A critical analysis of a review *pendente lite* application against a lower court`s proceedings and its influence on the right to a fair trial: A South African perspective.

MINI-DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE LLM IN

HUMAN RIGHTS LAW DEGREE

BY

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(2023)

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DEDICATION

To my single mother who remains my pillar and source of strength, you mean the whole world to me. This whole research is dedicated to you. May God grant you many years to see my success. To my fiancée Mulaudzi Mulweli Victorious, I remain humble to the support and love you gave to me throughout this research, hence I also dedicate this research to you. May God give you many days to see my success.

ACKNOWLEDGEMENT.

I appreciate God the father of all nations for offering me the precious gift of human salvation through his son Jesus Christ. I thank Him for life, good health and strength that had carried me throughout this research. Without Him I would not have completed this dissertation.

Special gratitude goes to my one and only supervisor Prof T Van der Walt. The support and mentorship you revealed throughout this research is marvellous. May God bless you and your family.

I acknowledge the contributions of my Oversear and the President of the Apostolic Faith Mission of Africa, Rev R Zulu, for his kind mentorship toward the youths. His words of grace gave me power and encouragement to study further.

I further, acknowledge the impact of my one and only friend Mashau Thivha, for the love and support he shows toward my academic life. May God bless you continually.

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Abstract.

The Constitution of the Republic of South Africa is built upon the values of protection and promotion of human dignity, equality, and freedom. It is the state that is bound to promote, fulfil, and protect human rights as enshrined in the Bill of Rights. The very same Constitution makes a provision for the right to a fair trial to every accused person allegedly presumed to have committed offence[s] and subjected to a criminal trial. Whenever the accused is not satisfied with the pending criminal proceedings in a lower court and has a reasonable ground[s] or apprehension that, such proceedings are not in accordance with justice, this study contends that, there is an avenue provided by the South African law, to review and set aside the so-called poisoned proceedings. Yet, it remains undisputed that, the Criminal Procedure Act 51 of 1977 is considered a cornerstone statute of the criminal jurisprudence in South Africa. However, there is no provision in the Criminal Procedure Act that regulates on how review *pendente lite* in criminal cases should be conducted. This exposes the indigent accused persons to a very expensive and confusing civil courts review in terms of section 22 of the Superior Courts Act read with rule 53 of the Uniform Rules of the Court. This study will argue that, such an exclusion prejudices the right to a fair trial which amongst others, includes the right for a review. This study has employed the doctrinal method in order to achieve its purpose.

CHAPTER 1

1.1. **Background**.

In South Africa, criminal proceedings are subject to a review and appeals by the high courts.[1] The fair trial rights as enshrined in the Constitution of the Republic of South Africa (Constitution)[2] are assessed during reviews and appeals. However, Kruger A explains that ''there is no separate Constitutional yardstick.''[3] This is to say that all criminal reviews and appeals are assessed with reference to the fair trial rights as enshrined in the Constitution.[4]

There is no statute in South Africa that provides for a review *pendente lite* application in criminal matters specifically. However, the Constitution makes a blanket provision for a review of the lower court's proceedings.[5] Furthermore, the Superior Courts Act, in section 22 generally provides for the right to a review of the lower court`s proceedings.[6] This study investigates the different types of review applicable to criminal proceedings, for example, review *pendente lite* and criminal reviews in terms of the Criminal Procedure Act (CPA). Based on the latter premise, this dissertation argues that a review *pendente lite*, is incorporated in section 35(3) (o) of the Constitution and in section 22 the Superior Courts Act.

If one scrutinises the meaning of review *pendente lite* in South African law, it becomes clear that, the leading case of *Walhaus and Others v Additional Magistrate, Johannesburg,*[7] explains it, as a review which is made amid the proceedings.[8] The same explanation of review *pendente lite* was also rendered in the decision of *D v L*.[9] These two cases reveal the origins and existence of review *pendente lite* in South Africa. In *Walhaus,* the review application was based on section 24 of the Superior

[1] Section 35(3) (o) of the Constitution of the Republic of South Africa, 1996, hereafter referred to as the Constitution.

[2] Section 35(3) (a) –(o) of the Constitution.

[3] A Kruger *Hiemstra`s Criminal Procedure* (2019) 30-6, hereafter referred to as Kruger.

[4] Section 35(3) (a)-(o) of the Constitution.

[5] Section 35(3) (o) of the Constitution.

[6] Section 22 of the Superior Courts Act 10 of 2013, hereafter referred to as the Superior Courts Act.

[7] *Walhaus and Others v Additional Magistrate* 1959 (3) SA 113 (A).

[8] As above.

[9] *D v L*. [2018] ZAFPPHC 543.

Courts Act 59 of 1959,[10] the predecessor of section 22 of the Superior Courts Act 10 of 2013.[11] I would here explain that, at the time sections 302,304 and 306 of the 1977 CPA were not in existence and the predecessor of the 1977 Act, 1955 CPA, did not contain any provision regarding reviews.

Sections 302, 304, and 306 of the CPA were enacted in 1977 and deal with reviews of criminal matters in the lower courts. In terms of these sections, the reviews regulated are automatic review and special review. An automatic review is applicable after the conviction and sentence of the accused and is available to accused persons who were legally not represented throughout the proceedings, and further applies when the magistrate passes a sentence that is beyond his substantive rank.[12] Special reviews occurs when a sentence imposed by the magistrate court is brought to the attention of the judge at the division of a high court, provided that, the provision of an automatic review is not applicable, and where it is argued that, such sentence is not in accordance with justice.[13] Hence, the high court will review such sentence.[14] However, these reviews provided for in terms of the CPA, do not cover circumstances where the accused during the criminal proceedings believes that, his/her right to a fair trial is violated to a degree that there is a miscarriage of justice and therefore, cannot wait until the case is completed. Such an accused must lodge a review *pendente lite* in terms of section 22 of the Superior Act.[15]

A review *pendente lite* application is instituted in terms of any of the grounds locatable in section 22 Superior Courts Act (discussed hereunder)[16] If any party intends to lodge review *pendente lite*, the entire on-going criminal proceedings in the lower courts are postponed pending the finalisation of such a review.[17] However, this dissertation will argue that, in order to safeguards the accused`s fair trial rights,

[10] Section 24 of the Superior Courts Act 59 of 1959, hereafter the Repealed Superior Courts Act

[11] Superior Courts Act.

[12] Sections 302(1) (a) & 302(3) (b) of the Criminal Procedure Act 51 of 1977, hereafter referred to as the Criminal Procedure Act.

[13] Section 304(4) of the Criminal Procedure Act.

[14] As above.

[15] Section 22 of the Superior Courts Act.

[16] E du Toit *et al* Commentary *on Criminal Procedure Act* (2021) 30, hereafter referred to as Du Toit.

[17] *Boshomane v NG Pretorius N.O and Another* [2021] ZALMPPHC 39, hereafter referred to as the *Boshomane*.

which *inter alia*, includes right to a review, the CPA must be amended in order to accommodate review *pendente lite* provisions.

Moreover, it is of uttermost importance to note that, located at the heart of the South African criminal justice jurisprudence, is the principle of justice. Justice must be seen to be done,[18] taking into consideration that, it is a double-edged sword that absorbs the interest of all parties in the proceedings.[19]

Before the completion of the criminal proceedings, the accused may institute a review *pendente lite*. Such a review can be lodged in the high court if the affected party believes that, the criminal proceedings in the lower courts are not in accordance with justice and that, a grave injustice had occurred.[20] In the case of *Boshomane v N.G Pretorious and Another*, the High Court was faced with a review *pendente lite*, which the Applicant sought to review the criminal proceedings of Mokopane Regional Court on the basis that, the Court was biased, and such review was lodged in terms of section 22(1) (b) of the Superior Courts Act.[21] However, the application was dismissed on the basis that, the Applicant failed to discharge the requisite onus. This decision reinforces the general rule under review *pendente lite* which provides that, the courts will only interfere with the proceedings of the lower courts when there is a grave injustice.[22]

This kind of review may also be applied in civil matters in South Africa.[23] However, this study is limited to a review *pendente lite* of criminal proceedings of the lower courts in South Africa. Currently in South Africa, a person who aspires to lodge a review *pendente lite* in the high court must establish one and/or more of the ground(s) in section 22 of the Superior Courts Act which include:[24]

(a) Absence of jurisdiction on the part of the Court;

[18] *R v Sussex Justices ex parte McCarthy* [1923] ALL ER Rep 223.

[19] *S v Sallem* 1987 (4) SA 772 (A) at 791C-D.

[20] *Boshomane* (n 17 above).

[21] *Boshomane* (n 20 above) 2.

[22] *Motata v Nair No and Another* (7023/2008) [2008] ZAFSCHC 53.

[23] *Mxolisi Jojwana v The Regional Magistrate Mr Me and RNE Holdings (Pty) Ltd* (case no: 543/17).

[24] Section 22 of the Superior Courts Act.

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(c) gross irregularity in the proceedings; and
(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

Furthermore, the lower courts are creatures of statutes and thereby bound not to act arbitrary to the powers conferred to them.[25] It might happen that lower courts, in certain circumstances, may act arbitrary to its powers and this may also trigger a review *pendente lite,* for example:

i. If the court conducts its questions in a manner that its impartiality can be doubted;
ii. If the court takes part in the case to an extent that it obscures the points in the issue (this point will be expanded in chapter 3 hereunder); or
iii. If the court intimidates a witness or the accused to such an extent that the answers are weakened, or credibility degraded.[26]

The abovementioned elements lay a proper foundation in drawing the conclusion on whether the criminal proceedings were and/or are in accordance with justice or not.[27] Hence, this study will address those elements in alignment with fair trial rights. However, the cardinal grounds of review to be addressed by this paper can be located from section 22 of the Superior Courts. The latter Act provides that, there are four grounds upon which the decisions of the magistrate courts can be brought into a review.[28] The four grounds will be scrutinised later in the respective chapters of this paper. This paper will argue that those grounds incorporated in section 22 of the Superior Courts Act, must be adopted into the CPA for criminal reviews to curb the element of costs associated with the reviews conducted in terms of the Superior Courts Act which are civil in nature.

[25] *S v Scholtz & Others* 1996 (2) SACR 623 (C) & S Pete *et a*l *Civil Procedure A Practical Guide (*2017) 66.

[26] *S v Rall* 1982 (1) SA 828(A).

[27] Kruger (n 3 above) 30-8'.

[28] As above.

The provision of section 22 of the Superior Courts Act is applicable in criminal proceedings as it speaks about the proceedings of the magistrate courts which can be brought into a review upon one of the grounds abovementioned. This study submits that, the proceedings of the magistrate court includes both criminal and civil matter. [29] However, civil proceedings are extremely expensive, difficult for access to indigent accused persons.

The high courts have been empowered with jurisdiction to adjudicate in all review matters pursuant to the proceedings of the magistrate courts.[30] Furthermore, for the applicant to be successful in his review *pendente lite* application, his founding affidavit must unambiguously articulate that, he/she will suffer an irreparable prejudice if such criminal trial is permitted to proceed to its conclusion.[31]

An example of review *pendente lite* as applied in case law is captured;

- The case of *Sayed and Another v Levitt N.O and Another*, [32] wherein the Applicant brought an application to review the pending proceedings of the Regional Court on the basis that, such court had allowed an unsworn interpreter to interpret. The same interpreter was failing to accurately interpret into the language spoken by the accused. This review case was instituted in terms of section 22 of the Superior Courts. On the basis of the gross irregularity committed by the Regional Court, the High Court reviewed and set aside the proceedings and ordered that, such proceedings should commence *de novo* before another regional magistrate.[33]

The Supreme Court found that, a review *pendente lite* is an extraordinary avenue because, it can only be used when there are exceptional circumstances upon which one party is of the view that, if the criminal trial proceeds, a grave injustice will be suffered.[34] In some circumstances it may occur when the presiding officer in the lower court descends into the arena and takes over any party's case in a manner

[29] Du Toit (n 16 above) ch30.

[30] Section 21(1) (b) of the Superior Courts Act.

[31] *Walhaus* (n 7 above).

[32] 2012 (2) SA SACR 294 (KZP) at 3.

[33] *Sayed and Another v Levitt NO and Another* 2012 (2) SA SACR 294 (KZP) 18(i).

[34] *Gabaathlolwe and Another v S* 2003 (1) All SA 1 (SCA).

that frustrates the principle of justice and fairness.[35] Furthermore, if a court in a criminal trial decides to admit evidence that is inadmissible or reject the admissible evidence, the same constitutes a gross irregularity which affects the right to fair trial and triggers review of this nature.[36] If the accused waits until the finalisation of the case, he stands to suffer an irreparable harm possibly in a form of a wrongful conviction and the wrongful sentence.[37]

Criminal proceedings of the lower Courts can be reviewed and/or appealed.[38] However, both criminal and civil proceedings of the Higher Courts are not reviewable but only appealable.[39] In amplifying the latter submission, in the case of *S v Kheswa* and Another,[40] the Court held that, there is no judicial decision made by a judge in South Africa, which under any circumstances may be subjected to a review.[41] The latter case reveals that, only the decisions of the lower courts can be reviewed and not that of the high courts. What makes the lower court`s proceedings to be reviewable and not those of the higher courts? Erasmus submitted that, the reason why the decisions of the lower courts are reviewable by the higher courts, and that the higher courts decisions are not reviewable cannot be found in logic nor reason.[42] He further contented that, history can be used as a solution to the answer.[43] Hence, history narrates that, the supervisory power of the high courts over the lower courts, was thus, introduced in 1828 when the Court of the Colony of Good Hope was given the powers to review the decisions of the inferior courts in the Colony under the First Charter of Justice of 1828.[44]

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[35] Kruger (n 28 above) 22-60.

[36] Section 33(5) of Constitution & section 22 of the Superior Courts Act.

[37] Kruger (n 36 above) 30-8'.

[38] Sections 302, 304, 306 & 309 Criminal Procedure Act.

[39] Kruger (n 37 above) 30-8.

[40] *S v Kheswa* and Another 2008 (2) SACR 123 (N) 27.

[41] As above.

[42] HJ Erasmus 'Judicial Review of Inferior Courts Proceedings -Or, the Ghost of Prerogative writs in South African Law' (2015) 1 *TSAR* 94, hereafter referred to as Erasmus.

[43] As above.

[44] As above.

The Constitution allows the courts to consider foreign law in circumstances where the Bill of Rights is subject to an interpretation.[45] The Namibian law has a different provision from the South African law regarding reviews. In Namibia, both the lower courts and the high court`s decision are appealable and reviewable.[46] The purpose of choosing Namibian law as compared to other jurisdictions, lies at an ideal that, the Namibian law proves that, both the high courts and lower court`s decisions are reviewable, whereas in South Africa, only the lower courts decisions are reviewable but not the high court's decisions. The brief comparison is articulated in chapter four of this research.

