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Re-assessing the Compatibility of the Requirement for Leave to Appeal with the Constitution of South Africa: Evaluating the Duty to Explain the Refusal of Leave to Appeal

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2025
University of the Witwatersrand, Johannesburg
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Lubisi, Tivoneleni Edmond . (2025). Re-assessing the Compatibility of the Requirement for Leave to Appeal with the Constitution of South Africa: Evaluating the Duty to Explain the Refusal of Leave to Appeal [Master's dissertation, University of the Witwatersrand, Johannesburg. WIReDSpace. https://hdl.handle.net/10539/50128

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RE-ASSESSING THE COMPATIBILITY OF THE REQUIREMENT FOR LEAVE TO APPEAL WITH THE CONSTITUTION OF SOUTH AFRICA: EVALUATING THE DUTY TO EXPLAIN THE REFUSAL OF LEAVE TO APPEAL

by

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Submitted partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of Witwatersrand, Johannesburg

Date: 06 May 2025

DECLARATION

I, Tivoneleni Edmond Lubisi, declare that this research report is my unaided work. It is submitted in partial fulfilment of the requirements for the Master of Laws (by Coursework and Research Report) degree at the University of the Witwatersrand. It has not been submitted for any degree or examination at this university or any other university.

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STUDENT NUMBER

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DATE

DEDICATION

I dedicate this work to my late loving and caring sister Ivy Nomvula Lubisi.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank and appreciate God Almighty for the ability, strength and His divine intervention in my life, especially during this study. Indeed, “all things work together for good to those who love God, to those who are the called according to His purpose”.

Special thanks and appreciation to my supervisor Dr Mkhululi Nyathi. I have no sufficient words to express my gratitude for your guidance, patience and attention to my study.

Friends and staff members of Wits University, I thank you for your support whenever I needed help of some kind. In this regard, I would like to specifically mention Marisa Sauls and the law librarians.

Finally, I acknowledge and appreciate the unmeasurable support and encouragement from my family, especially my wife Thoko and children Teejay, Titty and Timmy. To my twin brother Velly and his wife Nelly; Glenny Lubisi; Mama CJ Nkuna; and Mama Puleng Letuka, your support kept me strong and motivated, thank you very much!

ABSTRACT

The Constitution of South Africa provides that every accused person has a right to a fair trial, which includes the right to appeal to a higher court. It is trite law that the right to appeal is not absolute but is limited by the requirement of leave to appeal. While the leave to appeal requirement is generally compatible with the Constitution, the leave to appeal processes must be in line with constitutional principles of justice and fairness. Giving reasons for refusal of leave to appeal should be treated as an essential component of the leave to appeal processes. This study discusses the judicial practice of not providing reasons for the refusal of leave to appeal, and how this practice is incompatible with the Constitution. The study argues that giving reasons for refusal of leave to appeal is a constitutional and inherent judicial obligation which must be fulfilled to ensure compliance with the Constitution. The study concludes that refusing leave to appeal without providing reasons unreasonably restricts the right to access courts and the right to a fair trial, which includes the constitutionally protected right to appeal. The study recommends that s316 of the Criminal Procedure Act and s17 of the Superior Court Act should be amended to require judges to provide reasons for refusing leave of appeal.

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ABBREVIATIONS AND ACRONYMS

AI	Artificial Intelligence
ALR	Australian Law Reports
ASIL	American Society of International Law
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CLR	Commonwealth Law Reports
ECHR	European Court on Human Rights
EHRR	European Human Rights Reports
NADEL	National Association of Democratic Lawyers
SA	South African Law Reports
SACR	South African Criminal Law Reports
SAJHR	South African Journal on Human Rights
SCA	Supreme Court of Appeal
WLR	Weekly Law Reports
ZACC	South Africa: Constitutional Court

1 INTRODUCTION AND BACKGROUND

The legal prerequisite of the application for leave to appeal is a well-established principle in the South African criminal justice system.[1] The application for leave to appeal is a process where a person aggrieved by a court decision and wishes to appeal against that decision, such a person should first make a request to the court for leave to appeal before the appeal itself can be lodged.[2] The person who wishes to appeal must persuade the court that the appeal has a 'reasonable prospect of success or that there is some other compelling reason why the appeal should be heard'.[3] The leave to appeal requirement is 'aimed at sifting out unmeritorious and frivolous appeals, and seeks to balance demands for state resources reasonably.'[4] However, the leave to appeal requirement is likely to discourage and bar even good appeals when the person seeking to appeal has to overcome the hurdle.[5] Although the leave to appeal requirement has been held to be compatible with the Constitution of the republic of South Africa,[6] the process of leave to appeal should always be in line with the constitutional demands of justice and fairness.[7]

One major challenge that has been faced by litigants who have sought leave to appeal is the failure or refusal by courts to give reasons for such refusal to grant leave to appeal. The practice of not giving reasons for refusing petitions for leave to appeal has been challenged since the adoption of the Constitution as the supreme law in South Africa. As will be demonstrated in this report, the practice of not giving reasons when judges refuse petitions for leave to appeal persists in South Africa; and while it used to be prevalent in the Supreme Court of Appeal, it is practiced in the High Court and Constitutional Court petitions as well.

