FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no: 138

PARTIES:
RASHAAD SOOMAR **APPLICANT**

and

THE HONOURABLE MR JUSTICE KROON **FIRST RESPONDENT**

THE DIRECTOR OF PUBLIC PROSECUTIONS **SECOND RESPONDENT**

MR ALWYN GRIEBENOW **THIRD RESPONDENT**

REFERENCE NUMBERS -

- Registrar: **1584/06**
- Magistrate:
- High Court: **South Eastern Cape Local Division**

HEARD: **08 June 2006**

DATE DELIVERED: **17 August 2006**

JUDGE(S): **Dambuza J**

LEGAL REPRESENTATIVES -
Appearances

- for the State/Applicant(s)/Appellant(s): **Adv Zazeraj**
- for the accused/respondent(s): **Adv Pienaar**

Instructing attorneys:

- Applicant(s)/Appellant(s): **Roland Meyer & Co**
- Respondent(s): **State Attorney**

CASE INFORMATION -

- *Nature of proceedings* : **Application for judicial review**
- *Topic*:

- Keywords

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO: 1584/06

In the matter between:

RASHAAD SOOMAR **APPLICANT**

and

THE HONOURABLE MR JUSTICE KROON **FIRST RESPONDENT**

THE DIRECTOR OF PUBLIC PROSECUTIONS **SECOND RESPONDENT**

MR ALWYN GRIEBENOW **THIRD RESPONDENT**

JUDGMENT

DAMBUZA J:

1. The applicant in this case seeks an order in the following terms:

> "1. That the High Court of South Africa declare that the High Court of Port Elizabeth Provincial Division's failure and/or inability to provide the applicant, the accused in the court a quo, with a record of the proceedings to be procedurally unsound, thereby preventing the applicant from initiating Appeal proceedings, thus rendering prejudice to the Applicant and his rights entrenched in (t)he Constitution of the Republic of South Africa, in particular Section 35 thereof;
>
> 2. Requesting the Honourable Mr Justice Kroon to provide reasons as to why

(he) convicted and sentenced the accused on the 21st September 1998;

3. That the High Court of South Africa order that the conviction and sentence against the accused, made an order of court on the 21st September 1998 under Case Number CC 39/97, be set aside;
4. That the High Court of South Africa order that the proceedings against the application (start) de novo;

5. That the above Honourable Court mandate the Department of Correctional Services to release the applicant from custody, pending the outcome of the applicant's new hearing;

6. Costs in the event of the application being opposed."

2. The application is opposed by the second respondent who has raised a number of points in *limine* thereto.

3. On 9 September 1998 applicant was convicted by the Eastern Cape Local Division of the High Court of South Africa for the crimes of murder, rape and kidnapping. The presiding judge in the criminal proceedings was **Kroon J.** When the current review proceedings were instituted **Kroon J** was cited as first respondent. At some stage the application was withdrawn against the learned Judge. The third respondent has filed a notice to abide by the order of this court.

4. On 21 September 1998, consequent to applicant's conviction, he was sentenced to undergo 26 years imprisonment. The sentence was made up as follows:

4.1 On the murder conviction, the applicant was sentenced to 22 years imprisonment;

4.2 A sentence of 12 years imprisonment was imposed in respect

of the conviction of rape, eight years of this sentence was suspended;

4.3 For the crime of kidnapping applicant was sentenced to five years imprisonment.

5. Applicant had pleaded guilty to the charges and a statement prepared by him and his erstwhile legal representative, the third respondent, in terms of **Section 112 (2) of the Criminal Procedure Act 51 of 1977 (the CPA)** forms part of the record.

The court, however, entered a plea of not guilty and evidence was led in respect of all the charges against the applicant. He was therefore, convicted subsequent to a full trial.