There are different kinds of review. In the case of J*ohannesburg Consolidated Investment Company* v *Johanessburg Town Council*,[47] it was held that reviews are categorised into three broad categories. The first one is the review of the inferior courts due to irregularities and illegalities occurring in the proceedings.[48] The latter kind of review can be applied in both criminal and civil proceedings. The second one is the common law review used to quasi-judicial bodies.[49] The third one is the statutory review where the statute has empowered the high courts to exercise such review powers.[50]

The CPA (CPA) does not make a provision for a review *pendente lite*. Though section 302 and 304 of the CPA respectively provide for an automatic and special review of the lower court's criminal proceedings, such provisions are therefore, only limited to those circumstances provided in sections, for example:

(a) If the magistrate who has not held the substantive rank imposes sentence of more than three months imprisonment.
(b) If the magistrate who has held the substantive rank of magistrate imposes sentence of more than six months imprisonment.

[45] The Constitution, sec 39(1) (c).

[46] Section 16(1) Namibian Supreme Act 15 of 1990).

[47] *Johannesburg Consolidated Investment Company* v *Johanessburg Town Council* 1903 TS 111 114-115.

[48] As above.

[49] Erasmus (n 43 above) 94.

[50] As above.

(c) Where a fine of more than R6000 is imposed by a magistrate who has not held a substantive rank of the magistrate.

(d) Where a fine of more than R12 000 is imposed by a magistrate who has held the substantive rank of magistrates.[51]

As articulated above, an automatic review is limited to situations provided for in terms of section 302 of the CPA, it is further, solely available to the accused persons who were legally unrepresented throughout the lower court's criminal proceedings.[52] It means that, if the accused was represented by a legal practitioner throughout the criminal proceedings in the lower courts, he cannot use an avenue of automatic review to set aside the sentence imposed thereof. Additionally, sections 302, 304 and 306 respectively, are not applicable under review *pendente lite*, because they can only be applied after conviction and sentence by the lower courts. On the other hand, review *pendente lite* must be lodged in the High Court while the criminal proceedings in the lower courts are still pending. It is therefore clear that review *pendente lite* is an additional procedure that is provided for by the Constitution,[53] and the Superior Courts Act.[54] Hence this study contends that, in order to safeguard the interest of the indigent accused persons, grounds for review *pendente lite* locatable in section 22 of the Superior Courts Act must be incorporated in the CPA specifically to regulate criminal reviews in order to limit the costs and complexity of the procedure as captured in terms of rule 53 of the Uniform Rules of the Court.

Though this paper is focusing on review *pendente lite* for criminal proceedings in the lower courts, the procedure of lodging such review is civil, and must comply with both rule 6 and 53 of the Uniform Rules of the Court.[55] Unlike in appeal where the high court will only rely on the record, in review, the Court is allowed to go beyond the transcribed and paginated record.[56] This study argues that if the legislature can possibly amend the CPA, and incorporate review *pendente lite* clause, there must be relevant rules that must be established to regulate its procedure. The same position

[51] Section 302(1) of the CPA.

[52] Section 302 (2(b) of the CPA.

[53] Section 35(3) (o) of the Constitution.

[54] Section 22 (a)- (d) the Superior Courts Act.

[55] Uniform Rules of the Court, hereafter referred to as the Rules.

[56] Rule 53 of the Rules.

applies to criminal appeals that are regulated in terms of the CPA[57], because there are rules specifically crafted for such purpose.[58]

It is common cause that proceedings of the Higher Courts are not reviewable.[59] However, there is a legal avenue in terms of the Criminal Procedure Act,[60] which provides for a similar recourse as that of a review and it is called ''special entries''.[61] But, it is brought simultaneously with an appeal if there was an irregularity on the proceedings. Therefore, one cannot say that the latter is a review per se. Hence, this research deals with as aspect of reviewing of the lower court`s criminal proceedings. Therefore, the Superior Courts Act specifically empowers the High Court Division having jurisdiction to entertain the review application targeted against the lower court's proceedings.[62] Since there is no provision in the CPA which provides for a review *pendente lite*, therefore currently, section 22 of the Superior Courts Act is the only statute used for review of this nature.

On the other hand, the second leg of this paper deals with how review *pendente lite* affects or influences the right to a fair trial. The right to fair a trial is an important right which the criminal jurisprudence of South Africa is established on. This dissertation will address section 35(3) and 35(5) of the Constitution which embraces many rights fallings within fair trial.[63] The second leg of fair trial element entails evidence which is procured by a manner that violates any right which otherwise contradicts fairness,[64] and will be addressed herein because, it goes along with the right to fair trial and proper administration of justice.

This study will submit that, whenever review *pendente lite* is instituted, the right to fair trial as enshrined in the Bill of Rights is also involved. Hence, the two concepts are inseparable. One cannot, therefore, institute this kind of review without invoking the fairness aspect of the trial in question.

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[57] Section 309 of the CPA.

[58] Rule 51 of the Rules.

[59] Erasmus (n 43 above) 94.

[60] Act 51 of 1977.

[61] Section 317 of the CPA.

[62] Section 21(1) (b) Superior Court Act 10 of 2013.

[63] The Constitution.

[64] Section 35(5) of the Constitution.

It is therefore based on the above premised that this research is drafted. This research has five chapters which will address each four grounds of review successively and each one`s influence on the right to fair trial.

1.2. **Problem Statement**.

In order to reach a desirable destination of finding out how review *pendente lite* affects the right to fair trial, this study will analyse the fundamental problem underpinned by the non-incorporation of review *pendente lite* in the CPA. It remains a non-debatable issue that, the CPA is the cornerstone of criminal jurisprudence in South Africa and regulates all procedure of the criminal proceedings. It further remains clear that, the Constitution recognises review *pendente lite* and appeal as one of the fair trial rights.[65] Section 309 of the CPA protects the right of an appeal, whereas there is no provision in the CPA that provides for a review *pendente lite* right. The fundamental question remains, why is the CPA not recognising review *pendente lite* of criminal proceedings whereas recognising criminal appeals?

In terms of the CPA, sections 302, 304 and 306 respectively, speaks about other reviews which relatively not relevant to a review *pendente lite*. Those review are only available after sentence and solely available to accused who were not represented by a legal practitioner throughout the proceedings.[66] Those accused persons who were legally represented throughout the criminal proceeding can only make a review *pendente lite* through an avenue provided for in terms of section 35(3)(o) of the Constitution read with 22 of the Superior Courts Act.

Obviously, to lodge review *pendente lite* application in the high court, the accused persons will need the assistance of a legal representative, which comes at a great expense. It is so because, the procedure adopted thereof is civil in nature as captured in rule 53 of the Rules. This rule requires amongst others, the request for record of proceedings, application for a review (notice of motion and founding affidavit) amendment of the notice of motion and supplementing the founding affidavit, setting the matter down for a hearing, and drafting of the heads of

[65] Section 35(3) (o) of the Constitution.

[66] *S v Williams* 2005 (2) SACR 290 (C).

arguments.[67] The latter rule does not distinct criminal reviews against civil reviews. Whereas the same Rules draw a line between civil appeal and criminal appeal. Rule 49 and 50 incorporates civil appeals whereas rule 51 and 52 regulates criminal appeals. This study maintains that the root of the problem, comes with the unjustified exclusion of the review *pendente lite* in the CPA. All of these comes at the expense of the accused person. This, therefore, impacts negatively on the right to a fair trial as enshrined in section 35(3) of the Constitution where everyone (indigent and unrepresented) accused persons are afforded fair trial rights. This study will recommend that the CPA should possibly be amended to reflect the review *pendente* lite provisions, so to safeguard right to a fair trial to accused persons.

Definition of concepts.

Concepts which are at the heart of this research will be defined hereunder. These concepts are interchangeably utilised throughout this research. Those concepts are hereby defined in the following manner:

1.2.1. **Review.**

Review is the process whereby the proceedings of the lower courts, both civil and criminal, are brought before the high court to correct the irregularities occurred during the proceedings.[68] In *Pretoria Portland Cement Co Ltd And Another v Competition Commission and Others*,[69] the court defined review as a means by which those in position of authority may be compelled to behave lawfully. Furthermore, the Oxford Advanced Learner`s Dictionary, defined review as ‘’an examination of something, with an intention of changing it if necessary’’.[70] In South Africa, a review is provided for in terms of the Constitution, Superior Courts Act and the CPA empowering the division of a high court having jurisdiction to review the decisions of the lower courts.[71]

1.2.2. **Common law review.**

[67] Rule 6 and 53 of the Uniform Rules of the Court.

[68] S Pete *et al Civil Procedure A Practical Guide* (2017) 703.

[69] *Pretoria Portland Cement Co Ltd And Another v Competition Commission and Others* 2009 (1) SACR 503 (T) para 34-35.

[70] M Deuter *Oxford Advanced Learner`s Dictionary* (2015) 1287.

[71] Section 21(1)(b) of the Superior Courts Act.

A common law review involves the reviewing of the quasi-judicial bodies; that is where a public body has duty imposed upon by the statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear irregularity in the performance of duty.[72]

1.2.3. **Review *pendente lite* in South Africa**.

The term is divided into two elements. The first is to find out the meaning of *pendente lite* being the Latin words. The second is to find out the meaning of review as defined above. Merriam Webster dictionary defines the meaning of *pendente lite* as '' while litigation continues or during the suit''.[73] Whereas a review has been defined by Oxford Advanced Learners Dictionary above. Review *pendente lite* can then be defined as the examination of something, with an intention of changing it while the litigation continues or during the suit. The high courts have a jurisdiction to conduct any review of the lower court's proceedings. In South Africa, review *pendente lite* is defined as kind of review instituted before the completion of the case, where the high court will use its inherent powers to intervene into the lower courts proceedings to prevent an occurrence of the grave injustice.[74]

1.2.4. **Jurisdiction.**

Jurisdiction is defined as the legal authority of the members of judiciary to hear and determine judicial disputes in specific geographical area or on specific subject matter.[75]

1.3. **Aims and objectives.**

The aims and objective of this research is to critically examine the extent to which non-provision of review *pendente lite* proceedings in the CPA affects the right to fair trial in the lower courts.

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[72] *National Union of Textile Workers v Textile Workers Industrial Union (SA*) 1988 (1) SA 925 (A) 938F-939A.

[73] Meriuam Webster Dictionary 'Legal Definition of *pendente lite*' https://www.mwrriam-webster.com (accessed 6 Septermber 2021)

[74] Kruger (n 39 above) 30-8.

[75] G Quinot *Administrative Justice in South Africa An Introduction* (2016) 316.

1.4. **Research questions**.

This paper breaks the topic into various segments of questions as herein captured:

Main question:

i. Whether there is any nexus between review *pendente lite* application and the right to a fair trial as enshrined in section 35(3) of the Constitution in South Africa?

Sub-questions:

ii. Whether review *pendente lite* as provided in section 22 of the Superior Courts Act be incorporated into the CPA to ensure fair trial rights to all accused in criminal proceedings in lower courts?

iii. To what extent can the grounds of review in section 22 of the Superior Courts Act be incorporated into criminal reviews in the CPA?

1.5. **Literature review**.

Kruger A, in his book Hiemstra's Criminal Procedure, reaffirms the importance of the decision of *Johannesburg Consolidated Investment Co v JohannesburgTown Council,*[76] which ruled that, there are three forms of review namely, those of the lower courts, those of other tribunals (common law review) and those which a particular legislation makes a provision. He further stated that, the source of review in criminal cases is in the Superior Courts Act,[77] as stated in *Sefatsa and Others v Attorney-General Transvaal and Another*.[78]

Furthermore, Kruger submitted that, under the CPA, there are three forms of review namely:

[76] *Johannesburg Consolidated Investment Co v JohannesburgTown Council* 1903 TS 111 114-115

[77] Section 21Superior Courts Act.

[78] 1989 (1) SA 821 (A) 831I-834F & A Kruger (n 74 above) 30-5.

(i) automatic review which kicks in automatically without any application from any party, and which is applicable only to unrepresented accused after sentence and conviction;[79]

(ii) non-automatic review which is only available after the finalisation of the criminal case;[80]

(iii) review set-down for argument based on irregularities which is available after the finalisation of the case.[81]

Moreover, Kruger stated that, the grounds for criminal review can be found from section 22 of the Superior Courts Act.[82] Kruger`s submissions meant that, the provisions of CPA cannot be used under review *pendente lite*. In the case of *S v Williams*,[83] the Court stated that, section 302 of the CPA is only applicable to automatic review after conviction and sentence and to unrepresented accused throughout the proceedings.

Additionally, Kruger recognised review *pendente lite* but named it ‘’review before completion of the case.’’[84] He quoted a case of *Wahlhaus v Additional Magistrate, Johannesburg*,[85] which reveals that, review before completion of a case, can only be used when there is an existence of the highest degree of exceptional circumstances which causes the fundamental prejudice to fair trial rights, and that if the higher court fails to intervene, a grave injustice will occur. However, he did not elaborate on the meaning of exceptional circumstances.

None of the abovementioned scholar has expressed his view on the non-inclusion of review *pendente lite* into the CPA. This research is crafted to cover that gab.

On the other hand, Du Toit et al`s: Commentary on Criminal Procedure Act, provided an extension on how the higher courts will intervene before the completion of the

[79] Section 302 of the Criminal Procedure Act.

[80] Section 304(6) Criminal Procedure Act

[81] As above.

[82] Kruger (n 78 above) 30-5.

[83] *S v Williams* 2005 2 SACR 290 (C).

[84] Kruger (n 82 above), 30-8.

[85] *Walhaus* case (n 31 above).

criminal proceedings.[86] He said that ‘‘the high court will exercise its inherent jurisdiction to review proceedings in the lower courts, where grave injustice might otherwise result or where justice will not by other means be attained.’’[87]

Furthermore, Du Toit also quoted a case of *Pretoria Portland Cement Co Ltd & Another v Competition Commission & Others,*[88] which proposed that, the essential nature of review is quite simple, as compared to an appeal. Hence, review is not targeting the merits of the case but, to maintain the legality and means upon which those in position may be compelled to behave lawfully.

Whereas Pete, submitted that, the civil review’s grounds as well can be located from section 22 of Superior Courts Act.[89] Harms agrees with Pete on the grounds of civil review being found in section 22 of the Superior Courts Act. However, he made it clear that, establishing one ground is not enough for the court to review and set aside the proceedings, hence prejudice must be established.[90]

Pete, Harms and Kruger agreed on the similarities about grounds of review being in section 22 of the Superior Courts Act, whether in civil or criminal proceedings. However, the difference is that, in civil cases there is no applicability of fair trial rights. On the other hand, criminal jurisprudence demands that, to institute a criminal review, such an application must clearly establish the fair trial rights that had been violated.[91]

The review matters can also be tackled from different perspectives as existing in various branches of the law. There is review in labour law and mostly in administrative law. However, this study addresses the review *pendente lite* solely on the criminal procedure`s perspective. This study asserts that, it is possible to review

[86] E du Toit (n 28 above).