The practice of not giving reasons for refusal of petitions for leave to appeal was first challenged in a civil case of *Mphahlele v First National Bank*.[8] The applicant was a qualified attorney and had a dispute with the respondent over attorneys' trust account which made applicant to approach the High Court by way of an application for relief. The application was denied with costs by

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[1] JP Swanepoel 'Appeal' in JJ Joubert (ed) *Criminal Procedure Handbook* 13 ed (2019) at 483.
[2] *S v Rens* 1996 (1) SA 1218 (CC) para 7.
[3] Superior Courts Act 10 of 2013, s17(1)(a).
[4] Constantine Theophilopoulous (ed) *Criminal Procedure in South Africa* (2019) at 412.
[5] *Rens* supra note 2 para 25.

[7] Ibid para 22.
[8] *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC).

Southwood J on 11 December 1997. Subsequently, the applicant proceeded to the Supreme Court of Appeal and applied for condonation for late filing of his petition for leave to appeal which was ultimately refused in June 1998. The petition was attended by judges in chambers and dismissed without reasons provided.[9] The applicant asked the Registrar of the Supreme Court of Appeal for the reasons of refusal of the petition. The Registrar responded by referring to the Supreme Court of Appeal's long-standing practice of not providing reasons.

The applicant filed an application to the Constitutional Court to challenge the Supreme Court of Appeal's long-standing practice of not providing reasons when refusing petitions for leave to appeal. The main relief sought by the applicant, among others, was an order directing the two judges of the Supreme Court of Appeal who reviewed the petition to give reasons for dismissing the petition and that the Constitutional Court should grant the applicant leave to appeal, founded on the argument that judges are obliged to do so by the Constitution.[10] The applicant further contended that the practice was not consistent with the Constitution, for the reason that it violated s34 of the Constitution, which provides for the right of access to courts. The applicant also argued that the practice violated s32 of the Constitution which enshrines the right to information,[11] as well as ss9(1) and (2) of the Constitution which protect the right to equality.[12]

Goldstone J, writing for the court in an unanimous decision, made a finding that the dismissal of the petition without providing any reasons by the judges of the Supreme Court of Appeal was a constitutional issue, even though he believed that it was a procedural practice matter.[13] The Constitutional Court found that there was no breach of the Constitution in this case.[14] Although the court concluded that no constitutional mandate exists obligating judges to provide reasons for their decisions, Goldstone J still acknowledged that the rule of law generally demands judges to refrain from arbitrary decisions and to maintain accountability.[15] In appeal cases, reasons for the

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[9] Ibid para 1.
[10] Ibid para 4.
[11] Ibid para 9.
[12] Ibid para 10.
[13] Ibid para 7.
[14] Ibid para 19.
[15] Ibid para 12.

decisions are always provided by the appeal courts, but it is not the same with matters concerning petitions for leave to appeal.[16]

Although *Mphahlele* is a civil case, reference is made to it because it is one of the leading cases where the practice of refusing petitions for leave to appeal without providing reasons in higher courts was challenged. After *Mphahlele*, there were various court challenges seeking to have the practice declared unconstitutional, as will be illustrated in the discussion of some of the cases below.

Despite these legal battles, the practice of not providing reasons when petition for leave to appeal is refused is, as will be illustrated in this report, still endemic in South Africa. The main reason behind the failure of constitutional challenges to the practice is the fact that none of the litigants was able to prove that the practice is inconsistent with the Constitution in any way. It should be recalled that, according to the Constitution, 'every accused person has the right to a fair trial, including the right of appeal to, or review by, a higher court.'[17] As has already been indicated, the right to appeal is not absolute, since it is subject to the requirement of leave to appeal,[18] and it is now settled law that the requirement of leave to appeal is not inconsistent with the Constitution.[19]

However, given the importance of basic human rights in today's constitutional democracy, it is important that courts should provide reasons for the refusal of leave to appeal, and that the duty to provide reasons for leave to appeal refusal should be made an essential element of leave to appeal process.[20] This will no doubt feed into the new culture of justification and respect for fundamental rights,[21] where the application of law must always be capable of justification. This would establish legal standards and expectations under which the public may hold those exercising public authority, including judges, accountable.[22]

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[16] Ibid para 13.
[17] Constitution of the Republic of South Africa, 1996 s35*(3)(o)*.
[18] Theophilopoulous op cit note 4 at 411.
[19] *Rens* supra note 2 para 30.
[20] Kai Möller 'Justifying the culture of justification' (2019) 17 *International Journal of Constitutional Law* 1078-97 at 80.
[21] Ibid.
[22] Sanne Akerboom & Robin Kundis Craig 'How law structures public participation in environmental decision making: A comparative law approach' (2022) 32 *Environmental Policy and Governance* 232-46 at 241.

