights to her.

At the time the accused was handed the said SAPS 14A, she was also handed a section 56 notice to appear in court. The notice contained a warning that an "[A]dmission of guilt fine of R500.00 may be accepted." She was notified that she would have to appear

⁵⁴ *Tong par* [11].

⁵⁵ As stipulated in Section 57(2)(a) of the Criminal Procedure Act.

⁵⁶ *Tong par* [20].

⁵⁷ *S v Rademeyer* Case No 272/16 (G).

⁵⁸ Also called a "SAPS 14A".

at Court on 9 September 2014. Instead of attending Court, she opted, without the benefit of any legal advice, to pay the admission of guilt fine.

She subsequently sought a clearance certificate from the South African Police Services. The certificate, dated 23 March 2016, recorded that she was convicted of theft and furthermore that she was, upon conviction, fined R500.00. According to court documents "[T]his revelation was unexpected. She was stunned, confused and frustrated."⁵⁹

In her affidavit the applicant stated (amongst others) that:

"At the police station it was not explained to me that signing an admission of guilt will be held against me for a 10 year period. I was unaware of the consequences by signing the admission of guilt. I never received nor signed a summons. The option of going to court was not even mentioned to me by the police station."

The court agreed with the judgment in the *Tong*-case that no duty is imposed on a police officer to warn an accused of the **full** consequences of paying an admission of guilt fine.⁶⁰ In *Tong*⁶¹ the court stated that:

"As such, the accused must be informed that he or she will be deemed to have been sentenced and convicted by the court with jurisdiction in respect of the offence in question. It must be furthermore explained to an accused that, if it is indeed the case, such conviction will appear on the accused's criminal record. A police officer must further inform the accused that, as a consequence of paying an admission of guilt fine, an accused would be waiving the right to be sentenced only upon proof beyond reasonable doubt that one is guilty of the commission of the offence, the right to contest the allegations in open court, the right to confront one's accusers, the right to call witnesses and the right to legal representation. A police officer must state in a certificate referred to in s 56(1)(d) of the Act contained in a written notice, that he/she has indeed warned the accused in the above manner.

In casu Rademeyer complained that it was never explained to her that paying the admission of guilt would result in her having a criminal conviction, but the court was of the opinion that there was no duty on a police officer to do so.⁶² The judge equated it with the situation where a judge or magistrate does not have to warn an accused in advance that conviction will result in a criminal record. It also stated that a certificate to the effect that the police officer has explained the full import of the processes may be desirable, but that the absence of such a certificate does not imply that the accused's right to a fair trial has been trampled.⁶³

⁵⁹ *S v Rademeyer* par [6].

⁶⁰ *S v Rademeyer* par [11].

⁶¹ Par [25].

⁶² *S v Rademeyer* par [13].

⁶³ *S v Rademeyer* par [18].

The court was of the opinion that the law should be developed to incorporate into the section 56 notice a warning that payment of the stipulated admission of guilt fine translates into a conviction. The absence of such warning was described as "not fair to unsuspecting members of the public."⁶⁴ Based on the test developed in *Cedras* the court confirmed the proceedings in the matter.

3.4 *S v Madhinha*⁶⁵

In the *Madhinha* matter the court expressed doubt whether a conviction in terms of 57(6) of the Criminal Procedure Act (the result of the payment of a fine issued in term of section 56) is a conviction as envisaged in section 271 of the Act (previous conviction by a court of law). The court was also doubtful whether such section 56(7) conviction is one which the Head of the Criminal Record Centre of the South African Police Service (SAPS) should enter on the criminal record of a person to appear as a previous conviction as envisaged in section 271 of the Act.⁶⁶ In 2010 the accused allegedly slapped a fellow grass vendor. He was detained, fingerprinted and handed a written notice which included an endorsement that he may admit guilt. He paid the R500 fine and was released. In 2018 he applied to join Uber and required a police clearance certificate. This revealed that he had a criminal record and he applied to have the conviction and sentence set aside.

He alleged that he was led to believe that the only option to be released from custody was to pay a fine immediately and that payment was accordingly not made freely and voluntarily. He also averred that his constitutional rights were not explained at any stage.

The court ruled that a written notice is a method of securing the attendance of an accused in a magistrate's court and the level of court is indicative that the method is meant primarily for less serious offences.⁶⁷ The court found that as the amount determined for the purposes of admission of guilt represents 8.33% of the limit of jurisdiction for magistrate's courts, it is intended for **trivial offences**.⁶⁸ According to the court, a conviction and sentence in terms of section 57(6) is not a verdict – it is an automatic consequence of an administrative act performed by a member of the court's

⁶⁴ *S v Rademeyer* par [189].