6. The review proceedings presently before me were instituted on 7 March 2006.

7. This application is founded on the contents of a report on applicant's evaluation by a clinical psychologist **Ian Meyer**, prior to the trial. In his report **Mr Meyer** states, amongst others, that at the time of the commission of the offences applicant had, to a degree, lost touch with reality, suffered with Borderline Personality Disorder and was probably suffering with Chronic Major Depressive Disorder, comorbid Post-Traumatic Stress Disorder, a diagnosable mood disorder and PTSD. On this basis applicant maintains that at the time (of tendering the plea of guilty) he was not of sound mind and "*would (ordinarily) not be in a position to put up much of a defence.*" He only tendered the plea as he did because third respondent coerced him to act to his detriment by advising him to plead guilty.

8. I may, at the outset state that the argument by or on applicant's behalf which is founded on applicant's plea of guilty is, in my view, irrelevant in the light of the non-acceptance of the plea and a full trial having been conducted.

9. Applicant was a 19 year old first offender when he was convicted and sentenced. He maintains that the sentence imposed on him was excessive in view of his age, the fact that he was a first offender, the fact that he was abusing *"mind-altering substances*" and in the light of the fact that he was honest to court and showed remorse for his actions.

10. It appears to be common cause that the record of the criminal proceedings which culminated in applicant being sentenced on 21 September 1998 can now not be located. The applicant submits that this has resulted in great hardship to him in his attempts to take the matter further forward subsequent to his conviction and sentence.

Second respondent has raised the following points *in limine* to application:

10.1 **UNREASONABLE DELAY**: In that proceedings were instituted 7½ years after the conviction and sentence.

10.2 **WRONG PROCEDURE UTILIZED**: In that the application is for a review of a Judge's decision by another Judge of a Local Division. The argument on second respondent's behalf is that applicant should have applied for leave to appeal to **Kroon J** and then addressed any queries regarding the record to the learned Judge.

10.3 **WRONG FORUM**: In this regard second respondent has submitted that the application should have been directed to the Provincial Division of the High Court in Grahamstown instead of this Local Division. This issue is somewhat related to the issue raised in 9.1 *supra.*

10.4 **ACQUISCENCE**: The argument is that at all material times, applicant acquiesced in his defence and should therefore be bound thereby.

10.5 **NON JOINDER**: Second respondent submits that as applicant seeks an order that the Department of Correctional Services release him from custody pending the outcome of the *"new hearing*", the Department of Correctional Services should have been joined in the proceedings. I am not persuaded that the Department of Correctional Services has such substantive interest in this matter that it should be joined in these proceedings. In my view this Department merely keeps prisoners as directed to do so by the courts of this country and in fulfilment of its function as a Government Department.

11. On the merits of the application second respondent submits that apart from Meyer's report, applicant takes full responsibility for the crimes he committed in a letter addressed to the parents of the deceased.

In this letter (Annexure "A" to applicant's founding papers) applicant apologises to the deceased's parents for having committed the crimes that he was convicted of. In particular, he says; amongst others:

"Firstly I went through a very painful divorce as my wife decided to leave me

because of this horrible crime I committed which I take responsibility for . . . . .

. . . I want you to know that I take full responsibility for the crimes I have committed and I will serve my sentence no matter how long it takes, for surely the crimes I have committed where (*sic)* very horrible crimes and if there was any way of undoing what I have done, even if it meant giving my life in the process, I want you to know I would do it without thinking twice.

. . . My only wish is to one day try and fill that gap, I created in your heart by taking your daughter away from you, and how I intend doing it is becoming like a son to you. . . . "

The letter is undated. The most I can gather from its contents is that when applicant wrote it he had been in prison for a number of years. He mentions that:

"After that I decided to study further as you must have heard in court that I only passed standard seven outside and that I did not have any qualifications. . . I have since completed my matric as well as N3 electrical engineering. I am now busy studying mechanical engineering and this is my second year."

12. Another submission made on second respondent's behalf is that applicant's psychological state, when he committed the offences was such that he knew what he was doing and could act in accordance with his appreciation of his conduct. In this regard **Mr Meyer's** report states that "*at the time of the execution of the crime the accused was able to differentiate between right and wrong. He was able to act in accordance with his appreciation thereof, although emotional factors would have had a profound influence on diminishing his ability to act in accordance with his appreciation, owing to synergistic interaction of internal and external factors*." Second respondent also submits that applicant was fit to stand trial.