The courts are invested with judicial authority in terms of s165(1) of the Constitution, and this includes judges' determinations of leave to appeal petitions. Observation of the principle of accountability is a mechanism of holding judicial officers responsible in exercising judicial power. In his address to the 2015 judicial training conference, Judge L.O Bosielo of Gauteng North Division, Pretoria, remarked that giving reasons of judicial decisions is a mechanism of accountability to the community;[23] and that '[t]he exercise of [judicial authority] requires caution, restraint, responsibility, and accountability'.[24] According to Bosielo, state agencies, including the judiciary, are required by the Constitution to be responsive, accountable, and transparent in their conduct.[25]

The most effective way of ensuring accountability of judicial officers, is through their decisions and reasons as to how they arrived at a particular decision, which reasons must be furnished openly and publicly.[26] This may serve as a mechanism to foster and strengthen public confidence and trust in the judicial system.[27] It is also consistent with the important principles of transparency, openness, accountability, and responsiveness.[28] Furthermore, providing reasons serves another vital purpose, which is to demonstrate to the interested parties that judicial officers have applied their minds to the issues before them, and as a result, the decision is sufficiently reasoned.

There seems to be a compelling argument for the need for a statutorily prescribed duty upon judges to furnish reasons for refusal of petitions for leave to appeal as this is an important measure of accountability of the judiciary to the public. Such a duty will also be in the interests of the concerned person or petitioner. This was well articulated in *Mphahlele v First National Bank*, in which Goldstone J stated as follows:

> '[T]here is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in Section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule

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[23] LO Bosielo 'What is judgment and how to write it' available at *https://advocatetanmoy.com/africa/what-is-judgment-and-how-to-write-it-judge-l-o-bosielo-sa/*, accessed on 25 February 2024.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] *S v Mokela* 2012 (1) SACR 431 (SCA) paras 11-13.
[28] Constitution s1.

> of law undoubtedly requires judges not to act arbitrarily and to be accountable. How they ordinarily account for their decisions is by furnishing reasons.'[29]

Accordingly, Goldstone J, interpreted section 1 of the Constitution as requiring judges to give reasons in judicial decisions. Although not explicitly stated, the Constitution requires that when exercising judicial authority, an explanation must be given for every decision based on the principle of accountability.[30] It is contended in this report that judicial decisions encompass court decisions regarding refusal of petition for leave to appeal, as that is part of the exercise of judicial authority.

In criminal cases in the regional and district courts, magistrates must give reasons in compliance with a statutory obligation to record reasons for decisions refusing leave to appeal applications.[31] If the application for leave to appeal is denied in the lower court, the accused may approach the Judge President of the relevant High Court, by way of petition, for leave to appeal.[32] However, in the High Court, the Criminal Procedure Act does not require judges to record or give reasons for refusing petitions for leave to appeal originating from the lower courts. However, for criminal cases originating from High Court, judges should furnish reasons for refusal of leave to appeal application.[33] If a petition or application for leave to appeal is denied by the High Court, the next step is to petition the President of the Supreme Court of Appeal to grant leave to appeal.[34]

In addition to theoretical and constitutional imperatives for stating reasons outlined above, an accused person would often need to know the reasons for refusal of his petition for leave to appeal, in order to 'inform himself whether the issues canvassed by him in the application or petition for leave to appeal and presented in argument before court were the same issues which the court considered when refusing him leave.'[35] In addition, a person who feels aggrieved should be able to express his or her feelings by saying: "Even though I may not agree with it, I now understand why the decision went against me. I am now able to decide whether that decision involved an

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[29] *Mphahlele v First National Bank* supra note 8 para 12.
[30] Ibid.
[31] Criminal Procedure Act 51 of 1977 s309B(4)*(b)*.
[32] Ibid ss 309B and 309C.
[33] Ibid s316)10) *(b)*.
[34] Ibid s316(8)*(a)(ii)*.
[35] Möller op cit note 21.

unwarranted finding of fact, or an error of law, which is worth challenging."[36] Lord Denning posited that "reasoned decisions are generally superior to unreasoned ones, and it is just to communicate the rationale behind any actions taken against affected individuals."[37] Based on the constitutional principle of accountability, providing reason for judicial decisions is a crucial mechanism for ensuring judicial accountability.[38]

The importance of reasons for refusal of leave to appeal is made clear in various civil and criminal cases. In *Leeching and Others v S,* [39] for example, the applicants expressed concern regarding the Acting President of the Supreme Court of Appeal's refusal of their petition for reconsideration of the decision that dismissed their application for leave to appeal under s17(2)(f) of the Superior Courts Act, without giving reasons for such refusal. The applicants contended that the Acting President was required to furnish reasons for her decision to dismiss their petition, since the case had a potential to be challenged in the Constitutional Court.[40] The Constitutional Court ultimately determined that the President of the Supreme Court of Appeal made an error by not providing reasons for the dismissal of the applicants' s application.[41]

In *Greenfields Drilling CC v Registrar of the Supreme Court of Appeal*,[42] the applicants sought direct access to the Constitutional Court to contest the constitutionality of the practice of not providing reasons for denying petition of leave to appeal. The petition was based on the ground that the practice of the Supreme Court of appeal of not giving reasons for refusal of petition for leave to appeal hindered the applicant's ability to seek leave to appeal to the Constitutional Court.[43] The Constitutional Court concluded that such a practice was not inconsistent with the Constitution, subject to the qualification that, 'the position might well be different if a constitutional matter is involved and the Supreme Court of Appeal is not the court of final instance.'[44] The Constitutional Court however did not categorically state whether the Supreme