[87] As above.

[88] *Pretoria Portland Cement Co Ltd & Another v Competition Commission & Others* 2003 (3) SA 385 (SCA).

[89] Pete (n 67 above) 375.

[90] DR Harms *Civil Procedure in the Superior Courts* (2020) B-380.

[91] Kruger (n 84 above) 30-8.

civil proceedings in the lower courts using review *pendente lite*, based on the grounds of section 22 of the Superior Courts Act.[92]

On the other hand, other scholars have greatly contributed on the second leg of the study`s investigation being the right to a fair trial. Van der Walt, in her article, ''the right to a fair criminal trial: a South African perspective'', contributed fundamentally on the second leg of this paper`s topic.[93] She contended that, 'the right to a free and fair trial is one of the most basic human rights afforded to human kind.'[94] This study agrees to her contention on that regard. However, her paper is not scrutinising review *pendente lite*.

Moreover, Ngalo, in page 17 of his dissertation,[95] quoted a well-comprehensible case of *S v Ntuli* in the following manner:

> A fair trial refers to a trial that is substantively fair, it embraces the concept of substantive fairness which is not to be equated with what might have passed constitutional muster in our criminal courts before the constitutional court came into force.[96]

Whereas the abovementioned scholars only focus on the right to a fair trial, this study agrees to their assertions to the extent to which they are emphasising the importance of the right to a fair trial. However, their papers are not investigating criminal review pending the proceedings, which is the subject matter of this research.

Furthermore, this study is not focussing on the civil perspective. However, it is crucial to note that, review pending the proceedings must be instituted in the High Court. Even if it is a review lodged to challenge the criminal proceedings, once one lodges

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[92] The Superior Courts Act.

[93] T van der Walt 'The Right to a Fair Criminal Trial: A South African Perspective' (2010) 7(1) *US-China Law Review* 29.

[94] As above.

[95] LZ Ngalo 'The Right to Fair Trial; An analysis of section 342(A), s168 of the Criminal Procedure Act and Permanent stay of Prosecution' Unpublished dissertation, University of KwaZulu-Natal 2017

[96] *S v Ntuli* 1996 (1) BCRL 141 (CC).

such review, Rule 53 of the Uniform Rules of the Court (Rules) kicks in.[97] It means that automatically, the proceedings are no longer criminal but civil.

It is therefore important to appreciate the contributions of the afore-mentioned scholars whose thoughts and approaches to the interpretation of human rights have assisted in the structuring of this research. Therefore, this paper will also contribute to the packed knowledge of criminal jurisprudence in South Africa. It will also share more understanding on the applicability of review *pendente lite* to legal practitioners, candidate legal practitioners and scholars.

1.6. **Research methodology**.

The method applied during the course of this research is a doctrinal one. The essential component about this method involves the analysis of the case laws necessary relevant to the topic under scrutiny.[98] This study adopts this method because, in order to achieve its aims and objectives, it requires a proper assimilation of various jurisprudences captured by scholars and other rich information adopted by the courts of law. The doctrinal methodology also entails the desktop researching method. Therefore, taking into consideration of the time period to finalise this dissertation, this method is the most preferred. Thus, the following primary and secondary sources will be consulted; Constitution, legislation, books, journal articles, case laws, and internet sources and lastly newspaper`s articles.

1.7. **Limitation of the study**.

This study seeks to investigate the extent to which review *pendente lite* affects the right to a fair trial. In so doing, this research will examine different sources of law to scrutinise the effects of non-corporation of review *pendente lite* in the CPA. This topic is more dominant in the practical arena and scarcer in scholarly world. Whereas the research methodology used is doctrinal, this study will avert the shortcoming by analysing the available jurisprudence laid by scholars and combine the information with case laws relevant to the study.

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[97] Harms (n 89 above) B369.

[98] T Hutchinson Vale 'Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era' (2014) 106(4) *Law Library Journal 579 at 584.*

1.8. **Ethical Considerations**

It is important to note that this is purely doctrinal research and will not in any way unethically affect humans and animals in anyway. However, the researcher is aware of the research ethics that regulates the way academics should conduct themselves during the period of their respective research. It is a common cause that, the study in question must avoid plagiarism and copying of another person`s work without acknowledging the source. It is for this reason that, the researcher will reference all sources and acknowledge all ideas taken from various sources of the law. Therefore, the researcher will observe all the highest level of integrity, transparency, and honesty in data collection and in writing this dissertation. I am also aware of the University of Venda anti-plagiarism policy which had adopted the national best practices to combat plagiarism, and I hereby undertake to comply with the said policy.

1.9. **Research schedule**.

MONTH OF SUBMISSION	**CHAPTER DUE FOR SUBMISSION**
Early November 2021	Submission of chapter 1(research proposal)
Mid-January 2022	Submission of chapter 2
Early February -May2022	Submission of chapter 3
Early June- October2022	Submission of chapter 4
Early-November 2022	Submission of chapter 5

1.10. **Structure.**

This research is comprised of five chapters as follows:

CHAPTER ONE:

This chapter provides an introduction, and background of the study, sets out the research problem, the aims, the research questions, and methodology adopted by this study.

CHAPTER TWO:

There is no provision in the CPA that provides for a review *pendente lite* application and a review ground of absence of jurisdiction on the court. Currently, that ground for criminal review is locatable from section 22(1) (a) of the Superior Courts Act. This chapter contends that, without the incorporation of such a ground of criminal review into the CPA, the right to a fair trial is subject to a serious threat. This chapter reveals also, the nexus between *review pendente lite* and fair trial rights. It will further reveal the extent to which lack of jurisdiction on the court can possibly lead a conviction and sentence.

CHAPTER THREE:

In this chapter, various elements of gross irregularities and their nexuses to right to a fair trial will be addressed. This chapter will also address that, if the court commits any gross irregularity in the criminal proceedings, any subsequent conviction and/or sentence imposed thereby is wrongful. The ground for irregularities is incorporated in section 22(1) (c) of the Superior Courts Act, and not provided in the CPA. Therefore, this paper will contend that, to safeguard the rights to a fair trial even to the indigent accused persons, this ground must be incorporated into the CPA. This chapter will further outline the procedure adopted when applying for review pendente lite using the approach outlined in Rule 53 of the Uniform Rules of the Court.

CHAPTER FOUR:

Bias is also a ground for a criminal review in section 22(1) (b) of the Superior Courts Act and will be addressed in this chapter This ground is not incorporated in the CPA, therefore it must be incorporated. Furthermore, in circumstances where the court admits the inadmissible evidence and rejects the admissible evidence what must the accused person do? This chapter will contend that, the latter is one of the grounds of a review not incorporated in the CPA. Therefore, this ground must be incorporated in order to promote the right to a fair trial. This chapter will further give a brief comparison of the South African an Namibian Law to deduct the similarities and differences in as far as review pendente lite is concerned.

CHAPTER 5: CONCLUSION AND RECCOMENDATIONS.

This research will be concluded by a summary of all chapters which will incorporate the recommendations.

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Dissertation

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Journal articles

- T Hutchinson Vale 'Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era' (2014) 106(4) *Law Library Journal 579 at 584.*
- T van der Walt 'The Right to a Fair Criminal Trial: A South African Perspective' (2010) 7(1) *US-China Law Review* 29.

Rules of the court

- Uniform Rules of the Court.

CHAPTER 2.

Lack of Jurisdiction as a ground for review *pendente lite*

2. Introduction.

This chapter will address two issues. Firstly, to establish the link or nexus between review *pendente lite* and the right to a fair trial as enshrined in section 35(3) (o) of the Constitution. Secondly, as it was stated in chapter one, there are four grounds for a review, and they are incorporated in section 22 of the Superior Courts Act.[99] This chapter will, therefore, interrogate one of those grounds being lack of jurisdiction on the court, and how it affects the accused`s right to a fair trial in South African criminal proceedings. This chapter submits that lack of jurisdiction on the court must be directly incorporated as one of the grounds of review into the provisions of the CPA.

2.1. Defining the concept of jurisdiction.

Jurisdiction is defined as the competence or power of a particular Court to hear and determine any issue between parties brought before it.[100] On the other hand, A Kruger defines jurisdiction as ‘’the legal capacity to give a valid judgment.

For a person to ascertain jurisdiction, one has to firstly decide as to, which general court has jurisdiction (e.g. High Court, Magistrate Court, Labour Court, Income Tax Court, Admiralty Court). The following step after the latter is to determine which particular court may hear the matter (e.g. Polokwane Division of High Court, Johannesburg Local Division, and/or Thohoyandou Magistrate Court).[101]

The Constitution does not define jurisdiction, however, as a departure point, it protects the right for everyone to have their dispute resolved by the court or relevant forum located in South Africa.[102] It is the submission of this study that, the forum that must resolve the dispute must have the required jurisdiction in terms of the law. It is

[99] The Superior Courts Act.

[100] Pete S (n 89 above) 698.

[101] Kruger (n 84 above) at 16-1.

[102] Section 34 of the Constitution.

inevitable to allude that, if the court lacks the requisite jurisdiction the judgment taken by that court becomes ineffective.[103]

The Constitution stipulates that, after arrest the accused must be brought before the rightful forum within the 48 hours.[104] The accused cannot be fairly tried if the trial court lacks the required jurisdiction. ‘’A court must have jurisdiction for a judgment or order to be valid.’’[105] It means that, if the court which had arrived at a particular decision which affected any party, and eventually found that it lacked jurisdiction to adjudicate over the matter, such judgment is void or is a nullity.[106] In order to ascertain whether to apply for review *pendente lite* on the ground of lack of jurisdiction, a person has to approach the relevant laws regulating jurisdiction. In South Africa, jurisdiction can be found in Legislation, common law, and the Constitution. General jurisdiction is articulated bellow, in relation to the hierarchy of the South African Courts.

2.1.1. **The Constitutional Court.**

This Court is established in terms of Chapter 8 of the Constitution of South Africa.[107] In terms of the Constitution, this is the highest Court of the Republic, as depicted in the hierarchy of the courts.[108] This Court is empowered with jurisdiction to decide on all constitutional matters.[109] A constitutional matter might include amongst others interpretation of the Constitution and enforcement of any provision in the Constitution.[110]

Under normal circumstances, if the accused is not satisfied with proceedings of the lower courts, he may apply for review *pendente lite* in the High Court.[111] If the High Court dismisses the application, the applicant may proceed to appeal at the

[103] LTC Harm (n 90 above) at 233.

[104] Section 35(1) (d) (i) of the Constitution.

[105] LTC Harm (n 103 above) at 233.

[106] ‘As above, at 233.

[107] Section 167 of Constitution.

[108] Section 166 & 167(3) (a) of the Constitution.

[109] Section 167(3) (b) (i) of the Constitution.

[110] Section 167(7) of the Constitution.

[111] Section 24 of the Constitution.

Supreme Court of Appeal.[112] Furthermore, if the Supreme Court of Appeal dismisses such appeal, the applicant may end up appealing the same decision in the Constitutional Court.[113]

Generally, the Constitutional Court cannot adjudicate over review *pendente lite* applications regarding the criminal proceedings. However, a review *pendente lite* matter can be heard in the Constitutional Court if the Constitution can grant direct access order.[114]

2.1.2. **The Supreme Court of Appeal.**

The Supreme Court of Appeal is established in terms of the 17th amendment of the Constitution located in chapter 8.[115] This Court was established in order to entertain all appeal matters pursuant from the high courts and those courts having the similar status of the high courts except for labour matter.[116] As for labour matters, the Labour Relations Act,[117] created the Labour Court with a similar status of the high court, and the Labour Appeal Court having the same status of the Supreme Court of Appeal.[118] The Supreme Court of Appeal is not the court of first instance, hence, it enjoys the jurisdiction for appeal matters only.[119]

It might happen that the outcome of the review *pendente lite* as applied in the high court is not favorable, such person may apply for a leave to appeal in the High Court if such application was before single judge.[120] However, if the matter was before the full bench of the High Court Division, leave for appeal must be sought in the Supreme Court of Appeal, and if granted, an appeal will be set down to be heard by the required quorum.[121]

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[112] Section 17 of the Superior Courts Act.

[113] Same as above.

[114] Section 167(6)(a) of the Constitution.

[115] Section 166(b) of the Constitution.

[116] Section 168 (3) (a) of the Constitution.

[117] Act 66 of 1995.

[118] Sec 168(3) (a) of the Constitution.

[119] Section 168(3) (b) (i) of the Constitution.

[120] Section of the 16 (1) (a) (i) the Superior Courts Act.

[121] Same as above.

2.1.3. **High Court.**

The departure point in relation to jurisdiction of the high court is the Constitution. The High Court has Jurisdiction to adjudicate over any matter unless if the Constitutional Court agrees an application for a direct access of that matter in terms of section 167 (6) (a) of the Constitution.[122] The High Court further, lacks jurisdiction in any matter which the Act of parliament provides jurisdiction to the court of similar status i.e Tax Courts,[123] and Labour Courts.[124] The high courts are established in terms of divisions which usually each province of South Africa has one (mainly the provincial division) and might further be having one or two local division[s].[125]

Furthermore, in terms of the Superior Courts Act,[126] any Division of the high court has jurisdiction over all persons who resides, and in terms of the cause of action arising and all offences triable within its area of jurisdiction. The latter submission reinforces the aspect of territorial jurisdiction.[127] In terms of the latter Act, the Division of the High Court has jurisdictions for all appeals from the Magistrates Courts within its area of Jurisdiction.[128] Moreover the high court possess the inherent and statutory jurisdiction to adjudicate over reviews whether common law review, administrative law review,[129] and review *pendente lite*.[130]

Every province in the Republic of South Africa has at least one or two divisions of the high court. In Limpopo province there is one Provincial Division of the High Court located in Polokwane and one Local Division of the High Court located in Thohoyandou. Having said all these, no High Court is allowed to capture the jurisdiction of another court unless if it is a provincial division that exercises concurrent jurisdiction over its local division[s].

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[122] Section 169 (1) (a) (i) of the Constitution.

[123]Section 116 of Tax administration Act 28 of 2011.

[124] Sec 151 of the Labour Relations Act.

[125] Section 169 (2) (a) and (b) of the Constitution.

[126] The Superior Courts Act.

[127] Section 21 (1) of Superior Courts Act.

[128] Section 21(1) (a) of the Superior Courts Act.

[129] Section 33 of the Constitution.

[130] Section 24 of the Superior Courts Act.