UNREASONABLE DELAY:

13. In response to this argument applicant submits that he is entitled to bring a review application "at any time". Applicant relies on the judgment of **Miller J** in **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13(A) at 39 C-D** that:

> "no statutory period is prescribed within which proceedings for review must be brought but it is clear that they must be brought within reasonable time . . . . ."

14. Applicant further submits that in any event the state is the cause of the delay in applicant's institution of these proceedings by its failure to furnish him with the record of proceedings in the criminal court.

15. It is trite that the applicant bears the responsibility to persuade the court that an application for review has been brought within a reasonable period. What amounts to "reasonable time" in each case depends on the facts and circumstances peculiar to each case. **See:** the unreported decision of the Eastern Cape Division in **Justice Madiba & Another v The Chairman, Brourde Commission & Others**, **Case No: 1260/03** delivered on 27 January 2005.

Apart from stating that second respondent is the cause of the delay, applicant does not explain how or why he comes to such conclusion. He also does not explain what he did during the period immediately following finalization of the criminal proceedings and institution of these proceedings on 7 March 2006. Such factual background would enable me to determine whether the delay in bringing these proceedings was reasonable or not. The only factual background I have is the date of finalization of the criminal proceedings and the date of institution of the application for review. I am of the view that the period of 7½ years is

indeed unreasonable. I do not however, agree with the contention on behalf of the second respondent that applicant is to blame for the loss of the record of proceedings in the criminal trial. There is no evidence on when the record got lost. I am of the view that it is the responsibility of the state to keep the records of proceedings in all court proceedings safely. I am not aware of any time limit to this responsibility.

16. Be that as it may what I can only conclude from the evidence before me that for sometime subsequent to the imposition of the sentence upon him, the applicant was not in any way aggrieved by the proceedings and the sentence imposed. He resolved to spend his energy in improving himself and generally making himself useful in a constructive way. There is no evidence that prior to March 2006 he intended to challenge the decision of **Kroon J**. It would seem therefore that the delay in challenging the proceedings before **Kroon J** was not caused by applicant's decision not to do so earlier than 7 March 2006.

INCORRECT PROCEDURE UTILIZED AND WRONG FORUM:

17. Perhaps I would not dismiss the application on the basis of the delay alone. But I am persuaded by the submissions on behalf of second respondent that incorrect procedure and wrong forum were utilized in bringing this application. **Mr Pienaar** who appeared on behalf of the second respondent, submitted that applicant should have either brought an application before **Kroon J** for leave to appeal against the conviction and sentence, or applied for a special entry in terms of **Section 317 of the CPA**. I am in agreement with this submission. **Section 317 of the CPA** states that:

"(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to

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

Section 317 makes it possible to appeal on the basis of an irregularity. An irregularity 'in connection with or during trial' which is par excellence a ground for review, is also, in terms of **Section 317**, a ground of appeal to the Supreme Court of Appeal against the decision of a superior court as a court of first instance ***(S v Mtimkulu* 1975 (1) SA 209 (T)). See: Du Toit** *et al.* **See: Du Toit et al Commentary on the Criminal Procedure Act, at 31-28**

The difficulties regarding the record of proceedings in the court a quo would have been directed to the learned Judge during the application for leave to appeal. In my view the absence of the record of proceedings does not justify use of incorrect procedure.

18. It is a well established procedural rule that a Judge of the High Court exercising his/her judicial / authority cannot be taken on review. In **Zulu v Minister of Defence and Others 2005 (6) SA 446 at 458 A-H, Mojapelo J (**concerning the judgment in **Pretoria Portland Cement Co Ltd v Another v Competition Commission & Others 2003 (2) SA 385 (SCA) (PPC)):**

"it is fairly clear in my view that in hearing and deciding the matter ex parte and in

Chambers, he acted as a Judge of the High Court and exercised powers vested in him as such. . . . . It is in my view the clear authority of Pretoria Portland Cement (PPC) that a Judge acting in those circumstances acts as a Judge of the High Court and is not reviewable. His or her actions may only be corrected by other means including appeal but certainly not by review proceedings. . . . . .