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[36] *Ansett Transport Industries (Operations) Pty Ltd v Wrath* (1983) 48 ALR 500 at 507.
[37] Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3rd ed (2021) at 629.
[38] Ibid.
[39] *Lieching and Others v S* [2018] ZACC 25.
[40] Ibid para 27.
[41] Ibid Para 63.
[42] *Greenfields Drilling CC v Registrar of the Supreme Court of Appeal* [2010] ZACC 15.
[43] Ibid para 1.
[44] Ibid.

Court of Appeal was required to provide reasons for its refusal of leave to appeal in a case involving a constitutional issue.[45]

The Supreme Court of Appeal does not usually provide reasons when refusing petitions of leave to appeal.[46] In *Strategic Liquor Services v Mvumbi,*[47] the Constitutional Court referred to *Mphahlele v First National Bank* with approval, observing that there is no explicit constitutional provision requiring judges to provide reasons for their decisions, and consequently upheld the practice of the Supreme Court of Appeal of not giving reasons when adjudicating petitions for leave to appeal.[48]

In *Mabaso v Law Society, Northern Provinces*,[49] the Constitutional Court held that when the Supreme Court of Appeal denies petition for leave to appeal without providing reasons, any future application for leave to appeal to the Constitutional Court is directed against the High Court's decision rather than the Supreme Court of Appeal's decision.[50] Thus, according to Kathree-Setiloane AJ in *Liesching and Others v S*,[51] in instances where the High Court has supplied reasons, the Supreme Court of Appeal is not obligated to furnish reasons for denying leave to appeal in both constitutional and non-constitutional cases.[52] The party requesting permission to appeal to the Constitutional Court against that decision is expected to rely on the High Court's written reasons.[53] That notwithstanding, the point remains that there is no explicit constitutional provision mandating judges to provide reasons for their decisions.[54] However, there is a limited statutory framework in place for the provision of reasons where an accused is applying for leave to appeal: The Criminal Procedure Act requires a magistrate who denies an application for leave to appeal to 'immediately record his or her reasons for refusal of leave to appeal.';[55]and judges of the High Court are required, in terms of section 316 of the Criminal Procedure Act, to provide

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[45] Ibid para 4.
[46] *Mphahlele* 8 para 2.
[47] *Strategic Liquor Services v Mvumbi* [2009] ZACC 17 para 9.
[48] Ibid para 16.
[49] *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC).
[50] Ibid para 18.
[51] *Liesching* supra note 41.
[52] Ibid para 59.
[53] Ibid para 59.
[54] *Mphahlele* supra note 8 para 12**.**

[55] Criminal Procedure Act s309B(*4)(b).*

reasons for denying applications of leave to appeal against decisions taken in the High Court as a court of first instance. In contrast, High Court judges are not required to provide reasons when denying petitions for leave to appeal from the lower courts.[56] As for the Supreme Court of Appeal, it is a settled long-standing practice that reasons are not provided in cases concerning refusal of petitions for leave to appeal.[57] Similarly, the Constitutional Court is not obliged or required by any statute to provide reasons for refusing petition of leave to appeal. However, there are exceptions in some of these principles as discussed in section 4 below.

The practice of the appeal courts of refusing petitions for leave to appeal without providing reasons is clearly contrary to the accused person's expectation and need to know the reasons for the court's denial of the petition. It negatively affects the accused's capacity to ascertain whether the matters addressed in the petition for leave to appeal, and the written or oral arguments presented before the court, were identical to those examined by the court when denying the petition for leave to appeal.[58] It renders the accused incapable of making an informed decision on his or her pursuit of the petition for leave to appeal.[59]

The Constitutional Court's jurisprudence regarding the practice of not providing reasons for refusal of petition for leave to appeal is based on the principle that 'any further appeal would be against the order of the court below and that court's reasons for judgement would be available.'[60] This approach, in my view, is flawed in two ways. First, the petition for leave to appeal would be disputing of the very same court aquo judgment and reasoning. Second, the approach appears to contradict the necessity for accountability and transparency in the adjudication process. The accused would desire to ascertain whether the court adequately addressed the points presented in the petition, which can only be substantiated by the reasons provided by the court. It would be effortless for a court that has not thoroughly engaged with the pertinent issues to conceal itself behind the presumption that its rationale for dismissing the petition mirrors that of the lower court, which it merely reiterates.

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[56] Ibid s 309C (7)*(c)*.
[57] *Mphahlele* supra note 8 para 2.
[58] *Mvumbi* supra not 49 para 16.
[59] Ibid.
[60] *Mabaso* supra note 51 para 18.