⁶⁵ *S v Madhinha* Review 18617 in the Western Cape High Court. Judgment delivered 7 December 2018.

⁶⁶ *S v Madhinha* par [5].

⁶⁷ *S v Madhinha* par [11].

⁶⁸ *S v Madhinha* par [13].

support services⁶⁹ that results in an automatic conviction and sentence of the accused pursuant section 57(6) of the Act.⁷⁰

In the court's view, the legislature has provided the section 57 mechanism to settle trivial disputes between the state and accused persons where "neither party wish to go through a long trial procedure and both are willing to bring their dispute to a quick end".⁷¹ It is regarded as a waiver by both parties – the state waives the offences upon payment of an amount and the accused waives his right to have his case proved beyond reasonable doubt. In effect it is a settlement mechanism of trivial criminal offences and not an unequivocal admission of guilt, primarily because it is not required:

- a) That the facts of the offence upon which the admission is based be set out.
- b) Once made to a peace officer, it need not be confirmed and reduced to writing in the presence of a magistrate or a peace officer.⁷²

The procedure in section 57(7) requires a judicial officer to examine the documents (admissions of guilt) to detect any problems and to determine whether the conviction and sentence by operation of law was in accordance with justice.⁷³ In Madhinha's case the paperwork was entered in the criminal record book kept for admissions of guilt. A few days later, a magistrate "examined" the documents and, having done so, set aside neither the conviction nor the sentence. This cleared the way for the police to enter his name in their criminal record system, along with other details such as that his sentence was 'AOG R500'.

Madhinha then took the matter to court, raising the question that has long troubled many people: when someone pays an admission of guilt fine what is the precise status of that transaction?

Madhinha said the conviction and sentence resulting from paying the fine should be set aside as "not in accordance with justice". He had not been informed of his rights and being held in prison, he reasonably believed paying the fine was the only way to be released from custody. He said he accepted that if the conviction and sentence were set aside, he might still be prosecuted in relation to the original matter. The strength of the case was never tested and a magistrate never found Madhinha guilty, or sentenced him. Even the admission of guilt register of such cases is destroyed after a year, unlike the proper criminal record book which is never destroyed.

⁶⁹ *S v Madhinha* par [15].

⁷⁰ *S v Madhinha* par [16].

⁷¹ *S v Madhinha* par [17].

⁷² Section 271 of the Criminal Procedure Act.

⁷³ *S v Madhinha* par [24].

In two cases from 2013,⁷⁴ where the accused had also said they did not know that payment of a fine would lead to a criminal record, judges of the High Court had, according to the full bench in Madhinha's case, appeared to "accept, without deciding" that a section 57 (6) conviction had the required status to result in a permanent record: the narrow issue raised by Madhinha.

Madhinha denied having assaulted the woman selling grass, and according to the court the appropriate way to deal with his application was to set the proceedings aside and let the state prosecute if it wished to prove his guilt. The court's recommendation to prevent such cases in the future is that "[i]n my view, the time has arrived for the National Commissioner of Police ... to require a member of the SAPS who detains an accused" in a case where an admission of guilt fine would be appropriate, and is in fact used after an initial detention, to submit a monthly written record of such detentions and the reasons for them to the commissioner. The record should show why it was necessary to arrest someone before giving them notice of the option of an admission of guilt fine. A policy should also be drafted that would address the criticism "that the SAPS use arrest and detention to force vulnerable members of society who fear being locked up, to admit guilt on petty crimes using arrest and the threat of continued detention."

Summarising its findings in relation to Madhinha, the court said a conviction and sentence following an entry into the admission of guilt record book by the clerk of the criminal court in the Magistrate's Court "is not a conviction whose record is permanent" and that the conviction and sentence of Madhinha under section 57(6) was set aside.⁷⁵

4. Duties of peace officers

From the cases it appears that the payment of an admission of guilt fine is often used as a bargaining tool by police officers to effect the release of a person from custody.⁷⁶ In the *Madhinha* matter the judges also commented on the role of the police. They had asked him to go with them to the police station but instead of simply issuing a written notice and allowing for payment of a fine, the police opened a docket and detained Madhinha. This constituted a threat of continued custody while the police officer knew he should not arrest the accused, and was intended to put pressure on Madhinha to admit guilt and pay the fine.