Furthermore, the Divisions of the High Court having jurisdiction possesses the powers to adjudicate over matters pursuant to Magistrate Courts.[131].The high court division has jurisdiction to try all offences.[132] It further possesses powers to pass all sentences including life sentences in terms of section 276 of the CPA.[133] However, the imposition of sentences may be determined by the relevant statutes. If the high court does not have jurisdiction to adjudicate over the matter, the accused must raise it at pleading state. However, by failure to raise it at that stage the accused would be deemed to have tacitly agrees to submit himself to the jurisdiction of such high court.[134]

2.1.4. **Regional Court.**

All Magistrate Courts are established in interns of the Constitution of South Africa,[135] and Magistrate Courts Act,[136] respectively. Regional Courts form part of the Magistrate Court which are creatures of statutes.[137] However the Constitution does not make a partition between the district courts and regional courts. This means that, when dealing with jurisdiction of the regional court, the Magistrate Courts Act,[138] must be invoked. Jurisdiction in terms of territory of the regional court is regulated in terms of section 91 of the Magistrate Court Act.[139]

In terms of offences triable, the regional court has jurisdiction to adjudicate over all offences except for treason.[140] If the regional court decides to adjudicate the case of treason, the proceedings will be in violation of the right to a fair trial and the same will attract review *pendente lite*. The latter aspect reveals the nexus between jurisdiction and right to a fair trial, which navigates the fact that without jurisdiction there is no fairness. A regional Court does not have a review jurisdiction.

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[131] Sec 21 (1) (b) Superior Courts Act.

[132] Kruger (n 101 above) 16-8.

[133] Same as above p 16-8.

[134] section 110(1) of the Criminal Procedure Act.

[135] sec 166(d) the Constitution.

[136] The Magistrate Courts Act 32 of 1944, hereinafter referred as the Magistrate Court Act.

[137] *Tshisa v Premier of Free State and Another* 2010 (2) SA 153 (ZAFSHC) 5.

[138] The Magistrate Courts Act.

[139] Section 91 Magistrate Courts Act

[140] Sec 89(2) of the Magistrate Courts Act.

2.1.5. **Magistrate Courts (District Court).**

A district court forms part of the magistrate courts and is the creature of statutes.[141] This Court`s jurisdiction is mostly regulated by territory as stated in terms of section 90 of the Magistrate Courts Act.[142] In terms of the nature of offences the district court possesses jurisdiction to try all offences except for treason.[143] In terms of penalties or sentences, the Magistrate Court, cannot impose a sentence of more than three years.[144] Furthermore, it cannot impose a fine of more than R120 000.00.[145]

Should it happen that a particular district court tries an offence outside an area of jurisdiction when those proceedings are still open, the accused must raise such plea for lack of jurisdiction on the court in terms of section 106(f) of the CPA. That must be raised during the pleading stage. However, if the Court dismisses her plea, that is the exact time which she may apply for a review before the completion of the case (review *pendente lite*). The same position latter addressed is applicable when it comes to the sentence that is about to be delivered by the district court without jurisdiction to do so. A district court lacks jurisdiction to adjudicate over review matters.

2.2. Procedure to launch review *pendente lite* on the ground of lack of jurisdiction by the lower courts.

One of the rights to a fair trial in the South African criminal jurisprudence highlights that, the Court entrusted with a criminal trial must have a requisite jurisdiction.[146] It is so because, without jurisdiction, a court cannot pronounce a fair and equitable decision. In the case of *S v Dzikuda*,[147] the Constitutional Court held that, the purpose of right to a fair trial is that the accused persons who are innocent should

[141] Tshisa`s case (n 23 above) 5.

[142] The Magistrate Courts Act.

[143] Section 89(1) Magistrate Courts Act.

[144] Section 92(1)(a) of the Magistrate Court Act,

[145] Section 92(1) (b) of Magistrate Courts Act,

[146] *S v Dzukuda and Others* 2000 (4) SA 1078 (CC) para 11.

[147] Same as above para 11.

not be convicted of an offence charged.[148] This case is relevant to this chapter because it advances a point that, it is so unfair to convict the accused if the trial court does not have jurisdiction.

On the other hand, the jurisprudence underlying review *pendente lite* is embodied in the notion that:

> The high courts, however, have emphasised repeatedly that the power to intervene in unconcluded proceedings in the lower courts will be exercised only in cases of great rarity where grave injustice threatens, and where intervention is necessary to attain justice. The same approach has been followed under the Constitution. At the same time, although the cases in which intervention has actually occurred are uncommon, this court has refused to define or limit the circumstances in which intervention would be justified. The categories remain open.[149]

The above assertion presupposes the general rule which prevents the high court from interfering with the proceedings of the lower courts. However, every general rule has its own exception. Under review *pendente lite*, the high court may interfere with the lower court's proceedings when there is a clear failure of justice in the proceedings.[150] This is to say that such powers are exercised sparingly and only if exceptional circumstances permit.[151] There are certain ways which the High Court may interfere with the uncompleted criminal proceedings and that is; through the application for *mandamus*, interdict or review before the completion of the case (*pendente lite*).[152]

The test for review *pendente lite* is quite a difficult one because, the applicant must satisfy the court in her application that, exceptional circumstances exist and that such issue cannot wait until the case is finalised.[153] Hence, it is said that the high court conducting a review *pendente lite*, will exercise its review powers so

[148] Same as above para 11.

[149] same above at para 11.

[150] Same as above Para 13.

[151] Same as above para 16.

[152] Same as above, para 19.

[153] A Kruger (n 132 above) 30-8.

sparingly.[154] Those exceptional circumstances are not defined even unto this this era. For as long as that status *quo* remains unsolved, the matter will remain open to interpretation. In the case of *Wahlhaus v Additional Magistrate Johannesburg*,[155] it was reinforced that, the High Court can intervene in the proceedings of the lower courts when there is an irreversible failure of justice.[156] Neither the Constitution nor the CPA defines the term irreversible failure of justice.

Whereas the Constitution makes provision to the right to a fair trial.[157] This study submits that, right to a fair trial is not exhausted in the list as enshrined in section 35(3) (a)-o).[158] The fact that section 35(3) uses the words right to a fair trial ''which includes…'' suffices to indicate that that, indeed section 35 (3) does not solely provides for those listed fair rights provided in section 35(3) (a)-(o).[159] The latter assertion imposes the idea that, the Court when construing section 35(3) can even go beyond from what is provided in that section.

The CPA does not have a criminal review provision to extent where the criminal court lacks jurisdiction. Hence, a review where a criminal court lacks jurisdiction to facilitate a criminal proceeding is currently conducted in terms of section 22 (a) of the Superior Courts Act. This procedure is civil in nature and thus must comply with rule 53 of the Rules of the Court. Hence, this study submits that, this causes a fundamental problem which restricts the accused right to a fair trial which includes the right for a review. The in-depth procedure is outlined in chapter three.

The so-called civil approach of criminal review which is currently in operation is so far-fetched and complicated to the accused persons because of its peremptory provisions to comply with rule 53. That is the core reason, this study submits that, if this ground of lack of jurisdiction was to be incorporated into the CPA, the simple criminal procedure review rules will be adopted in order to facilitate criminal reviews specifically. This submission is made on the basis that, when it comes to appeal, the

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[154] Same as above.

[155] *Wahlhaus* case (n 86 above).

[156] Same as above.

[157] Section 35(3) of the Constitution.

[158] *S v Dzukuda and Others* 2000 (4) SA 1078 (CC) para 9.

[159] Same as above.

Criminal Procedure Act has its specific sections regulating appeal,[160] and further relevant rules dealing with criminal appeals.[161] However, the approach is different when dealing with criminal reviews as the current procedure is mixed with civil reviews in terms of rule 53.

The case of *Khumalo and Others v Louw and Another*,[162] gives another light on the aspect of right to a fair trial and a procedure to raise the plea lack of jurisdiction on the Court. On the 7th of April 2019, the applicants were arrested at Komartipoort, which is outside the jurisdiction of Johannesburg Regional Court. The applicants were charged of dealing with drugs and appeared in the Regional Court. On the 20th of April 2009, the applicant raised a special plea in terms of section 106(f) of the Criminal Procedure Act, that the Court lacks the requisite jurisdiction in order to adjudicate over that matter.[163] On the 11th of May 2011, the applicants pleaded not guilty.

After the entrance of such a plea, the office of the National Director of Public Prosecution issued a directive in terms of section 11 of the Criminal Procedure Act that the matter should be withdrawn and be reinstated to the relevant court which possesses the required jurisdiction.[164] Regardless of the direction, the first applicant retained that, he had been arrested outside the boundaries of South Africa and that, the Regional Court lacks jurisdiction on that regard.[165] Regardless of the points raised by the accused person`s, the plea was dismissed.[166] In November 5th 2014, the applicants applied for a review pending the criminal case (review *pendente lite*) relying on the two of the grounds locatable in section 22 of the Superior Courts Act.[167] The first ground was that, the court lacks jurisdiction to adjudicated over the

[160] Section 309 of the Criminal Procedure Act.

[161] Rule 51 of the Rules.

[162] (2014/40692) [2016] ZAGPHC 2016 C 39 (22 February 2016)

[163] *Khumalo`s* case (n 45 above) Para 9.

[164] *Khumalo`s* case (n 46 above) Para 13.

[165] *Khumalo`s* case (n 47 above) Para 17.

[166] *Khumalo`s* case (n 48 above) Para 21.

[167] The Superior Courts Act.

matter.[168] The second ground was that, the Magistrate was biased when he takes the decision.[169]

There were two legal questions which the Court had to adjudicate. The first question was whether the Magistrate of the Johannesburg Regional Court was right in dismissing the plea of jurisdiction or not. The latter question was to ascertain whether such court had the requisite jurisdiction to adjudicate over that matter. The second legal question was on whether the Regional Magistrate was biased or had interest in the cause in the outcomes of the case.

The court first considers the letter which was sent by the National Director of Public Prosecution to remove the accused persons to a relevant court having jurisdiction. However, the letter was sent after the accused persons have pleaded. The Court alluded that, yet section 111 of CPA might have stated that an accused can be removed to a relevant forum through the letter of the National Director of Public Prosecutions, there is a need to render an interpretation that will give it an ordinary meaning.[170]

When interpreting section 111 of the CPA, the Court borrowed the principle of interpreting statutes as captured in the case of *Cool Ideas 1186 CC V Hubbard and Another.*[171] The latter case asserts that:

> A fundamental tenet of statutory interpretation is that words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
> (b) the relevant statutory provisions must be properly contexualised; and

[168] *Khumalo`s* case (n 49 above) Para 3.

[169] *Khumalo`s* case (n 52 above) Para 3.

[170] Same as above.

[171] *Cool Ideas 1186 CC V Hubbard and Another* 2014 (4) SA 474 (CC) 28.

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

The Court alluded further that, such a letter by the NDPP, must be served to the accused and the original thereof to the Court.[172] However, in this case it was not served.[173] Therefore, in the Conclusion the Court reviewed and set aside the decision of the Regional Magistrate because it affects the accused right to a fair trial as enshrined in section 35(3) of the Constitution.[174]

The essence of this case in the criminal jurisprudence of South Africa reveals that if the court lacks jurisdiction, its judgment cannot be said to have complied with the right to a fair trial. Therefore, the extent to which the lack of jurisdiction on the court affects the right to a fair trial is bellow captured.

The abovementioned case outlines the procedure that must be followed when applying for a review pendente lite on the ground of lack of jurisdiction. The first step is to raise the plea of lack of jurisdiction in terms of section 106(f) of the CPA. If the court rejects such a plea, the procedure that will unfold is that of review *pendente lite* in terms of section 22 of the Superior Courts Act.

2.3. **The extent to which lack of jurisdiction affects the right to a fair trial**.

The above stated case of Khumalo,[175] fleshes out a clear location regarding the relationship between jurisdiction and right to a fair trial. It is a common cause that, every accused person must be afforded a right to a fair trial. There are elements of right to a fair trial incorporated in section 35 (3) (a)-(o) of the Constitution. Within those elements jurisdiction is not one of them. Is the list of fair trial rights an exhaustive one? Well notwithstanding that, criminal jurisprudence narrates that, those fair trial rights from enshrined in section 35(3) (a)- (o) are not exhaustive. Hence this paper submits that, establishment of the rightful forum or court to

[172] *Khumalo`s* case (n 170 above) 30.
[173] Same as above.
[174] *Khumalo's* case (n 173 above) at 40.
[175] *Khumalo*`s case (n 174 above)

adjudicate over the matter at the beginning of the case forms part of promoting fairness to the accused person in a criminal trial.

Hence Harms contends that, without jurisdiction, a court cannot offer a valid judgement.[176] This is to say that all judgments delivered by a court without jurisdiction are null and void. Therefore, without jurisdiction a court that passes a judgment is in violation of fair rights as provided by the Constitution. Hence such a decision is reviewable by either review after the completion of the case of review *pendente lite* which is investigated by this paper paper.

The case of *S v Khalema and Others*, [177] involves a situation where District Magistrate decides to transfer the case to the Regional Court *mero motu* on the basis that such Court lacks the requisite jurisdiction to try murder and rape cases. Regardless of the effort by the prosecutor who tried to convince the Magistrate that, the case is not trial ready and should in the meantime be postponed. However, the Magistrate decided to transfer the matter to the regional court`s roll.[178] The Regional Magistrate decided to refer pending matter the for a review to Johanessburg Local Division of High Court in terms of section 22 of the Superior court Act. The review in question was purported at reviewing and setting aside of the decision of the District Magistrates, who decided transfer cases to the Regional Magistrate without the prosecutor`s application.

The Court refused to accept that such a review of that nature must be brought in terms of section 22 of Superior Courts Act.[179] The Court further held that, the inherent jurisdiction of the high court permits that a review for the conduct of the district magistrates can be made.[180] It was held that the High Courts through review have supervisory powers over the Magistrate Courts.[181] Hence the Court quoted the case of Magistrate *Stutterheim v Mashiya*,[182] which held that:

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[176] Harm (n 1 above).

[177] [2007] JOL 20080 (C).

[178] *S v khalema* (n 177 above) 1.

[179] *S v Khalema* (n 178 above) 9.

[180] *S v Khalema* (n 179 above) 10.

[181] Same as above.

[182] *Stutterheim v Mashiya*, 2003 (2) SACR 106 (SCA) 13-14.

> The higher courts have supervisory power over the conduct of proceedings of in the Magistrate Courts in both civil and criminal matters is beyond doubt. This Includes the power to intervene in unconcluded proceedings. This court conclude decades ago that the jurisdiction exists at common law. It subsists under the Constitution which creates hierarchical court structure that distinguishes between superior and inferior courts by giving the former but not the latter jurisdiction to rule on the constitutionality of legislation and presidential conduct as well as inherent power. The Constitutional Court has emphasised the role of the higher courts in ensuring 'quality control' in the Magistrate Courts, and the importance of the High Court`s judicial supervision of the lower courts in reviewing and correcting mistakes.

At the Court ruled that, the District Magistrate does not have the required jurisdiction to *mero motu* transfer a case from the District Court to either regional courts and/or high courts.[183] Hence the High Court found it meet to review and set aside the decision of the District Magistrate.