During their 2019 policy conference and annual general meeting, legal practitioners in the National Association of Democratic Lawyers (NADEL) highlighted the problem of not providing reasons on petitions for leave to appeal. A senior legal practitioner asserted that:

> "The existing practice, wherein the Supreme Court of Appeal and the Constitutional Court are not compelled to provide reasons for their decisions, particularly in applications or petitions for leave to appeal, is erroneous, objectionable, unconstitutional, should be abolished, and fails to withstand constitutional scrutiny."[61]

This study examines the obligation to provide reasons for refusal of petition for leave to appeal and analyses the judicial interpretation of this duty in South Africa.

This report consists of eight sections. The first section carries the introduction and background. The objectives of the study and research questions are introduced in the second section. The third section has a discussion of the constitutionality of leave to appeal requirement. The fourth section describes the leave to appeal process. The fifth section explores the right to reasons. The sixth section consists of analysis and findings. Section carries the study's recommendations. Section eight is the conclusion.

2 PURPOSE OF THE STUDY AND RESEARCH QUESTIONS

Although it is trite and settled law that the requirement of leave to appeal is consistent with the Constitution, this study assesses the compatibility of leave to appeal requirement with the Constitution, specifically focusing on the judicial obligation to furnish reasons when a petition for leave to appeal is refused. The study seeks to critically analyse the duty to give reasons for refusal of petitions for leave to appeal in criminal cases in post-1996 South Africa. The study focuses on the importance of safeguarding the constitutional rights of an accused and assesses whether the judiciary's approach in the criminal appeal system thus far has shown a willingness to embrace the culture of justification and providing reasons for refusal of petitions for leave to appeal.

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[61] Mapula Sedutla & Kgomotso Ramotsho 'Symptoms of a state in gradual collapse discussed at 2019 NADEL conference – Day 1' available at *https://www.derebus.org.za/symptoms-of-a-state-in-gradual-collapse-discussed-at-nadel-conference-day-1/*, accessed on 19 January 2024.

The study explores the importance of furnishing reasons when petition for leave to appeal is refused by judicial officers and seeks to establish whether a legally enforceable duty to give reasons on refusal of petition for leave to appeal could operate to improve procedural fairness and transparency in the leave to appeal process. It is expected that the findings of the report will not only contribute to the academic literature of the South African criminal appeal system, but also provide practical guidance to courts and the legislature on how the current appeal process may be reformed in compliance with the dictates of the Constitution.

The study's research questions are: Is there a legal duty on judges to furnish reasons when petition for leave to appeal is refused? Is the practice of refusing petition for leave to appeal without giving reasons consistent with constitutional principles of justice and fairness?

For this study, it is of utmost importance to have a comprehensive appreciation of the litigation history surrounding the requirement of leave to appeal. The following section briefly discusses the Constitutional Court decisions on the constitutionality of the leave to appeal requirement.

3 CONSTITUTIONALITY OF LEAVE TO APPEAL REQUIREMENT

It has been noted above that statutory provisions that provide for leave to appeal requirement are consistent with the Constitution. The compatibility of leave to appeal requirement with the Constitution has been strongly debated in numerous cases in South African courts.

In *S v Rene*,[62] a Constitutional Court case that was decided in May 1995 under the Interim Constitution,[63] Madala J, found that s316(1)(b) of the Criminal Procedure Act was constitutional. This section provided that an appeal could not be made without leave from the court of first instance in which the decision sought to be appealed was made. The Constitutional Court found that the Interim Constitution did not give everyone the right to appeal and found that the leave to appeal requirement was not inconsistent with the Constitution if the process of the application for leave to appeal was fair.[64]

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[62] *Rens* supra note 2.
[63] Constitution of the Republic of South Africa Act 200 of 1993.
[64] *Rens* supra note 2 para 42.

In *S v Twala,*[65] the Constitutional Court had to decide whether the requirement for leave to appeal according to s316 of the Criminal Procedure Act was compatible with the Constitution.[66] The section required that a person convicted and sentenced by the High Court should make an appeal on condition that leave to appeal is granted by that High Court or Supreme Court of Appeal.[67] Writing for the court, Yacoob J examined and evaluated the constitutional compatibility of s316 of the Criminal Procedure Act with the constitutional provision that guarantees an accused's right to a fair trial, encompassing the right to appeal to and to a review by a superior court.[68] Yacoob J recalled that the Constitutional Court previously decided, in *Rene's case* above, that similar statutory provisions were found to be aligned with the right to appeal as stipulated in the Interim Constitution.[69] Nevertheless, the Constitutional Court was compelled to re-evaluate s316 of the Criminal Procedure Act, due to the altered phrasing of the right to appeal in the Final Constitution.[70] The Interim Constitution contained the phrase 'to have recourse by way of' (the recourse phrase) in s25(3)(h), while in the Final Constitution the phrase used is the right 'of appeal to, or review by, a higher court,' as provided in s35(3)(o) of the Final Constitution.