While it cannot be disputed that admission of guilt fines is an important component of the criminal justice system and that it eases the burden on an overloaded criminal

⁷⁴ *S v Parsons* and *S v Tong* *supra*.

⁷⁵ See Rickard, C (17 December 2018) "Admission of guilt – Permanent criminal record or not?"

<https://www.golegal.co.za/admission-guilt-payment/> (accessed 19 April 2019).

⁷⁶ Curlewis: 25.

justice system,⁷⁷ it is premised on the fact that an accused would be fully appraised of his or her rights and the consequences of the choice that is exercised.⁷⁸

The court held in *Tong*⁷⁹ that a peace officer must warn an accused of certain consequences of paying an admission of guilt fine, including that:

- He/she will be deemed to have been convicted and sentenced by a court;
- if it is indeed the case, such conviction will appear on the accused's criminal record;
- such conviction will appear on the accused's criminal record; and
- the accused will be waiving the right to be sentenced only upon proof beyond reasonable doubt that he/she is guilty of the commission of the offence, the right to contest allegations in open court, the right to confront one's accusers, the right to call witnesses **and the right to legal representation.**

As a result of this ruling the J534 form (written notice to appear in court in terms of section 56 of the CPA) has been amended to include the following information.

ADMISSION OF GUILT UNDER SECTION 57 OF ACT NO 51 OF 1977

I hereby acknowledge that I am guilty of the offence(s) set out in this notice and that, by paying the admission of guilt, I will be deemed to have been convicted in Court of the offence(s) (without having appeared in Court, having had the benefit of facing my accuser, having had legal representation or having exercised my right to call a witness in open Court) and that the conviction may be recorded as a previous conviction against my name and may appear on my criminal record.

Signature:

Date:

This is all good and it ticks the boxes, but in reality most South Africans see criminal trials as "looming terror" and something to be avoided as far as possible, resulting in the payment of admission of guilt fines without considering the possible consequences of the acknowledgement in the J534.⁸⁰

5. Alternative possibilities

Diversion⁸¹ is available to first time offenders, who freely admit their guilt before the commencement of a criminal trial. The most common offences for which diversion may be considered include theft or an attempt thereto, shoplifting, assault and possession of narcotics. The problem with diversion for adults in terms of the Criminal Procedure Act is

⁷⁷ *S v Tong* par [23].

⁷⁸ *S v Tong* par [14].

⁷⁹ Par [25].

⁸⁰ Schüler Heerschop Pienaar Attorneys "Diversion: The role of diversion in South African Law"

<http://www.shplaw.co.za/index.php/blog/22-diversion-the-role-of-diversion-in-south-african-law> (accessed 16 April 2019).

⁸¹ Diversion in terms of the Child Justice Act, 75 of 2008 is not included in this discussion.

that it is usually initiated by the legal representative of an accused in the form of written representations to presiding officers.⁸² In instances where admissions of guilt fines are paid, the recipient of the J534 notice waives the right to legal representation and in all probability he or she is not aware of the fact that such a possibility exists.

Informal mediation⁸³ is a process whereby a prosecutor, authorised thereto and within the ambit of the restorative justice guidelines, acts as a mediator between the victim and the offender and resolves the conflict which resulted in the criminal case. The matter is then withdrawn. In many instances where admission of guilt fines are paid, the crimes are considered to be "victimless" e.g. fishing without a licence, being in possession of abalone without a permit, possessing undersized mussel or crayfish etcetera, in which cases mediation would not be an option.

6. The duty to provide legal aid

Article 14 of the International Covenant on Civil and Political Rights⁸⁴ contains certain minimum guarantees to which everyone charged with a crime is entitled to, including the guarantee to:

- have **adequate time** and facilities for the preparation of his defence and to communicate with counsel of his own choosing;⁸⁵ and
- to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the **interests of justice** so require, and without payment by him in any such case if he does not have sufficient means to pay for it.⁸⁶

Article 6 of the European Convention on Human Rights⁸⁷ contains similar provisions on the minimum rights of accused persons.

According to Article 7 of the African Charter for Human and Peoples' Rights⁸⁸ every individual has the right to have his cause heard, and it comprises the right to defence, including the right to be defended by counsel of his choice.

⁸² Schüler Heerschop Pienaar Attorneys: 2.

⁸³ National Prosecuting Authority (2011) Annual Report 2010/11: 147.

⁸⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> (accessed 22 April 2019).

⁸⁵ Article 14(3)(b).

⁸⁶ Article 14(3)(d).

⁸⁷ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> (accessed 22 April 2019).