The abovementioned case does not speak about right to a fair trial however, it gives a clear indication on the aspect of jurisdiction. The case emphases that, district court cannot decide to transfer cases to other courts without the direction of either the prosecutor or the accused. This is to say that if the District Magistrate decides to make a *mero motu* referral of the case to the any of the courts, such a conduct is reviewable. Such conduct is not reviewed in terms of the Superior Courts Act,[184] however in terms of the inherent powers impowers conferred to the high court through common law, statutes and Constitution of South Africa.[185]

2.4. **Conclusion.**

[183] *S v Khalema* (n 180 above) 38.

[184] The Superior Courts Act.

[185] The Constitution.

Whereas it was mentioned that the purpose of this chapter is twofold in nature, all those critical aspects were addressed herein. The first critical issue dealt with the meaning of jurisdiction. A very critical point was advanced that, without jurisdiction on the trial court, its judgment becomes nothing else but a mere nullity.

The crux of the matter addressed by this chapter was the test applicable under review *pendente lite*. It was alluded that, the high court will only interfere with the uncompleted proceedings if the applicant in his application establishes exceptional circumstances. However, it was mentioned that what constitutes exceptional circumstances is different from one case to another. Regardless of the latter status *quo*, a solution was provided that when the right to a fair trial had been violated, that on its own must be interpreted to mean that exceptional circumstances exist and, on that ground, the accused can apply for a review *pendente lite*.

On the second aspect, the task of this paper was to investigate whether lack of jurisdiction as one ground of review does have an effect on the right to a fair trial. It was stated that, such a ground is ascertainable from section 22 the Superior Courts Act. It was further mentioned that jurisdiction in the perspective of South African criminal law can be ascertained from the Constitution, common law and statutes. It was concluded that, there is a nexus between right to a fair trial and jurisdiction. Hence lack of jurisdiction is a ground for review *pendente lite*.

In order to facilitate ground of lack of jurisdiction with ease and to promote the access to the right of review to every accused, including those who are indigent, the Criminal Procedure Act, must be revisited so to give effect to this ground, and adopt the uncomplicated criminal procedure rules of review that are not mixed with civil rules of review.

Chapter 3.

Gross irregularity in the proceedings of the court as a ground for a review *pendente lite* and the right to a fair trial.

3.1. Introduction.

This chapter is investigating the extent to which gross irregularity in the lower court`s proceedings can affect the fairness of the entire criminal trial. Gross irregularity in the proceedings, is one of the grounds of a review in terms of section 22(1) (c) of the Superior Courts Act. Obviously, the departure point to this chapter will be section 35(3) (o) of the Constitution which provides for the right to a review.

3.2. Defining gross irregularity.

The Constitution does not define gross irregularity, nor does it provide grounds for review. The Criminal Procedure Act also, does not define what gross irregularities in the proceedings of the court are. Whereas the Superior Courts Act, provides for a ground of a review to be investigated by this chapter, there is no definition or any explanation of gross irregularities thereto.

Providing a definition of gross irregularity is one of the most difficult tasks to undertake. It is so because, a lot of textbooks and journal articles do not give a definite definition. What constitutes gross irregularity is open to interpretation, each case is approached on a case-to-case basis. Books and articles provide a critical part which is to render examples of what constitutes a gross irregularity. Be that as it may, one can submit that, gross irregularity in the criminal proceedings of the lower courts can be defined as an omission or irregular step or act by the presiding officer in respect of the proceedings.[186]

Moreover, it is said that there are two categories of irregularities.[187] The first category relates to an irregularity which does not frustrate the reliability.[188] The second one is, gross irregularity which is characterised as an exceptional category, and in this case,

[186] *S v Marques and Another* [2016] JOL 36322 (GNP) 7.

[187] Kruger (n 153 above) 30-10.

[188] Same as above.

conviction and sentence will be set aside on that ground.[189] If the latter irregularity occur within the criminal proceedings, such proceedings will be rendered void *ab initio* by the review court.[190] This study admits that, it is not all gross irregularities which may lead to setting aside of the proceedings.[191] The proceedings that are warranting a setting aside due to gross irregularities, are those which are not in accordance with justice which eventually violates the accused`s right to a fair trial .[192]

3.3. Examples of Gross irregularities.

The departure point in this regard must be jurisprudence adopted in *S v Rall*,[193] which contended that:

> ''[T]he Judge must ensure that 'justice is done'. It is equally important, I think, that he should that justice must be seen done. After all the fundamental principles of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness and manifest to all those who are concerned in the trial and its outcome, especially the accused''.[194]

Scholars are in agreement that, it is impossible to give an exhaustive list of examples of irregularities.[195]This chapter will give some of the examples of gross irregularities. Firstly, criminal trials demand that, the presiding officer must be partial at all times.[196] When the judicial officer manifest the greatest level of impartiality or bias, the same constitute a gross irregularity reviewable in terms of the review under review *pendente lite*.[197] The latter aspect is reviewable because trial must be fair, and when the judges reveal intention or participates in the proceedings in a manner that reveals being bias, such proceedings are grossly irregular and reviewable, in terms

[189] *S v Shikunga* 1997 (9) BCLR 1321 (NmS)

[190] Same as above.

[191] Kruger (n 187 above) 30-9.

[192] *S v Gaba* 1985 (4) SA 734 (A)).

[193] *S v Rall* 1982 (1) SA 828 (A) at 831H-832A.

[194] Same as above.

[195] Kruger (n 191 above) 30-11.

[196] Same as above.

[197] Same as above.

of section 35(3) (o) of the Constitution read with section 22(c) of the Superior Courts Act..

Secondly, the criminal court must always be in accordance with the required procedure as enshrined in the CPA.[198] This is to say that, if criminal proceedings go beyond what is provided within the CPA, that constitutes an irregularity and warrants a review *pendente lite*. For an example, the Constitution allows the accused person to challenge the adduced evidence by the state.[199] Furthermore, the CPA entitles the accused to challenge evidence of any witness through cross-examination.[200] This study submits that, If a court decides to deny the accused, right to cross examine a witness, such a conduct falls to be reviewed and be set aside through review *pendente lite* because it is grossly irregular.

Thirdly, the Court must afford practitioners a fair opportunity during the closing address stage.[201] This is to say that, in the criminal proceedings, the court must not only grant more of the opportunity to the state and less to the accused. Criminal proceedings must be thus balanced and must provide a far opportunity to both parties to furnish their closing address. Hence this paper submits that, justice is a double-edged sword. It is the submission of this paper that, If the Court gives or shows such a conduct of giving preference to one party, review of this nature for gross irregularity can be called out.

Fourthly, it is a constitutional right that, the accused must be afforded the legal representative of his choice, or if unable to, be afforded one at the expense of the state.[202] The accused person must be promptly informed of this right.[203] This paper submits that, if a court fails to inform the accused of this right promptly, this constitutes a violation of the right to a fair trial, and it is grossly irregular. Therefore, such conduct can be subjected into a review *pendente lite* on that basis.

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[198] Same as above.

[199] Section 35(3)(i) of the Constitution.

[200] Criminal Procedure Act.

[201] ‘’As above.’’

[202] section 35(2) (c) of the Constitution.

[203] Same as above.

The last but no least example is in relation to a situation when the court admits the inadmissible evidence during the criminal proceedings.[204] The court enjoys the statutory discretion to give judgments about the admissibility of evidence. However, the issue regarding admissibility evidence is very much critical in criminal cases. It is so because, without proper evidence that must be established beyond reasonable doubt by the state, there is no valid conviction and sentence that can be imposed to the accused.

If the evidence in question is inadmissible, reason being that, it might have been obtained in a manner that frustrates the law, such evidence must be rejected on that basis.[205] The test applicable is that, evidence obtained in a manner that violates any right in the Bill of Rights must be rejected, but, if it violates the right to a fair trial or subject the administration of justice into disrepute.[206] Hence any affected party by the same proceedings which the court had accepted the inadmissible evidence, must apply to the high court clothed with jurisdiction, to review and set aside such proceedings.

The status remains the same even if the court rejects the admissible evidence. The same constitute a gross irregularity and reviewable under review *pendente lite*. This paper submits that Constitution, stretches the test further, by articulating that, the rejection of admissible evidence can be reviewed, if it violates the right to a fair trial and further prejudices the administration of justice into disrepute.[207]

3.4. The extent to which gross irregularity affects the right to a fair trial.

It is extremely crucial to deal with gross irregularities on the proceedings of the lower courts because, the Constitution guarantees every accused person a right to a fair trial as enshrined in section 35(3). The latter submission reinforces the ideal that, compliance with a fair procedure during the criminal proceedings is not just a privilege or favour afforded to the accused person, but a critical observation of rights in the Constitution of the Republic of South Africa.

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[204] *S v Nkhumeleni* 1986 (3) SA 102 (V)).

[205] Section 35(5) of the Constitution.

[206] Same as above.

[207] Same as above

In *S v Mkhise*; *S v Mosia*, *S v Jones* and *S v Le Roux*,[208] these cases triggers one of the fundamental gross irregularities that occurred during the proceedings.[209] The foundation of the above case is based on section 35(3) (g) of the Constitution which guarantees the accused persons, right to be represented by the legal representative in the criminal proceedings.[210] The latter right is attached to the right to be promptly informed of a right to legal representation by the court.[211]

The fundamental part of the above case is that, when the Court fails to give and explain the right to legal representative to the unrepresented accused, the proceedings become grossly irregular. The high court will intervene upon an application by any party to review and set aside the proceedings and cause them to start *de novo* before another presiding officer.[212]

The case above is about the proceedings that were allowed to proceed in the magistrate court, whereas the deemed legal representative did not have the right of appearance. The High Court had to review and set aside the proceeding on the basis of such gross irregularity. This case shows that, right to legal representation lies at the center of the of the right to a fair trial. Hence, if the court fails to promptly inform the accused of such a fundamental right, the proceedings become grossly irregular and the review *pendente lite* will be rightly featured.

In the case of *Nameka v S*,[213] the Court held that, ‘’It is trite that the magistrate must render assistance to the undefended accused.’’ When the magistrate fails to exercise such duty imposed on him, the proceedings are grossly irregular and must be reviewed and be set aside. The *Nameka* case involves a magistrate who expressed his unfavorable view on the previous conviction of the accused. It is common cause that, previous convictions have no value as far as criminal trials are concerned. However, in this *Nameka* case, when the court was pronouncing his judgment, such previous conviction becomes part of the reason why the accused

[208] *S v Mkhise; S v Mosia, S v Jones and S v Le Roux* 1988 (2) SA 868.

[209] ‘As above.’

[210] Section 35(3) (g) the Constitution.

[211] Same as above.

[212] *S v Mkhise* (n 209 above)

[213] *Nameka v S* [2021] JOL 48283 (ECG) 16.

was convicted. On review the high court, contended that, it was open that the right to a fair trial was compromised to a degree that justice was not done and as a result the conviction and sentence were reviewed and set aside.[214]

The case of *S v Hlongwane*,[215] emphasised the right of the accused to defend and challenge evidence.[216] This means that, throughout the proceedings the accused must be given an opportunity to address the court. When this right is not realised, it constitutes a gross irregularity and warrant review *pendente lite*.[217] In this case, after the closure of both party's case, the state was given an opportunity to address the court. The accused was denied such an opportunity and the court handed down its conviction and sentence.[218] The High Court reviewed both the conviction and sentence on the basis that, the failure to give an accused an opportunity to address the court after the state`s closing address constitute a gross irregularity which must be reviewed and be set aside.[219]

Between the court and parties in the proceedings, who must be blamed for gross irregularities appearing in the record? Well, the case of *S v Marques and Another*,[220] directly answered the question of who can be blamed for gross irregularities.[221] This is the case were the accused persons were charged with the common law offence of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act.[222]

On the above case a prosecutor who was representing the State consulted with witnesses of the case two days before the trial. He even went further to assist them to amend the statements that were then submitted to the Regional Court during the day of the hearing.[223] The accused legal representative spotted the irregularity and

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[214] *Nameka v S* [2021] JOL 48283 (ECG) 16.

[215] *S v Hlongwane* [2000] JOL 6567 (Ck).

[216] Sec 35(3) (i) the Constitution.

[217] *S v Hlongwane* (n 56 above) at 1.

[218] *Hongwane*`s case (n 58 above) at 4.

[219] Same as above.

[220] *S v Marques and Another* [2016] JOL 36322 (GNP).

[221] Same as above.

[222] Criminal Law Amendment Act 105 of 1997 & *S v Marques and Another* [2016] JOL 36322 (GNP) 2.

[223] *S v Marques and Another* (n 223 above) 2.

raised it on record to the Court. However, the Court decided to postpone the matter and submitted the record of the proceedings to the High Court for a special review.[224] The departure point for the High Court was the Constitutional provision on the right to a fair trial which included the review and or appeal any decision taken by the lower courts.[225]

The Court found that the grounds used which are of special and automatic review in terms of the Criminal Procedure Act does are not find any application because the case is pending and there is no sentence pronounced yet.[226] The Court`s reasoning was based on the ideal that; automatic review applies only when there is/are sentence(s) passed by the magistrate courts which otherwise were arrived at without a proper consideration of justice.[227] Additionally, such a review is only available when the accused person who was not legally represented throughout those proceedings. However, in this case the accused were legally represented throughout the proceedings hence, it was not applicable.[228]

The Court went further to exercise its inherent jurisdiction on reviewing the lower court`s decision, by looking into what should be the relevant applicable statute. The Court found that, the relevant statute that should have been used for a review under the circumstances is the Superior Courts Act.[229] The Court used the repealed 1959 Superior Courts Act which the grounds are found in section 24. However, in the new Act,[230] the grounds are locatable from section 22.

The Court ruled that, the ground to be used was gross irregularity on the proceedings of the Court.[231] In Conclusion the Court ruled that, it was not going to be possible for it to pronounce that there were gross irregularities in the proceedings because the prosecutor's conduct was not that of the Court.[232] The Court only

[224] *Masque's* case (n 223 above) 3.

[225] Section 35(3) (o) the Constitution.

[226] Marque's case (n 224above) 5.

[227] Same as above.

[228] Same as above.

[229] Act 10 of 2013.

[230] Same as above.

[231] *Marque*`s case (n 228 above) 6.

[232] *Marque*`s case (n 231 above) 7.

recommended that the prosecutor should be reported to the Chief Prosecutor, and eventual remitted the matter to the Regional Court for continuation of the trial.[233] This case therefore answers the above question. In simple terms, parties conduct in the proceedings cannot lead render the proceedings to be grossly irregular, but the manner in which the court conducts its trial of the court can.

In the case of *Doyle v Shenker & Co Ltd*,[234] the Court held that *bona fide* misinterpretation or an unintentional overlooking of the statute does not constitute a gross irregularity.[235] What the case is saying in simple terms is that, if the Court construes a certain Legislation wrongly and without the intention to do so, the affected party cannot use such an irregularity to as a ground of reviewing such a decision.[236] It is quite trite to appreciate what could possibly constitutes a *bona fine* misinterpretation as the case alluded.[237] The case goes on to provide that only the mistake of law ca be used as a ground for a review.[238]

In the case of *Tirapani v R,* [239] it was contended that, gross irregularity which attracts a review is that which is material, and which goes into the root of the matter. On the other hand, gross irregularity which frustrates the formality and does not prejudice the accused are immaterial and are of no use to review *pendente lite* applications.[240]

It is important to note that, the South African Constitution allows the Courts to consider foreign law when interpreting any right that is enshrined in the Bill of Rights.[241] It is also crucial to note that, this paper is investigating review *pendente lite* in South African context and the extent to which in influences the right to a fair trial. Due to limited authorities in South Africa, other judicial precedents from foreign

[233] *Marque*`s case (n 232 above) 14.