The applicant contended that the Final Constitution grants an accused person an unequivocal right of appeal in all matters, irrespective of prospect of success.[71] Counsel for the applicant based their argument on the differing formulations of the right to appeal or review in the Interim and Final Constitutions. They contended that the difference in phrasing demonstrated the legislature's intention to grant all accused individuals an unconditional right to appeal.[72]

Counsel for the respondent submitted that the alteration in phrasing was inconsequential, and that the Constitution afforded an accused's person the opportunity to have a court's judgment reviewed in a comprehensive and equitable manner.[73] The application was dismissed.[74] Yacoob J, writing for the Court, held that there was no significant distinction between a convicted person's right to

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[65] *S v Twala (South African Human Rights Commission Intervening)* 2000 (1) SA 879.
[66] Ibid para 1
[67] Ibid.
[68] Ibid para 2.
[69] Ibid.
[70] Ibid para 11.
[71] Ibid para 7.
[72] Ibid.
[73] Ibid.
[74] Ibid para 23.

appeal to or seek review by a higher court as stipulated in the Interim Constitution and the Final Constitution.[75] He further held that the text of s35(3) of the Final Constitution does not indicate an intention to grant unconditional rights to appeal and review whatsoever.[76] Jacob J concluded that s35(3)(o) requires 'a superior court than the one that condemned an accused to examine the concerns, provided that the procedure is fair.'[77]

In *S v Ntuli*,[78] the Constitutional Court held that the inclusion of judges' certificates as prerequisites for appeals was intended to prevent a specific mischief observed among unrepresented prisoners. The judges' certificate was a procedure provided in s305 of the Criminal Procedure Act which Didcott J had quoted and read thus:

> "Notwithstanding anything to the contrary in any law contained, no person who has been convicted by a lower court of an offence, and is undergoing imprisonment for that or any other offence, shall be entitled to prosecute in person any proceedings for the review of the proceedings relating to such conviction unless a judge of the provincial or local division having jurisdiction has certified that there are reasonable grounds for review."[79]

Didcott J observed that unrepresented prisoners made frivolous petitions for the sole purpose of obtaining a court appearance and temporary relief from the monotony of incarceration.[80] The main issue the Constitutional Court had to resolve was whether the statutory provisions which required a judge's certificate were in conflict with the provisions of s25(3)(h) of the Interim Constitution.[81] The court found that, among other things, there was a lack of statutory control measures that clearly defined the process of issuing judges' certificates,[82] and the court also cited the prevailing inequality of treatment between imprisoned and unrepresented persons and those offenders who were not serving a sentence of imprisonment.[83]

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[75] Ibid para 22.
[76] Ibid para 10.
[77] Ibid.
[78] *S v Ntuli* 1996 (1) SA 1207 (CC)
[79] Ibid para 4.
[80] Ibid para 22.
[81] Ibid para 4.
[82] Ibid para 15.
[83] Ibid para 18.

Upon examination of precedents and the underlying principle justifying the requirement of a judge's certificate, Didcott J concluded that the procedure lacked systematic organisation and operated arbitrarily.[84] The court acknowledged the potential obstacle posed by the judge's certificate requirement, which could impede the hearing of many meritorious appeal cases.[85] The Court found that the statutory provisions requiring judge's certificate contravened the Constitution, in particular, ss8(1) and 25(3)(h).[86] The Criminal Procedure Act s309(4)(a) was declared to be invalid, in as far as it was inconsistent with the Constitution.[87]

Although *Ntuli's* case was not about the leave to appeal requirement, the judges' certificate operated, to some extent, like a requirement for leave to appeal for imprisoned convicts who wanted to personally prosecute an application for review without assistance of a legal representative. Therefore, *Ntuli* has relevance to this study. Indeed, *Ntuli* was referred to in *S v Steyn*,[88] in which the Constitutional Court ruled on the constitutionality of leave to appeal requirement in the lower courts.

In *S v Steyn*,[89] the Constitutional Court was seized with a legal question concerning the constitutionality of provisions of ss309B and 309C of the Criminal Procedure Act of 1977, which introduced a requirement of leave to appeal prior to lodging an appeal against a conviction or sentence in the lower courts, and whether that requirement was not inconsistent with the constitutional right of appeal.[90] The applicant contended that the leave to appeal and petition for leave to appeal procedures established by ss309B and 309C infringed upon their right to a comprehensive and substantive hearing by a higher court, highlighting the fact that prior to the implementation of these provisions, there was an unconditional right of appeal.[91]

Madlanga AJ examined the magistrates' court leave to appeal process to see if it is also susceptible to similar criticism as that of *Ntuli's* case above.[92] It was found that a clerk of a magistrate's court

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[84] Ibid para 16.
[85] Ibid
[86] Ibid para 25.
[87] Ibid para 30.
[88] *S v Steyn* 2001 (1) SACR 25 (CC).
[89] Ibid.
[90] Ibid para 1.
[91] Ibid para 4.
[92] Ibid para 8.

was only required to submit copies of the refused application for leave to appeal, and the magistrate's reasons for refusing it, to the High Court, after a magistrate refused to grant leave to appeal. These were the very minimum of what should be submitted to the judges who reviewed the petition, and the judgment being appealed against and the reasons for its refusal were not even required to be lodged with the High Court.[93]