Principle 3 of UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems⁸⁹ encourages states to provide legal aid regardless of the person's means, if the case is particularly urgent or complex, or **if the potential penalty** the person faces is **very severe.**⁹⁰

In South Africa, the provision of criminal legal aid is an obligation imposed by the human rights chapter⁹¹ of the Constitution. The Bill of Rights resulted in constitutional⁹² provision for a number of rights that have a direct bearing on the duty to provide legal aid⁹³ and the vehicle that was established to ensure compliance with international guidelines and the Constitution is an entity called Legal Aid South Africa established in terms of the Legal Aid South Africa Act (the Act).⁹⁴ Section 23 of the Act requires the relevant Minister to make regulations relating to the **types of matters** in respect of which legal aid is provided and not provided, and the criteria that an applicant must comply with in order to qualify for legal assistance. In terms of section 24 the Legal Aid Board must compile, amend and approve a Legal Aid Manual. Amongst other matters, the manual prescribes the **procedures** in terms of which applications for legal aid are administered and the **systems and methods** whereby legal aid is delivered. The model employed is a mixed model service delivery system which consists of the Justice Centre,⁹⁵ Judicare, Co-operation Agreement,⁹⁶ Agency Agreement⁹⁷ and Impact Litigation Services models.⁹⁸

Regulation 3 of the Legal Aid Regulations (the Regulations)⁹⁹ provides that Legal Aid South Africa may grant legal aid to a sentenced or detained person or an accused person in a criminal trial if it is likely that such person would suffer **substantial injustice:**

⁸⁸ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> (accessed 22 April 2019).

⁸⁹ UN General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems : resolution / adopted by the General Assembly, 28 March 2013, A/RES/67/187, available at: <https://www.refworld.org/docid/51e6526b4.html> (accessed 22 April 2019).

⁹⁰ Article 1 of the UN Principles and Guidelines. Own emphasis.

⁹¹ Chapter 2 of Constitution of the Republic of South Africa, 1996.

⁹² Constitution of the Republic of South Africa, 200 of 1993; and Constitution of the Republic of South Africa, 1996 (the Constitution).

⁹³ The right to a fair hearing, the right to equality before the law, the right of detained persons to choose and consult with legal practitioners, as well as the right to have legal practitioners assigned by the state and at state expense if substantial injustice would otherwise result. Accused persons are afforded the right to choose, and to be represented by a legal practitioner, to be informed of this right promptly, and to have a legal practitioner assigned to them by the state and at state expense, if substantial injustice would otherwise result.

⁹⁴ Act 39 of 2014.

⁹⁵ The Justice Centre Model comprises the provision of legal services by salaried legal practitioners employed at Justice Centres and satellite offices. In criminal matters one of the models for legal service delivery involves the stationing of salaried legal practitioners at most District and Regional Magistrate's Courts in terms of its Practitioner per Court Model in an attempt to cover the criminal courts.

⁹⁶ The Co-operation Agreement Model is applied as a means of facilitating access to justice through Co-operation Agreements with other institutions capable of delivering either legal services of a particular specialist nature or within a particular geographical area.

⁹⁷ Agency Agreements are concluded with law firms to deliver access to justice to clients, especially in areas where it is too remote for Legal Aid SA or if it is not feasible to establish an office in that area.

⁹⁸ Legal Aid Manual: 23.

⁹⁹ Legal Aid South Africa Act, 39 of 2014): Regulations. GN R.745 GG 41005 of 26 July 2017.

Provided that substantial injustice might occur if that person **cannot afford legal representation** and the **possibility** that he or she **might be imprisoned** exists.¹⁰⁰

An applicant who is charged in the district magistrate's court for a number of offences, including any offence referred to in the Drugs and Drug Trafficking Act,¹⁰¹ may be granted legal aid, if the court has a statutory increased penal jurisdiction.¹⁰² An applicant who is charged in a district magistrate's court (without increased penal jurisdiction) may also be granted legal aid in a number of matters, including common assault, theft and shoplifting,¹⁰³ and any statutory offence relating to animal and nature conservation.¹⁰⁴ The latter would include legislation dealing with marine living resources.