[234] *Doyle v Shenke*r 1915 AD 233.

[235] 'As above.'

[236] Same as above.

[237] Same as above.

[238] Same as above.

[239] *Tirapani v R* 1910 EDL 193.

[240] 'As above'.

[241] Section 39(1) (c) the Constitution.

jurisprudence will also be utilised to establish the link between review *pendente lite* and the right to a fair trial.

In *Attorney-General v Makamba*,[242] in this Zimbabwean case the accused application for a discharge after the state case, was dismissed by the Regional Magistrate. The accused applied for a review *pendente lite* in the high Court alleging that the Regional Magistrate failed to exercise his mind and thus committed a gross irregularity.[243] Therefore, the High Court, reviewed and set aside the proceedings. Not satisfied with the decision, the Attorney-General applied for a leave to appeal on the same Court and such was granted.[244]

The appeal was then lodged in the Supreme Court of Zimbabwe. Supreme Court was tasked with ascertaining whether the High Court was entitled to interfere with the uncompleted proceedings of the Regional Court, basically because of the dismissal of the application for a discharge. The Supreme Court of Zimbabwe held that:

> The High Court`s statutory powers of review can be exercised at any stage of criminal proceedings before an inferior court. However, in uncompleted cases this power should be sparingly exercised. It would only be appropriate to do so in those rare cases where otherwise grave injustice might result, or justice might not be obtained. For example, if grave irregularity or impropriety occurred in the proceedings, it would be appropriate of the High Court to consider the matter. Generally, however, it is preferable to allow the proceedings to run to their normal completion and seek redress by means of appeal or review.[245]

After reading the papers the Supreme Court came to a conclusion that indeed the High Court misdirected itself on the case and made a wrongful decision. Therefore,

[242] *Attorney-Gneneral v Makamba* [2005] JOL 13536 (Zs).

[243] Same as above.

[244] 'As above.'

[245] *Attorney General v Makamba* [2005] JOL 13536 (Zs)

there was no need for the High Court to interfere with the proceedings of the lower courts. By those reasons the appeal was upheld.[246]

This abovementioned case of the Zimbabwean jurisdiction reaffirms the same principles applied in South Africa in dealing with review *pendente lite*. The same principles applied by that case reveals that, the High Court does not have extraordinary powers to interfere with the uncompleted proceedings of the lower courts. These judicial precedents inform us that, the high court will only exercise the supervisory power only in rare cases. Those rare cases include when the court commits a gross irregularity in the proceedings.

In the South African case of *S v Sixobongo*,[247] the court looks at a case where the candidate attorney without a right of appearance represented the accused persons in the Magistrate Court.[248] The accused were charged of rape and pleaded not guilty on the charge. Thereafter, the case was charactirised by long postponements which caused unreasonable delay.[249] The matter was referred to the High Court through review *pendente lite*.[250]

Furthermore, the High court emphasised the importance on the right to legal representation. Furthermore, the Court stressed that, without legal representative, the entire proceedings become grossly irregular.[251] Hence in this matter the High Court intervened with the incomplete proceedings because of gross irregularities as one of the exceptional circumstances that warranted such intervention. At the end the Court reviewed and set aside the decision and remitted the matter to the Regional Court to start *de novo* before another Magistrate Court.[252]

The above case had emphasised that, it is not necessarily a privilege but a right that the accused is entitled to a legal representative who have a right of appearance in the courts. The case further alludes that, if it happens that the accused is

[246] Attorney-General`s case (n 245 above) 5.

[247] *S v Sixobongo* [2009] JOL 24453 (E).

[248] Same as above, at para 1.

[249] Same as above.

[250] Same as above.

[251] Sixobongo`s case (n 250 above) 3.

[252] Sixobongo`s case (n 251 above) 4.

represented by a person who does not have right of appearance, the proceedings become grossly irregular, and may be reviewed through review *pendente lite*.

In the case of *S v Khan*,[253] the High Court was faced with the same review *pendente lite* based on the fact that the candidate attorney had no right of appearance.[254] The Magistrate submitted the matter to the High Court.[255] The High Court conducted review *pendente lite* and realised that the accused was not afforded the right to legal representation and that that constitutes a gross irregularity.[256] As a result the Court reviewed and set aside such a decision and remitted the matter to the Magistrate Court to commence afresh.[257]

It was alluded in chapter one that review *pendente* lite is also applicable in civil cases. This paper is not looking into the issues ascertainable on civil point of view but it would be extremely helpful to see the aspects which could possibly render the proceedings of the lower courts grossly irregular. In The case *Sanco v Mngoma N.O*,[258] the Court was faced with a situation where the Magistrate granted absolution from instance when the applicant has not yet finished leading evidence. The applicant lodged a review to the high court in terms of section 22 of the Superior Court Act,[259] alleging that the Court had committed an irregularity. In the end, the High Court reviewed the case and found that, indeed the Magistrate had committed a gross irregularity by giving a judgement of absolution from instance.[260]

The essence of the above case can be applied into the perspective of criminal procedure. This is because comparison of the two procedure reflects that, absolution from instance is the same as an application for a discharge in terms of the Criminal Procedure Act.[261] Therefore, if the presiding officer in the criminal proceedings of the

[253] *S v Khan* 1993 (2) SACR 118 (N).

[254] Same as above.

[255] Same as above.

[256] Same as above.

[257] Same as above.

[258] *Sanco v Mngoma N.O* [2019] JOL 46365 (KZP).

[259] The superior Courts Act.

[260] *Sanco v Mngoma N.O* (n 102 above) 17.

[261] Sec 174 of the Criminal Procedure Act.

magistrate court discharges the accused before the closure of the state`s case, the same constitutes a reviewable gross irregularity.

In the case of *R v Dumas*,[262] the Cape of Good Hope, provincial division had to review and set aside the proceedings of the Magistrate Court on the ground of gross irregularities.[263] It was submitted to the Court that the gross irregularities occurred when the Court failed to make sure that the accused was following or appreciating the proceedings. The applicant submitted that he neither understood Afrikaans nor English.[264] The High Court emphasised that, it was the duty of the Magistrate to make sure that the accused is carried along with the proceedings. This in particular to the accused who are legally unrepresented in the proceedings. At the end, the Court reviewed and set aside the conviction and reverted the matter to start *de novo* in the Magistrate Court before another presiding officer.[265]

The case of *S v Khumalo*,[266] offers a guidance regarding to the right to cross-examine a witness by any party in the proceedings.[267] In this case, the accused was charged with an offence robbery and pleaded not guilty to the charge in the Magistrate Court. During the state case, the accused was given an opportunity to cross-examine the complainant.[268] However, the matter was postponed before the completion of such cross- examination. On the date of the next appearance, the witnessed failed to attend the proceedings to be cross examined.[269]

The state closed its case and the accused applied for a discharge on the basis that the state failed to establish a *prima facie* case which a reasonable court might convict.[270] The further reason was that a failure to make the complainant cross-

[262] *R v Dumas* 1920 CPD 207.

[263] Same as above.

[264] Same as above.

[265] Same as above.

[266] *S v Khumalo* [2012] JOL 29355 (GSJ)

[267] Same as above.

[268] Same as above.

[269] Same as above.

[270] Same as above.

examined completely by the accused had poisoned the proceedings, and thus the accused must be discharged.[271]

Notwithstanding the submissions of the accused, the Court dismissed such an application. The accused closed his case. The Court considers the uncompleted testimony of the complainant and convicted the accused on the count of robbery. The matter was sent to the high court on a review grounding it on irregularities on the proceedings by a failure of the Court to award an accused a full opportunity to cross-examine the complainant.[272]

The High Court stated that, indeed the proceedings were grossly irregular because the accused enjoy the right to a fair trial which included right to challenge evidence. Thus, the failure of the court to award an opportunity to the accused to fully cross-examine the complainant corrupted the entire proceedings and as a result the Court reviewed and set aside the proceedings and remitted the matter to commence *de novo* in the Magistrate Court before another presiding officer.[273]

3.5. **Conclusion**.

Through the analysis given above, it is now clear that there is a nexus between right to a fair trial, gross irregularities, and the review *pendente lite*. It has been established that, review *pendente lite* will quickly be applied when the proceedings of the Magistrate Court are affected by gross-irregularities. It was advanced that gross-irregularities are so fatal to the proceedings to an extent that, the accused cannot wait for the proceedings to end in order to lodge a normal review and/or appeal. It was also tackled that, there is no precise definition of gross irregularities or examples, and that the list is not exhaustive. Therefore, in order to ascertain whether gross irregularities exist in a case, each case must be treated paying attention to its particular facts.

Furthermore, various case laws were provided emphasing the existence and the practicality of review *pendente lite* in courts. Reference was also made to the foreign jurisprudence, and conclusion was drawn that there are similarities in the application

[271] Same as above.

[272] Same as above.

[273] Same as above.

of the test under review *pendente lite*. It was stressed that, the test applicable is that of exceptional circumstances which must be established in the application that warrants the intervention by the high court.

Therefore, this chapter`s analysis had proven that, when there are gross irregularities in the proceedings, right a fair trial is violated. When the violation of the right to a fair trial appears in the proceedings, review *pendente lite* is an avenue to be used to reviewing and setting aside of such proceedings.

Chapter 4.

Analysing admission of in admissible evidence, rejection of admissible evidence, bias of the court in the criminal proceedings and the extent to which they affect the right to a fair trial.

4.1. Introduction.

This chapter will be investigating three issues. Firstly, it will look into the admission of inadmissible evidence and rejection of admissible evidence by the Court and the impact thereof on the right to a fair trial. On this aspect, this paper will submit that, when the criminal court admits evidence that is inadmissible, and reject the admissible evidence, that constitutes a ground for a review to be investigated in terms of the Superior Courts Act.[274] It will be submitted further that, the Constitution of South Africa, guarantees that, any form of evidence obtained in a manner that violates any right in the Bill of Rights must be rejected. Furthermore, such evidence will be rejected if the manner of its procurement compromises the fairness of a criminal trial or a proper administration of justice.[275]

The second issue to be scrutinised by this chapter is bias or interest in the cause by the judicial officer.[276] This chapter will submit that, when the presiding officer is biased in the case, the same constitutes gross irregularities and those proceedings can be reviewed and be set aside by review *pendente lite*. The crux of the latter ground of review is basically on the assertion that, criminal proceedings must be seen to be fair from the start to the end. When the presiding offer steps into the arena and takes over the case of either party in the criminal proceedings, that constitutes both gross irregularity and bias in the proceedings, and such conduct is reviewable.[277]

The last aspect to investigated by this chapter is to outline the procedure of review *pendente lite.* The procedure will be outlined in terms of rule 53 of the Uniform Rules of the Court. Yet in chapter one it was stated that, one of the purposes of this paper

[274] Section 22(1) (d) the Superior Courts Act.

[275] Section 35 (5) of the Constitution.

[276] Section 22(1)(b) of Superior Courts Act.

[277] *S v Rall* 1982 (1) SA 828 (A).

is to educate legal practitioner and scholars about the existence of review *pendente lite*, therefore, laying down a procedure in terms of the rules of the court will be of fundamental importance.

4.2. **Admission of inadmissible evidence and rejection of admissible evidence**.

The departure point of this topic is the Constitution of the Republic of South Africa. The Constitution provides that, the court must exclude any evidence procured in a manner that violates any right, and only if such violation jeopardies the proper administration of justice and/or violates right to a fair trial.[278]

In criminal cases, the general principle is that, it is upon the court`s discretion to exclude potential evidence even if that evidence was obtained properly, lawfully and constitutionally.[279] This is basically procured from the common law principle outlined in the case of *Kuruma, Son of Kaniu v R*,[280] which outlined that, in a criminal case, the presiding officer has the uttermost discretion to reject evidence if the strict rules of admissibility would be unfair against the accused.[281]

The discretion to admit or reject evidence must be exercised sparingly, and the court has to satisfy itself with the fact that, if evidence is admitted, it will prejudice the rights of the accused person.[282] The prejudice might not necessarily be a procedural one but if admission of such evidence will pose a likelihood to unreasonable delay to the accused and financial burden.[283] There are factors which must be taken into considerations when the court is exercising its discretion to admit or reject evidence. Such factors are listed here bellow:

(a) The danger of confusing issues;
(b) The delay and expense resulting from trying to procure the potential evidence;

[278] A Bellengere, The law of Evidence in South Africa Basic Principles (2016) at 231.

[279] Same as above.

[280] *Kuruma Son of Kiriu v R* [1955] AC 197 (PC).

[281] Bellengere (n 279 above) 232.

[282] Same as above.

[283] Same as above.

(c) The likelihood that the admission of the evidence arguably only relevant to collateral issues will blur the focus on the *facta probanda* of the case;
(d) The likelihood of wasting the court`s time by admitting the evidence in circumstances where the potential evidentiary weight of the proposed evidence is limited; and
(e) The duplication of evidence that is already before court.

Under the Constitutional dispensation, the challenge of inadmissible evidence made in terms of section 35 of the Constitution.[284] Under the latter section, evidence that will be set aside is that which was procured in a manner that violates any right enshrined in the Bill of Rights.[285] For instance, evidence that was procured by search and seizure without a valid search warrant, is excluded in court because, it was acquired in a manner that violated the accused`s rights of privacy.[286]

The next leg of the admissibility of evidence is locatable in terms of section 35(5) of the Constitution. This section advances that, even if there is a violation of the right in the procurement of evidence, such evidence cannot be excluded if it does not violate the right to a fair trial and administration of justice.[287] This means that, evidence obtained in a manner that violates the right in the Constitution will only be excluded if admitting such evidence will jeopardise the accused`s right to a fair trial and administration of justice.[288]

In order to determine whether the admission of a particular evidence will deprive the accused person`s right to a fair trial, the discretion lies with the court, and such is executed through looking into the facts of each and every case.[289] The factors to be considered are nature and extent of the constitutional breach, public policy, the society and the absence or presence of the prejudice to the accused.[290]

[284] Section 35(5) of the Constitution.

[285] Same as above.

[286] *S v Gumede and Other* 1998 (5) BCLR 530 (D).

[287] Bellengere (n 283 above) 236.

[288] Same as above.

[289] Same as above.

[290] Bellengere (n 289 above) 237.