As a result, it was held that the information that was required to be submitted to the High Court was insufficient to conduct a thorough evaluation and make a well-informed conclusion regarding a decision on the petition.[94] Madlanga J concluded that any subsequent application for leave to appeal and petition would similarly rely on the insufficient record presented to the High Court.[95] The Court further found that even with the addition of a petition to the Chief Justice and an application for leave to appeal against a High Court's refusal of leave, the weakened appeal procedure, which includes the leave and petition procedure in ss309B and 309C, limited the constitutionally guaranteed right of appeal to, or review by, a higher court (s35(3)(o)).[96] Thus, the Criminal Procedure Act sections 309B and 309C were declared invalid due to their inconsistency with the Constitution. However, the declarations of invalidity were postponed for six months from the date of the court order.[97]

The ruling in *S v Steyn* had the consequence of removing the requirement of accused persons to seek leave from a magistrate and it allowed them to directly make appeal to the High Court until 30th of May 2001.[98] After a period of two years, the leave to appeal requirement in the lower courts, had been re-introduced by the Criminal Procedure Amendment Act of 2003. The most notable change of the law that happened after *Steyn*, which is relevant to this study, is the requirement under s309C(3) of the Criminal Procedure Act that 'clerks of the court, when presenting documents to a High Court, must include copies of the record of proceedings from the magistrates' court along with the magistrate's reasons for the judgment being appealed.'[99]

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[93] Ibid para 9.
[94] Ibid para 11.
[95] Ibid para 26.
[96] Ibid para 27.
[97] Ibid para 53.
[98] Du Toit et al 'Commentary on the criminal procedure Act' Supplementary Binder, Service: 43,2009, Chapter 30 at 55.
[99] *Steyn* supra note 89 para 53.

However, the 2003 Amendment Act did not create a peremptory requirement or duty for judges to provide reasons when considering petitions for leave to appeal from the magistrates' court. This study contends that providing reasons for refusal of leave to appeal is crucial in the process of leave to appeal and that not doing so undermines the expectations of those that have an interest in the outcome of the petition for leave to appeal. Consequently, the subsequent section is devoted to presenting the leave to appeal process.

4 THE LEAVE TO APPEAL PROCESS

The leave to appeal process, which includes a duty to give reasons for refusal of leave to appeal in the lower courts and higher courts, is regulated by the Criminal Procedure Act and the Superior Court Act of 2013. Regardless of whether the application or petition for leave to appeal is filed in the High Court or lower court, the primary threshold is whether there is a reasonable prospect of winning the appeal.[100]

In the magistrate's court, the presiding officer is required to 'immediately record his or her reasons for such refusal' when deciding on application for leave to appeal.[101] Subsequently, the accused may submit an application to the High Court.[102] When the trial magistrate denies a request for leave to appeal, the accused must inform the clerk of the court about the submission of a petition for leave to appeal to the High Court.[103] Upon receipt of such notice, the clerk of the Court must promptly provide the Registrar of the High Court with copies of the denied application for leave to appeal, the magistrate's reasons for such refusal, and the record of proceedings, which consists of a copy of the judgment including the reasons for conviction and sentence, for which the application for leave to appeal was refused.[104]

When the petition is filed in the High Court, it is reviewed in chambers by two judges as selected by the Judge President.[105] If the two judges have differing opinions, the petition is reviewed in chambers by a third judge — either the Judge President or another judge chosen by the Judge

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[100] Theophilopoulous op cit note 4 at 509.
[101] Criminal Procedure Act s309B(*4)(b).*
[102] Ibid s 309C (5)(a).
[103] Ibid s 309C (3)*(b)*.
[104] Ibid s 309C (4)(c).
[105] Ibid s 309C (5)*(a)*.

President.[106] The opinion that is favoured by the majority of judges is considered as the collective decision of all three judges.[107] It is incumbent upon the judges that are considering a petition for leave to appeal to either grant or refuse it.[108] According to the Criminal Procedure Act, applications for leave to appeal must be attended to as a matter of urgency, particularly, where the accused has been sentenced to any unsuspended term of imprisonment.[109]

Unlike in lower courts, where magistrates are statutorily required to record reasons for refusal of an application for leave to appeal, judges in High Court are not statutorily required to provide reasons for refusing petition of leave to appeal in relation to petitions emanating from the lower courts, in instances where the magistrate would have refused to grant the application for leave to appeal. However, where the High Court is the court of first instance in a case, and after its own judgment in that case, the accused can apply for leave to appeal against the court's judgment or order. In that event, s316 of the Criminal Procedure Act stipulates that there should be reasons recorded when the application for leave to appeal is refused. However, there is an exception: There is no requirement of application for leave to appeal where the person concerned is a juvenile who has been found guilty by a High Court of an offence committed whilst he or she was between the ages of 14 and 16, and such juvenile was not given a wholly suspended sentence , but a term of imprisonment, and the juvenile must have been without legal representation during their trial.[110] This exception is similarly applicable in the lower courts in terms of the Child Justice Act of 2008 where there is no requirement of leave to appeal where a juvenile has been convicted and sentenced by a lower court and is undergoing a non-suspended term of imprisonment.[111] Similarly, there is an exception granted to a person who has been sentenced to life imprisonment.[112]

