



CHAPTER 8 //

# APPEALS

# AND REVIEWS



## Chapter 8: Appeals and Reviews

This chapter explains:

- The difference between an appeal and a review;
- The possible grounds for each; and
- The court process for appeals and reviews

### 8.1 Introduction: the distinction between appeal and review

Appeals and reviews are possible from both civil and criminal cases. In both, the party that loses a court action may ask a higher court to come to another decision.

Appeals are for a higher court to relook at the application and interpretation of the law in relation to the facts before it. There is no automatic right to appeal; the principle is that only those cases which present (have) more important or new legal issues should go on appeal. Reviews look at the strict legal procedures followed, to establish whether there were any gross irregularities that led to a miscarriage (failure) of justice, such as bias of the presiding officer, admission of inadmissible evidence, gross irregularities occurring during the proceedings, or the court not having the jurisdiction to hear the matter.

An appeal is restricted to what appears on the court record of the original case, while a review allows for argument to be led to prove the irregularities.

#### Who can appeal?

It is normally the losing party – such as a convicted offender – who appeals against a sentence or a finding. The NPA is permitted to appeal if it believes that a sentence was inappropriately low. This is what happened in 2017 in the case of athlete Oscar Pistorius, initially sentenced to six years imprisonment for murdering his girlfriend. His sentence was increased on appeal to 13 years. In civil cases, the winning party quite often returns to court to seek a higher award for damages. The party making the appeal is known as the appellant, while the party against whom the appeal is filed is known as the respondent.

#### Who hears appeals?

An appeal from a Magistrate's Court is addressed to the High Court in that province. If that appeal is unsatisfactory, a further appeal can be made to a High Court of Appeal, normally a specially constituted full bench (three judges sitting together) of the same High Court, or

even further, to the Supreme Court of Appeal itself. The last court of appeal, in an issue with constitutional implications, is the Constitutional Court.

Appeals from matters in the lower (Magistrate's) courts are always possible. But a judge in the High Court must always grant leave (give permission) to appeal in a High Court matter. If the judge refuses leave to appeal, the person seeking to appeal must ask the SCA for permission.

### 8.2 Appeal court process

The appeal court does not retry the matter, but instead studies the transcript or trial record of the case along with additional written argument by the parties. Counsel (the parties' advocates) are then given the opportunity to present oral submissions (spoken arguments) to the court.

The parties do not have to be in court as the facts of the dispute have already been considered by the lower court. Instead, the appeal court will look to whether the trial court applied the law incorrectly to the facts, or whether it erred in determining the law.

If the appeal court agrees with the trial court, it affirms the original decision; if it disagrees it reverses the trial court's decision.

Appeal judgments may be **unanimous** (where the entire bench agrees) or there may be a **majority decision** representing the views of more than half of the bench.

The judgment explains why the court affirmed or reversed the decision of the trial court. In the case of a majority decision, there is also a dissenting opinion by the remaining judge on the bench, explaining why they do not agree.

It is also possible to get concurring opinions. This happens when judges who agree with the final outcome of a majority finding but do not agree with the way in

which it was reached, or judges feel it is necessary to add their own individual points, or state their reasoning in a different way.

These differing judgments do not affect the majority ruling, but do indicate to lawyers how the law is developing and what it could be like in future. Majority decisions are critically important as they are adopted as part of the precedent (see *Chapter 1*) on which future decisions will be based.

### 8.3 Review process

Sentences imposed by Magistrate's Courts are automatically reviewed by the relevant High Court to ensure control over the consistency of the administration of justice in the lower courts, but there is no automatic review of Regional Court decisions.

But it is not just about lower courts. If public bodies such as the CCMA, the Independent Broadcasting Authority or licensing boards were to ignore their statutory duties, or be guilty of gross irregularities or clear illegality in their duties, the High Court would also have the power of review over their conduct.

#### Automatic review

Judges will automatically review all criminal cases:

- Where the accused was unrepresented (did not have a lawyer) and was sentenced to more than six months in prison or fined more than R12 000; and
- Where the accused was unrepresented and sentenced to three months in prison or fined more than R6 000 by a magistrate who had fewer than seven years' experience.



#### Reporting Tips

- All the rules and conventions that apply to court reporting also apply to appeals and reviews – including the *sub iudice* rule.
- Reporters covering a review or appeal hearing need to be clear about which it is, since the issues at stake are distinct.
- Reporters covering an appeal against a conviction need to understand the grounds for that appeal: is it against the verdict or merely the sentence – and why?
- Be aware that during an appeal on the grounds of a judge's wrong or mistaken actions, only what is said in court is privileged. If a party talks to a reporter outside court about these matters in strong terms, and the comments are published, the news outlet that publishes these comments may well be committing contempt of court, scandalising the court, or liable under the law of defamation.