In assessing an application for legal aid by an applicant who is charged in the district magistrate's court with an offence that is not listed,¹⁰⁵ legal aid may be granted after consideration of the complexity of the case in law and in fact, including the imposing of an appropriate sentence, the applicant's ability to represent himself, and (c) the gravity of the case, taking into account the nature of the charge against the accused and the **possible consequences** to him if convicted.¹⁰⁶

Regulation 27 of the Regulations contains the qualification criteria and means test. Legal Aid South Africa has the discretion to authorize fully subsidized legal aid for any applicant who exceeds the means test¹⁰⁷ and if an applicant does not qualify for legal aid in terms of the means test for a criminal matter, partial legal aid may be provided and the applicant may be required to contribute to the cost of the legal aid.¹⁰⁸ In assessing whether partial legal aid should be provided Legal Aid South Africa must take into account:¹⁰⁹

- a) Whether the applicant will suffer **substantial injustice** if legal aid is not provided;
- b) whether the applicant can afford the cost of his own legal representation; and
- c) whether the applicant can adjust his standard of living to be able to afford the cost of his or her own legal representation.

¹⁰⁰ In terms of Regulation 3(2), a legal aid applicant who is charged in the High Court of South Africa or a magistrate's court for a regional division may be granted legal aid without any further enquiry into the nature and seriousness of the charge: Provided that such applicant is unable to afford the cost of his or her own legal representation that would sustain the anticipated duration of trial.

¹⁰¹ Act 140 of 1992.

¹⁰² Regulation 3(3).

¹⁰³ Regulation 3(4).

¹⁰⁴ Regulation 3(6).

¹⁰⁵ In sub-regulations (3), (4), (5) or (6) of Regulation 3.

¹⁰⁶ Regulation 3(7).

¹⁰⁷ Regulation 30.

¹⁰⁸ Regulation 31.

¹⁰⁹ Regulation 31(2).

As far as “substantial injustice” is concerned, in *S v Bhengu*¹¹⁰ it was ruled that each case will have to be decided on its own merit. The Constitution¹¹¹ also provides that every accused, detained and sentenced person has the right, where **substantial injustice** would otherwise result, to be provided with legal representation at State expense.¹¹² In *Bhengu* the absence of a legal representative for the accused exposed how alienating the court room environment is to an uninitiated person and the trial as a whole objectively adjudged was found to be unfair.¹¹³ In this case the court expressed concern¹¹⁴ about the circumstances under which an accused person should be represented at the expense of the State. This concern was to a large part addressed by the Legal Aid regulations. The court found that the accused did not comprehend what was going on – he was out of his depth, not out of choice but ignorance and therefore it cannot be said it was up to him to decide whether he needed legal representation, even when given the choice to do so. It also stated that the explanation to the accused of his rights to legal representation should have contained an indication that a legal representative would be best suited to help the accused achieve the objectives of a fair trial. The court found support for this proposition in the Constitution as well as international instruments. Section 35(1) of the Constitution reads:

“In interpreting the provisions if this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.”

The court opined that all these rights are generally observed, but that more could be done to promote and advance them,¹¹⁵ and that the right to a fair trial remains a pipe dream as long as the right to legal representation remains the discretion of the accused person,¹¹⁶ although it is an aspect which is rigorously conveyed to accused persons in most trials. This is also the standard in pre-trial procedures. No doubt those who can financially afford to appoint counsel at their costs, do so. Those who cannot afford legal assistance are the people in whose interest these instruments must be read and interpreted. The court also accepted that not everybody will be entitled to legal representation at the expense of the State and that there must be threshold.

According to the court the wording in the Constitution, namely “to have a legal practitioner assigned to the accused person by the state and at state expense, if

¹¹⁰ [2010] ZAKZPHC 69 (1 October 2010).

¹¹¹ Section 35(2) and (3) of the Constitution.

¹¹² *S v Bhengu* Par [14].

¹¹³ *S v Bhengu* Par [7].

¹¹⁴ Par [5].

¹¹⁵ Par [12].

¹¹⁶ Par [13].

substantial injustice would otherwise result, and to be informed of this right promptly” appears to be limiting. However, it is consistent with international instruments, which use the phrases “*if justice*” requires and “*if the interest of justice*” requires. Section 35(3)(g) of the Bill of Rights must be read subject to the provision of section 39, which result in an interpretation in the context of comparable instruments and case law and would justify the court to interpret –

“its constitutional role as not only to advise the accused of his or her right to legal representation but also that of fairness of the trial whereby the interest of justice plays an important and pivotal role in determining whether a legal representative should be assigned to him or not, in instances the accused cannot afford one.”¹¹⁷

The court noted that in order to give effect to the constitutional provisions, the government through the Legal Aid Board has created Legal Aid Centres, but that despite this protection by the Constitution, the fact of the matter is that the unrepresented accused remains vulnerable to mistrial. It opined that until the courts play a more active role in deciding who should be assigned legal representation at State expense, as opposed to leaving this to the discretion of the accused, this constitutional imperative would remain but in the statute.¹¹⁸

Legal Aid South Africa acquires its mandate from the Constitution, the Legal Aid South Africa Act¹¹⁹ (the Act) as read with the Legal Aid Regulations¹²⁰ (the Regulations) and the Legal Aid Manual (the Manual).¹²¹ According to the short title of the Act, Legal Aid South Africa is created to ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in the Constitution and, amongst others, to render or make legal aid and legal advice available, and to define its objects, powers, functions, duties and composition. The Regulations contain the policy provisions whereas the Manual provides procedural requirements.