In the case of *S v Dzuguda and Others; S v Thilo*,[291] the Court emphasised the importance of the fair trial right and by stating that, it is a comprehensive and integrated right and that its context must be looked into considering merits and facts of each and every case. Furthermore, this case emphasised that, the most important aim of the right to a fair trial is to ensure that, the accused person must be protected from wrongful convictions and sentences.[292] Furthermore, this right is more closely linked to the dignity, equality, and freedom of the accused.[293] Hence there is an assumption that, human rights are inalienable and interdependent.[294]

In the case of *S v Zuma*,[295] it was held that, ''the right to a fair trial embraces a concept of substantive fairness and that is up to the criminal courts to give the context of the basic fairness and justice underlying a fair trial.'' This case is rendering an emphasis that, when the Constitution establishes section 35(5), it was promoting right to a fair trial and proper administration of justice. Hence, the Constitution shares light when it provides that, all unconstitutional obtained evidence must be excluded if it violates fairness of the trial and prejudices the administration of justice.[296]

When the court is at the juncture of deciding whether the evidence was obtained in a constitutional manner or not, what factors must be looked at? Well, the case of *S v Tandwa and Others*,[297] provided an explicit answer to this question in a manner captured hereunder:

> [T]he severity of the rights violation and the degree of prejudice, weighed against the public interest in bringing criminals to book. Rights violated are severe when they stem from the deliberate conduct of the police or are flagrant in nature… There is a high degree of prejudice when there is close causal connection between the rights violation and the subsequent self-incriminating acts of the accused…Rights violations are not severe, and the

[291] *S v Dzinguda And Others* 2000 (2) SACR 443 (CC).

[292] *S v Dzuguda* (n 292 above) 11.

[293]Same as above.

[294] J O'Manique 'Universal and Inalienable Rights: A Search for Foundations' *The Johns Hopkins University Press 12(4)* 59

[295] *S v Zuma* 1995(1) SACR 568 (CC) 16.

[296] Sec 35(3) the Constitution.

[297] *S v Tandwa* 2008 (1) SA CR 613 (SCA) 117.

resulting trial not unfair, if the police conduct was objectively reasonable neither deliberate nor flagrant.[298]

The case above is reiterating the point that, the evidence that had been procured through minor violation of the Bill of rights will normally be admitted by the Court. However, the whole situation will be different when the court is dealing with case that the evidence was fragrantly obtained and in violation of human rights, such evidence will be rejected by the court.

Who bears the onus to prove that the evidence challenged before the criminal proceedings was obtained in a manner that violated any right in the Bill of Rights? There has been some contradicting view expressed in the judicial precedents in South Africa regarding the latter question.[299] In the case of *S v Gumede and Others*,[300] it was held who alleges must prove.[301] This means that a party in the proceedings who alleges that, evidence was procured in manner that violates constitutional rights, bears the onus to prove. However, in the case of *S v Mfene and Another*,[302] the accused mandate is to establish his case that evidence was obtained in unconstitutional manner, the burden shifts to the state to prove beyond reasonable doubt that the evidence was obtained in a constitutional manner.[303]

However, if the accused decides to dispute the admissibility of evidence obtained through entrapment, the burden of proof is different to the one stated above. It is because the Criminal Procedure Act provided the requisite onus dealing with evidence trough entrapment. Therefore, state will have onus to prove on the balance of probabilities and that the evidence obtained in a trap is admissible.[304] The accused duty in these circumstances is to establish grounds on which the admissibility of evidence is challenged.[305] If the court finds that there is a reasonable possibility that the evidence is inadmissible, it will reject the evidence on that

[298] Same as above.

[299] Bellengere (n 290 above) 242.

[300] *S v Gumede and Another* 1998 (5) BCLR 530 (D).

[301] Same as above.

[302] *S v Mfene and Another* 1998 (9) BCLR 1157 (N).

[303] Same as above.

[304] Section 252A (6) the Criminal Procedure Act.

[305] Same as above.

ground.[306] However, if the court finds that, the state had proven that the evidence is admissible beyond reasonable doubt, such evidence will be accepted.[307]

The admissibility of evidence is tested in a mini trial called trial-within-a trial. The importance of dealing with trial-within-a trial is that, if the court decides to admit evidence which is inadmissible that prejudices the accused person, who will have to conduct a defence based on the evidence which is inadmissible, that completely renders the whole criminal proceedings unfair.[308] The decision of a trial-within-a trial is not appealable because, an appeal can only be noted when the total proceedings had ended.[309]

However, if the accused person feels that, in a trial-within-a trial, the court arrives to a judgment that evidence which is inadmissible is admitted, the applicant can institute a review *pendente lite* based his grounded at section 35(3) (o) of the Constitution,[310] read with section 22(1) (a)-(d) of the superior Courts Act.[311]

It was mentioned herein that, in order to find out whether the evidence in question is admissible, the court will stop the main proceedings and conduct a mini trial called the trial-within-a trial.[312] It is said that, a trial-within-a trial, must be held during the state`s case.[313] Therefore, it is submitted that if the Court fails to hold a trial-within-a trial when there is a need, that constitutes a gross irregularity reviewable by the High court. The aspect of gross irregularity on the proceedings of the criminal court was dealt with intensively in chapter three of this paper.

The most important purpose of trial-within-a trial is to assist the accused to contest the evidence. Such evidence is contestable because, the accused might be of the opinion that, evidence was obtained in a manner that violates rules of evidence

[306] Bellengere (n 299 above) 385.

[307] Same as above.

[308] Same as above.

[309] Same as above.

[310] Section 35(3) (o) the Constitution.

[311] Section 24 (1)(d) the Superior Courts Act.

[312] Bellengere (n 309 above) 37.

[313] Bellengere (n 312 above) 380.

under common law or the Constitution.[314] The accused will advance that, such evidence needs to be rejected by the court because, it violates his constitutional right to a fair trial or that, it jeopadises the whole administration of justice.

Can new evidence recorded in a trial-within-a trial be admissible? In the case of *S v Nglengethwa*,[315] the Court held that, the evidence of the state recorded in a trial-within-a trial can be used as evidence in the main trial in order to save time and resources of the court.[316] However, it was held further that, the evidence of the accused as adduced in a trial-within-a trial is not admissible in the main proceedings.[317] The latter case reflects that, the court decides to use evidence of thee accused obtained in a trial-within-a trial, such constitutes an admission of inadmissible evidence. It means further that; the affected party may institute a review *pendente lite* in a high court possessing jurisdiction in order to review and set aside such an irregular decision.

The importance of the above analysis of the admissibility of evidence in terms of section 35(5) of the Constitution lies at the two-legs test that had been established.[318] The first leg is that evidence obtained in a manner that violates the right to a fair trial is inadmissible.[319] Sometimes a mere violation of the right to a fair trial is not enough.[320] Hence the accused must go further to lay grounds that, if the evidence is admitted, the administration of justice will be prejudiced.[321]

In the case of *S v Van Deventer and Another*,[322] the accused persons were charged and convicted in the Regional Court of 767 counts of fraud, one count of contravening section 58(c) of the Value-Added Tax Act,[323] and 10 counts of

[314] Same as above.

[315] *S v Nglengethwa* 1996 (1) SA SACR 737 (A).

[316] Same as above.

[317] Same as above.

[318] Bellengere (n 314 above) 244.

[319] Same as above.

[320] Same as above.

[321] Same as above.

[322] S v Van Derventer and Another 2012 (2) SACR 263 (WCC)

[323] Act 89 of 1991.

contravening section 58(d) of the Value Added Tax Act.[324] One of the first accused was sentenced of four years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act. Accused number two in this matter was sentenced of three imprisonments to in terms of section 276(1) (i) of the Criminal Procedure Act.[325]

All the accused appealed both the convictions and sentences imposed in the case stated above. The accused invoiced certain VAT products and such the shops used were not VAT vendors. Furthermore, the invoiced monies were not submitted to South African Revenue Services. There was a search warrant which was issued, but the accused contended that it was not issued with reference to the rules and procedures regulating the admissibility of evidence. The submitted that the search and seizure of the documents in questions were unlawful in terms of section 35(3) because it prejudices the accused persons rights to a trial and further prejudices the administration of justice.[326]

In this case the court dismissed the appeal against conviction because the evidence in question was obtained through valid search warrant.[327] The court went further to state that, the violation of the applicant`s rights was of technical and not flagrant.[328] The Court decided further that, SARS had acted in good faith. Therefore, it was stated that, if evidence was procured in a lawful manner such evidence should not be rejected by the court. The essence of this case lies to an ideal that, a non-flagrant violation of right cannot be used in terms of section 35(5) to challenge the admissibility of evidence.

In the case of *S v Motloung*,[329] the High Court had to intervene to review and set aside the decision of the Magistrate Court, after the Magistrate Court had accepted hearsay evidence. The High Court reviewed such a decision because in general terms, hearsay evidence is inadmissible.[330] It was held further in this case that, the

[324] Same as above.

[325] *S v Van Deventer 2012* (2) SACR 263 (WCC)

[326] Same as above.

[327] Same as above.

[328] Same as above.

[329] *S v Motloung* [1997] 3 SA 18 (B).

[330] Same as above.

accused must be given an opportunity to render his defence regarding the admissibility of evidence.[331]

The above case law is advancing the point that, in general hearsay evidence is inadmissible.[332] However such evidence can be admissible under the following circumstances:[333]

(1) Subject to the provision of any other law, hearsay evidence shall not be admitted as evidence in a criminal or civil proceedings, unless-
   (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
   (b) the person upon whose credibility the probative vakue if such evidence depends, himself testifies at such proceedings; or
   (c) the court having regard to-
      (i) the nature of the proceedings;
      (ii) the nature of the evidence;
      (iii) the purpose for which the evidence is tendered;
      (iv) the probative value of the evidence;
      (v) the reason why the evidence is not given by the perso upon whiose the probative value of such evidence depends;
      (vi) any prejudice to a party which the admission of such evidence might entail; and
      (vii) any other factor which should in the opinion of the court be taken into account.[334]

The abovementioned Act fleshes out the requirements which must be taken into consideration when the court is deciding into the admissibility of hearsay evidence. Whereas it was stated that, in general, hearsay evidence is inadmissible, it appears that, the same evidence can be admitted provided that it meets the requirements abovementioned.

[331] Same as above.

[332] Bellengere (n 321 above) 292.

[333] Section 3 (1) The Law of Evidence Amendment Act 45 of 1988.

[334] Same as above.

The case of *Tshabalala and others v Attorney General of Transvaal and Another,*[335] reflected greatly on the fundamental part of the right to a fair trial.[336] Therefore, the court need to exercise the discretion in balancing the need of the accused interest against the interest of the state to protects the administration of justice.[337]

The provision of the laws and analysis of the above stated cases symbolise that, it is indeed correct that, the court must not reject the admissible evidence or admit the inadmissible evidence. If the court does that, the accused will be left with a ground for a review in terms of section 35(3) (o) of the Constitution read with section 22(d) of the Superior Courts Act.

4.3. Bias or interest in the cause on the part of presiding judicial officer in the criminal proceedings.

It has now come into light in this paper that, review must be assessed in reference to the Constitution of the Republic of South Africa.[338] Therefore, more reference must be drawn from section 35(3)(o) which provides that the accused person does enjoy the right to appeal and review the proceedings of the court. Chapter three alluded that, the right to a review as enshrined by the Constitution is a blanket provision thus covers all forms of review. It was submitted that, review *pendende lite* falls within the forms of a review as enshrined in terms of section 35(3)(o) read with section 22 of the Superior Courts Act. It was further asserted that, the grounds for a criminal review for the purpose of this paper will be ascertained in section 22 of the Superior Courts Act.[339] Therefore, the ground of interest in the cause, bias, malice or corruption on the part of the presiding judicial officer, is locatable from the latter Act.[340]

Under common law the rule that prevents the court from favouring one party in the proceedings is captured from Latin maxim *nemo judex in sua causa esse debet*.[341]

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[335] *Shabalala and Others v Attorney General Transvaal 1996 (1) SA 725*

[336] Same as above.

[337] Same as above.

[338] Section 35(3)(o) of the Constitution.

[339] Superior Courts Act.

[340] Section 22(1) (b) of the Superior Courts Act.

[341] G Quinot (n above) 166.

The latter maxim literally means that, ‘’no one can be the judge at his own case.’’[342] An example can be drawn from a football match. A referee can neither be a footballer nor a coach in a match because, that is going to prevent him from making impartial decisions required of a referee to approach the match with open mind.[343]

In the case of *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*,[344] the court emphasised that, presiding officers must be impartial. Yet this case deals with review under PAJA, this paper submits that the test for bias is the same in all types of review in South Africa. This case alluded that, the real likelihood of bias will trigger a review in the following sense:

> In the end of the guarantee of impartiality… is conspicuous impartiality. To insist upon the appearance of real likelihood of bias would … cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done.[345]

There are various instances upon which a decision maker may create a reasonable apprehension of bias in the proceedings. This bellow listed are examples of reasonable apprehension of bias:

(i) If the decision maker will benefit financially from the outcomes of the decision, for example if the presiding officer is a shareholder of the company that is litigating before him in court.[346]

(ii) If a family member of the presiding officer will benefit from the the decision taken.[347]

(iii) Before the hearing of the matter, the issue came to the presiding officer and had formed a view or prejudged the matter to an extent that, no matter the submissions which parties can make, he will not change his mind.[348]

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[342] Same as above.

[343] Same as above.

[344] 1992(3) SA 573 (A).

[345] *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' and Another* 1992 (3) SA (A) 688d-697.

[346] *Rose v Johanessburg Local Road Transportation Board* 1947 (4) SA 272 (W).

[347] *Liebenberg v Brakpan Liquor Licensing Board* 1944 WLD 52.

[348] *Patel v Witbank Town Council 1931* TPD 284.

(iv) If the presiding officer is affiliated to a certain organisational policy that hinders him from rendering an impartial decision.[349]

In the case of *S v Basson*,[350] it was held that the impartiality of a presiding officer is a critical prerequisite of the constitutional democracy and closely linked to the independent of the courts. Chapter two of this paper dealt with the aspect of jurisdiction and independence of the court. The Constitution embraces that '' The courts are independent and subject only to the Constitution and the law.[351]

Should it appear before the judicial officer that in a particular case assigned to him, he will not arrive to a partial decision because of any reasons, he should recuse himself from sitting as a judicial officer in such a case. It is so because, the Constitution enshrined rights to access to court for a resolution of disputes through a fair public hearing by the court or tribunal which is impartial.[352] This study submits that, in the absence of impartiality on the part of the court, right to access to court in terms of section 34 of the Constitution cannot be fairly realised.

In the abovementioned case of *Bason*,[353] it was further stressed that, the issue concerning impartiality in the criminal proceedings is closely related to the right of the accused person to a fair trial guaranteed in section 35(3) of the Constitution.[354] It is submitted that criminal trials must be conducted with the ideal of basic fairness and justice.[355] Hence, if it happens that any party in a criminal proceedings feels that the proceedings are not fair and thus contradicting the principle of fairness, available to him is an avenue of bringing the entire proceedings into a review, thorough review *pendente lite*. It is thus said that, the fairness of a trial will be under threat if the court does not assess the facts of the case impartially and without fear, favour or prejudice.[356]

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[349] *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C).