The principle is also stated by **Rose Innes Judicial Review of Administrative Tribunals in South Africa** at 11 when he says:

'There is no procedure, other than in the form of an appeal whereby the proceedings of a Supreme Court may be brought on review. There is no right of review from the decision of a Judge of the Supreme Court, either by Statute or at common law.'"

19. It was submitted in applicant's Heads of Argument and in argument before me that the review court is competent to set aside an order issued by a judge of the same division. In this regard applicant relied on **S v Katu 2001 (1) SACR 528 E**. In **Katu's** case **Pickering J**, acting in terms of **Section 304(1) of the CPA,** had issued a certificate to the effect that criminal proceedings before a magistrate appeared to be in accordance with justice. The magistrate had ordered that the accused be sent to a reform school; he (the accused) would be detained in the juvenile section of the Grahamstown Prison until his referral to a reform school. About two years subsequent to the proceedings having been certified, the accused had not yet been referred to reform school and was still in prison. The magistrate referred the matter on review in terms of **Section 304 (4) of the CPA** to the High Court, suggesting that the sentence be set aside and the matter referred back to the magistrate's court for the question of sentence to be reconsidered. **Smuts AJ** then withdrew the certificate issued by **Pickering J** set the sentence aside and remitted the case to the magistrate's court for sentencing afresh.

20. **Katu's** case is, in my view, not relevant authority for applicant's

submission for these reasons:

20.1 In **Katu's** case **Pickering J** merely issued a certificate that the proceedings in the magistrates' court were in accordance with justice. It is trite that a judge who receives a record of proceedings in chambers from the registrar for purposes of review mainly considers whether all the relevant legal rules were complied with and an appropriate sentence was imposed. **See: Du Toit et al;** *supra* **at 30-10.**

20.2 It is clear from the judgment of Smuts AJ and the authorities cited therein (in **Katu's** case) that the basis for the withdrawal of the certificate issued by **Pickering J** was to rectify a situation where a competent sentence could, for practical reasons, not be carried into effect and the accused was prejudiced thereby.

20.3 Contrary to **Mr Zazeraj's** submission on applicant's behalf I find no valid basis for application of **Section 173 of the Constitution of the Republic of South Africa Act 108 of 1996**. This section provides that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. The interests of justice are well served in this case by the established procedures available to aggrieved accused as already explained above (see *supra).*

21. Even if I were to accept that the judgment of **Kroon J** could be taken on review, clearly the correct forum for institution of such proceedings would be the Eastern Cape Division. **Section 19 of the Supreme Court Act 59 of 1959** states:

"(1)(a) A provincial or local division shall have jurisdiction over all person residing . .

(i) to hear and determine appeals from inferior courts within its area of jurisdiction (my emphasis)

(b) . . . . .

(c) . . . .

(2)(a) Subject to the provisions of paragraph (b), no appeal jurisdiction or review jurisdiction under subsection (1) shall be exercised by a local division."

Consequently this court, being a Local Division, has no jurisdiction in review proceedings emanating from another Local Division. Perhaps the cause for applicant's error in this regard is the reference in paragraph 1 of notice of motion to this court as the "Port Elizabeth Provincial Division."

22. Be that as it may, in view of my findings above the application must fail. It is therefore not necessary for me to consider further grounds on which this application is brought.

The following order shall therefore issue:

(a) The application is dismissed with costs.

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N DAMBUZA

JUDGE OF THE HIGH COURT 11 August 2006

Applicant's Counsel:	Adv Zazeraj
Applicant's Attorneys:	Roland Meyer & Co 46 Stanford Road Korsten **PORT ELIZABETH**
2nd Respondent's Counsel:	Adv Pienaar
2nd Respondent's Attorneys:	State Attorney 29 Western Road Central **PORT ELIZABETH**
3rd Respondent's Attorneys:	D Gouws Attorneys 157 Cape Road Mill Park **PORT ELIZABETH**
Heard on:	08 June 2006
Delivered on:	17 August 2006