The objects of Legal Aid South Africa are to¹²² render or make available legal aid and **legal advice**, provide legal representation to persons at state expense and to provide **education and information** concerning legal rights and obligations as envisaged in the Constitution and the Act. It also declares itself as the vehicle to work towards achieving

¹¹⁷ Par [15]. On the merits the court found that the accused did not have a fair trial because, judging by the evidence presented and how the accused dealt with his own defence, it was manifestly clear that this is one matter where a legal representative was needed to represent the accused. The whole process was beyond the accused, he could not challenge evidence against him even if he wanted to, and his cross-examination was no more than a superficial enquiry. As a result of not being legally represented there was a failure of justice (Par [16]).

¹¹⁸ Par [17].

¹¹⁹ Act 39 of 2014.

¹²⁰ Legal Aid South Africa Regulations R. 745 published in GG 41005 dated 26 July 2017.

¹²¹ Legal Aid South Africa (2018) Legal Aid Manual.

¹²² Section 3 of the Legal Aid South Africa Act.

Target 16.3 of Sustainable Development Goal 6, namely to: Promote the rule of law at the national and international levels, and ensure **equal access to justice** for all.¹²³

In *Director of Public Prosecutions, Limpopo v Mokgotho*¹²⁴ the court stated that "[It is trite that an accused can only be convicted if the evidence establishes his guilt beyond reasonable doubt." In *S v Madhinha*¹²⁵ the court cited a number of authorities to the effect that "in relation to sentence a conviction is not a previous conviction unless the offender was brought to court and convicted and sentenced for the offence before the current offence was committed."

7. Conclusion

It is clear that the admission of guilt system in South Africa is seen as a "nonchalant quick-fix method" by a public who are not fully aware of the possible consequences of making such decisions despite the fact that potential penalties are severe. The regulations¹²⁶ to the MLRA, for example, provides for a fine of R800 000 or 2 years imprisonment for catching or being in possession of fish without a permit,¹²⁷ fishing in a tidal river or lagoon,¹²⁸ being in possession of diving equipment on a vessel that was used for fishing or transporting of west coast rock lobster¹²⁹ and being in possession of undersized abalone (*Haliotis midae*).¹³⁰ Although these sentences are not normally imposed on first offenders, the possibility is much stronger upon a consecutive conviction if the payment of a fine is taken into consideration as a previous conviction for the purposes of sentencing. These possibilities should be sufficient to warrant the involvement of Legal Aid South Africa.

If Legal Aid South Africa wants to deliver on its promise and legislative obligation¹³¹ to render or make available legal aid and legal advice, to provide education and information concerning legal rights and obligations as envisaged in the Constitution and the Act, and to promote the rule of law, it would implement a system to fill the cracks to prevent serious injustice and possible adverse consequences resulting from the payment of admission of guilt fines. In particular, the dissemination of information on the

¹²³ Legal Aid South Africa (2018) Integrated Annual Report 2017/2018: 1.

¹²⁴ *Director of Public Prosecutions, Limpopo v Mokgotho* [2017] ZASCA 159 (24 November 2017) par 18.

¹²⁵ Par [27].

¹²⁶ GN R.1111 published in Government Gazette 19205 of 2 September 1998.

¹²⁷ Reg 9.

¹²⁸ Reg 10(a).

¹²⁹ Reg 45.

¹³⁰ Reg 37(1).

¹³¹ In terms of section 3 of the Legal Aid South Africa Act.

consequences of paying such fines should be included in Legal Aid South Africa's community outreach programme, which forms part of its annual performance plan.¹³²

Even though the conviction resulting from the payment of an admission of guilt fine falls away automatically after 10 years¹³³ it offers little hope for the person who paid the fine as the payment has the meaning and effect of a previous conviction.

¹³² Legal Aid South Africa (2018) 29.

¹³³ S 271A of the CPA.