[350] *S v Bason* 2005 (12) BCLR 1192 (CC) 24.

[351] Section 165(2) the Constitution.

[352] Section 34 of the Constitution.

[353] *Bason* (n 351 above) 26.

[354] Same as above.

[355] Same as above.

[356] Same as above.

The analysis derived out of the *Bason* case emphasised that, when the court is biased, it cannot approach the case with open mind to apply the legal principles and laws applicable to that case.

In the case *Van Royen and Others v The State and Others*,[357] the court emphasised the independence and impartiality of the courts that the latter principles are not for the sole purpose of providing justice to one individual in the criminal proceedings, but proceedings must accommodate public confidence on the administration of justice. Therefore, tribunals must be always seen to be upholding the impartiality to promote the proper administration of justice.

In the case of *President of the Republic of South Africa and ithers v South Africa Rugby Football Union* (SARFU),[358] the Court provided two approaches in dealing with bias. The first approach us that of determining the appearance of bias.[359] The second approach deals with the reasonable suspicion or apprehension of bias.[360] The one who is applying for a review on the ground of bias must be able to establish the approach in the latter case. Such an approach must be established on the balance of probabilities for the applicant to be successful.

It is a common cause that presiding officers are human beings who can use the life experience to reach to a particular decision. The latter assertion means that, they are neutral in an absolute sense.[361] It was further alluded that because judges are natural beings, it is thus not improper for them to exercise the human perspective on a particular case.[362] The essence of this case lies on the submission that, judges must not be expected to act as spiritual beings, but must exercise the discretion with the uttermost etiquette required of a judicial officer who is presiding over a case.[363]

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[357] *Van Royen v S* 2002 (5) SA 246 (CC).

[358] *President of the Republic of South Africa v South African Rugby Football Union* 1999 (10) BCLR 1059 (CC).

[359] Same as above.

[360]Same as above.

[361] *S v Bason`s* case (n 357 above).

[362] Same as above.

[363] Same as above.

Furthermore, it is important to note that, in the criminal proceedings a presiding officer is not a mere umpire but must actively participate to the proceedings in order to manage the trial in question.[364] But the intervention must be exercised sparingly. Hence the court must know when to intervene or not. The fundamental part lies at crisp that, presiding officer must not intervene in the proceedings in such a way that it takes any party's case. Peradventure may happen that the judge decides, to descends into the arena and take either party`s case in the proceedings. If such happens, that reveals a level of being bias and such proceedings may be reviewed and be set aside through review *pendente lite.*[365]

In the case of *Boshomane v Pretorius and Another*,[366] the high court of Polokwane was faced with a review *pendente lite`s* application on the ground that the respondent was biased in the proceedings of the Mokopane Regional Court. During the proceedings the accused raised an application that the presiding officer should recuse himself as a presiding officer on the case, due to reasonable apprehension of bias against him.[367] The first respondent dismissed such an application for a recusal. Not satisfied with the decision, the accused lodged a review *pendente lite`s* application in the High Court of Polokwane.

The grounds for a review for the abovementioned case was locatable from section 22 (1) (b) of the Superior Courts Act.[368] In assessing whether the first respondent was biased or not the High Court applied the principles outlined in the case of *S v Roberts*,[369] which outlined the factors to be taken in considerations as follows:

(i) There must be a suspicion that the judicial officer might, would, be biased;
(ii) The suspicion must be that of a reasonable person in the position of the accused or litigant;
(iii) The suspicion must be based on the reasonable grounds; and

[364] *S v Bason*`s case (n 364 above).

[365] *S v Rall* 1982 (1) SA 828 (A).

[366] *Boshomane v Pretorius and Another* [2021] ZALMPPHC 39.

[367] Same as above

[368] Boshomane`s case (n 367 above) 2.

[369] *S v Roberts* 1999 (2) SACR 243 (SCA) 25.

(iv) The suspicion is one which the reasonable person referred to would, not might have.

It was further stressed that, in order to be successful with application for bias, the court has to look into the two tests established in the matter of *Saccawu and Others v Irvin and Johnson Seafoods Division Fish Processing*.[370] The first approach is that of a rebuttable presumption that facing a review application for bias is always under the impression that, judicial officer are always impartial in adjudicating disputes.[371] This means that, a party who disputes the impartiality of the courts, bears the onus to prove that the court was biased on the balance of probabilities.[372] The second leg of the test or inquiry looks at the absolute neutrality of the judicial officer in the proceedings.[373]

At the end the applicant`s case was dismissed and there was no order as to costs. The most important reason for dismissal was that the applicant had failed to establish his case on the balance of probabilities.

The abovementioned case plays an important role on the creation of precedents regarding the review *pendente lite* on the ground of bias. It reflects that, the party cannot just merely rely on the ground of bias, without a reasonable proof that indeed the presiding officer was biased. Hence the party who claims that the presiding was biased throughout the criminal proceedings bears the onus to prove on the preponderance of probabilities that indeed the judicial officer was impartial.

4.4. The procedure applicable under review *pendente lite*.

Once the applicant had established one of the grounds of review in terms of section 22 of the Superior Courts Act as discussed in this chapter, the next difficult step but fundamental, is to ascertain the requisite procedure that must be followed. Procedure of a review is provided in the Uniform Rules of the Court.[374] This chapter uses the Uniform Rules of the Court which are the High Court Rules instead of using

[370] *Saccawu and Others v Irvin and Johnson Seafood Division Fish Processing* 2000 (3) SA 705 (CC).

[371] Same as above.

[372] Boshomane`s case (n 369 above) 19(1).

[373] Boshomane`s case (n 373 above) 19(2).

[374] Rule 53 of the Uniform Rules of the Court.

the Magistrate Courts Rules.[375] The Superior Courts Act empowers the High Court having jurisdiction to entertain the review application for the proceedings of the lower courts[376]

Any review targeted against the decision of the magistrate court must be lodged in the high court having jurisdiction, directing it to the decision-maker and any other affected parties thereof.[377] The notice in question must call upon the decision maker to show cause the reasons why the high court should not review, correct, and set aside the decision that he made.[378] The notice must also call upon the decision maker to dispatch within 15 court days the record of the proceedings, to the clerk of the magistrate court who must submit the record to the registrar of the high court.[379]

When the registrar of the high court receives the record, he must dispatch it to the relevant parties in the proceedings.[380] After receiving the record in question the applicant will be given an opportunity to amend his notice of motion and further supplement his founding affidavit.[381] If the presiding officer or any party who wish to oppose the review , will have 15 days to issue such notice of intention to oppose.[382] After the notice of intention to oppose, such party must issue the answering affidavit, within 30 days of issuing the notice of intention to oppose.[383] Thereafter, within 10 days the applicant if he so wishes, can issue a replying affidavit in terms of Rule 6.[384] Lastly the applicant or any party may set the matter down for a hearing.[385]

Now that the matter has been set down for a hearing, the practice directives of different divisions of the high court will unfold. Practice directives vary from province to province. This paper will consider the practice directives of Limpopo Division of

[375] Magistrate Courts Rules.

[376] The Superior Courts Act, sec 22.

[377] Uniform Rules of the Courts, Rule 53(1).

[378] Uniform Rules of the Court, Rule 53(1) (a).

[379] Uniform Rules of the Court, Rule 53(1) (b).

[380] Unform Rules of the Court, Rule 53 (3).

[381] Uniform Rules of the Court, Rule 53 (4)

[382] Uniform Rules of the Court, Rule 53(5) (a).

[383] Uniform Rules of the Court, Rule 53(5) (b).

[384] Uniform Rules of the Court, Rule 53(6).

[385] Uniform Rules of the Court, Rule 53(7).

High Court. In terms of such a directive, after setting down a matter the applicant must before the hearing file and issue the heads of arguments and practice note.[386] The respondents reply to the heads by filling their heads of arguments before the hearing.[387] During the hearing, the applicant will start presenting his case to the court. However, if the respondents have raised points in *limine* in their respective affidavits, they have duty to start. Such duty is derived from the *Khrishna v Pillay* matter, which asserts that, ''he who alleges must prove.''[388] Furthermore, the respondents will be given chances to present their cases after the case of the applicants. Then the applicant will be given an opportunity to make his replying address.

After the party`s submissions, the court will give its judgment. The court can grant the judgment in favour of the review application with or without costs.[389] Furthermore, it can strike off the application from the roll or it can also remove the matter from the roll.[390] Moreover, the court can dismiss the application from the roll with or without costs.[391]

4.5. A brief comparison between South African law and Namibian law.

It is extremely necessary to usher a brief comparison between these two jurisprudences as far as review *pendente lite* is concerned. The South African Constitution tells us that, it is more important, or put differently, it is necessary to consult foreign law when interpreting the Bill of Rights enshrined in the Constitution.[392]This comparison is only limited to whether which decisions between those of higher courts and lower courts are reviewable. The South African Jurisprudence is very clear to the effect that, only lower courts decisions are subject of a review.[393]

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[386] Practice Directive of the High Court of South Africa, Limpopo Division Polokwane and Limpopo Local Division, Thohoyandou.

[387] 'As above.'

[388] *Khrishna v Pillay* 1946 AD 946.

[389] Uniform Rules of the Court, Rule 6(5) (g).

[390] Same as above.

[391] Same as above.

[392] Section 39(1) (c) of the Constitution.

[393] Section 22 of the Superior Courts Act.

However, the position is different in Namibia. The Namibian law in Section 16(1) Namibian Supreme Act,[394] simply articulates that both the decisions of the high courts and the lower courts are subject to a review. It is the submission of this paper, that the Namibian approach is the best, because it acknowledges that even judges can conduct proceedings in a grossly unjust manner which may attract review pendente *lite*. However, in South African, the position is regrettably seeming to suggest that judges are superior to the Magistrate and their decisions are automatically not reviewable. This also, has a major constraint in far as the right to a fair trial is concerned.

4.6. Conclusion.

This chapter had dealt with three issues. The first was on the issue of admission of inadmissible evidence and rejection of admissible evidence as a ground of review. It was established that, when the court admits inadmissible evidence, the same frustrates fairness of trial and administration of justice, and that can attract a review *pendente lite.* Furthermore, when the court reject admissible evidence, it was submitted that, such conduct had put the right to a fair trial into jeopardy. This chapter had further submitted that, when fairness of a criminal trial is under threat, review *pendente lite* must be used.

The second aspect which was very crucial in this chapter was the aspect of bias on the part of the judicial officer. As a departure point, it was submitted that, the Constitution awards every person a right to approach the court, so that it can make an amicable decision over a dispute in an impartial manner.[395] Furthermore, it was submitted that, the courts were awarded their independency under the Constitution to adjudicated over disputes without fear, favour or prejudice. Therefore, if the court is found to be impartial; the affected party may use review *pendente lite* to review such a conduct because it would have violated the right to a fair trial and prejudiced the administration of justice. However, there is a rebuttable presumption which appreciates that, a presiding officer is always presumed to be fair unless proven otherwise. Therefore, the burden must be on the applicant to prove on the preponderance of probabilities that, the court was biased.

[394] Section 16(1) Namibian Supreme Act 15 of 1990.
[395] Section 34 of the Constitution.

The last aspect that this chapter investigated the procedure that must be used under *pendent lite.* This chapter had thus proven the existence of review *pendente lite* on the grounds investigated.

Chapter 5.

5. Conclusion.

The purpose of this chapter is to render a summary of the whole dissertation made up of five chapters. This means that, four chapters have dealt with the substance of this research.

It was alluded in chapter one that, the purpose of this paper is to give a critical analysis of a review *pendente lite*`*s* application against the lower court`s proceedings and its influence on the right to a fair trial in South Africa. Chapter one of this paper rendered a solid introduction to establish the foundation of review *pendente lite.*

It was alluded that, the right to a fair trial is a crucial right awarded by the Constitution to the accused persons in South Africa. Hence, once such a right is under threat throughout the criminal proceedings, the accused can apply for a stay of criminal proceedings pending a review *pendente lite* which must lodge in terms of section 35(3) (o) of the Constitution read with section 22 of the Superior Courts Act. The problem underlying this paper was non-inclusion of the review grounds in the Criminal Procedure Act. The grounds in section 22 are far-fetched and takes long to finalise. They are further expensive. Therefore, this all is happening at the expense of the accused right to a fair trial which includes the right for a review.

Moreover, chapter two looked at one ground of review which is lack of jurisdiction on the court. It was submitted that, if the court lacks jurisdiction, the judgment is *ab initio* null and void. In chapter two, it was submitted that, the court which does not have jurisdiction on the matter cannot uphold the principle of fairness. This paper further makes an interpretation to exceptional circumstances that must be established under review *pendente lite*. It was submitted that, when the right to a fair trial is violated, that constitutes an exceptional circumstance that can be used to establish an application for review *pendent lite*.

Chapter three of this paper proceeded to look at another ground of review which is gross irregularity in the proceedings of the court. This chapter submitted that, there is no exhaustive list of examples of gross irregularities. Few examples were given in the chapter. Furthermore, chapter three proved that there are different kinds of irregularities. It was stated that, the kind or irregularity that will poison the entire

proceedings, is when the entire proceedings are grossly irregular. What was important of the chapter was that gross irregularities must be understood within the context of right to a fair trial. It was so because, when the court commits gross irregularities, the same put the administration of justice into disrepute and violates the right to a fair trial, hence the conduct is reviewable under review *pendente lite*. This chapter further, made a distinction between automatic and review *pendente lite*.

The fourth chapter looked at three critical issues. The first was regarding admission of inadmissible evidence and rejection of admissible evidence which was explained n detail. The second issue was on bias in the proceedings of the court. It was submitted that; criminal proceedings must be fair from its commencement to the end. When the accused feels that there is an apprehension of impartiality by the judicial officer in the criminal proceedings, he may apply for a review *pendente lite*, so that the proceedings be reviewed and be set aside. It was submitted further that the onus is on the applicant to proof on the balance of probabilities that, the presiding officer was biased throughout the proceedings.

The third critical issue that that chapter four looked at was the procedure of review *pendente lite*. It was so crucial that the procedure be laid out in terms of rule 53 of the Uniform Rules of the Court because, if the litigant fails to follow the rightful procedure, the application will be struck off or removed from the roll.

The analyses given by this research had proven that criminal proceedings under review *pendente lite*, are reviewable in terms of section 22 of the Superior Courts Act. At the end, this research submits that, review *pendente lite* affects the right to a fair trial, because it is one of the avenues which can be used to review and set aside the criminal proceedings in South Africa.

This study recommends that to safeguard the right to a review of criminal matters, the current legal framework must be re-visited to incorporate explicit grounds of review that are time effective and affordable to every indigent accused. This suggestion will safeguard the right to a review as enshrined in the Bill of Rights.

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