According to what has been said above, an accused person who has been found guilty of any offence by a High Court has the right to apply for leave to appeal in the very same court against his or her conviction or sentence.[113] Logically (and one would also assume that this is expected

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[106] Ibid s 309C *(5)(b)*.
[107] Ibid.
[108] Ibid s 309C (7)*(c)*.
[109] Ibid s 309C (8)*(a)* and *(b)*.
[110] Ibid s 316 (1*)(c)*.
[111] Child Justice Act, 2008 (Act 75 of 2008) s 84.
[112] Criminal Procedure Act s 309(1)*(a)*.
[113] Ibid s 316 (1)***(a).***

and widely accepted by both the accused persons and society), the High Court, just like the lower courts are statutorily compelled to do, must provide reasons for rejecting an application for leave to appeal. As has already been indicated above, judges must provide reasons for refusal of applications for leave to appeal in criminal matters where the High Court is a court of first instance. According to s316(10) of the Criminal Procedure Act, '[w]hen receiving notice of a petition as contemplated in subsection (9), the Registrar shall forward to the Registrar of the Supreme Court of Appeal copies of the- (a) application or applications that were refused; (b) the reasons for refusing such application or applications.' This provision clearly shows that the High Court, when it is acting as the trial court, is compelled to provide reasons to justify the refusal of application for leave to appeal.

The accused may petition the President of the Supreme Court of Appeal for leave to appeal in cases where the High Court, exercising original jurisdiction, refused to grant the application for leave to appeal.[114] When an accused person files a petition for leave to appeal, they also have to notify, in writing, the Registrar of the High Court where the trial was held and the trial judge who presided over it.[115] Upon receiving the notice of petition, the High Court's Registrar must transmit copies of the refused application, along with reasons for such refusal, to the Registrar of the Supreme Court of Appeal.[116] The petition is reviewed in chambers by two justices of the Supreme Court of Appeal.[117] If the two justices cannot reach a unanimous decision, the petition will be reviewed by the President of the Supreme Court of Appeal or another judge appointed by the President.[118] When three judges review a petition, the decision of the two judges, as a majority, will be considered as final.[119]

Prior to enactment of the Superior Courts Act of 2013, the prevailing rule was that the determination made by the majority of judges reviewing the application, or the ruling of the Appellate Division of the Supreme Court of South Africa regarding the approval or refusal of the application, was final.[120] Since the Constitutional Court has surpassed the Supreme Court of

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[114] Ibid s 316 (8)*(a)(ii)*
[115] Ibid s 316 (9)*(b)*.
[116] Ibid s 316 (10)*(a)* and *(b)*.
[117] Ibid s 316 (11)*(a)*.
[118] Ibid s 316 (11)(b).
[119] Ibid s 316 (11)*(b)*.
[120] Supreme Court Act 59 of 1959 s 21(3)*(d) (Repealed)*.

Appeal as the highest court of the land, the Supreme Court of Appeal is currently not the last court of appeal.[121] The Constitutional Court is the one that ultimately decides whether or not a certain case falls under its purview.[122]

The Supreme Court of Appeal has a long-standing practice of not providing reasons for the refusal of leave to appeal and the tradition has been in place for generations.[123] Such practice was challenged on the basis that it was unconstitutional as it violated the constitutional rights to access to court, appeal, fair trial and equality. The following section, therefore, addresses the constitutional rights linked to the provision of reasons for denying leave to appeal.

5 THE IMPORTANCE OF GIVING REASONS IN LEAVE TO APPEAL PROCESS

As has been indicated above, there is no provision in the Constitution that expressly obligates judges to provide explanations for their decisions, except for the general principle of rule of law which demands that judges must not behave arbitrarily and must be held responsible for their decisions.[124] Similarly, there is no provision, either in the Constitution nor any statute, that specifically provides for the right to reasons in the event of a refusal of leave to appeal application or petition. However, as has already been intimated, the right to reasons is frequently regarded as an essential component of natural justice or procedural fairness.[125] There are situations in which the interests at stake, such as personal freedom, are so 'highly regarded by the law' that it is necessary for reasons to be provided as a matter of course for justice to prevail.[126]

Usually, the right to equality, the right to a fair trial and appeal, and the right to access to courts are used to challenge the practice of not giving reasons for refusal of petition for leave to appeal. In *Mphahlele,* the basis of the applicant's argument was that the judiciary is bound by the Constitution and must provide reasons for orders it issues.[127] Furthermore, the right to access to

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[121] Constitution s 167(3)*(a)*.
[122] Ibid s 167(3)*(c)*
[123] *Mphahlele* supra note 8 para 3.
[124] Ibid note 8 para 12.
[125] Hoexter, Cora & Penfold Glenn *Administrative Law in South Africa* 3rd ed (2021) Juta, Cape Town at 629.

[126] *R v Higher Education Funding Council* [1994] 1 WLR 242 at 263.
[127] *Mphahlele* supra note 8 para 4.

courts, as guaranteed by s34 of the Constitution, fosters an 'ethos of accountability' within the framework of the Constitution.[128] The applicant went further to invoke the equality right, that there is no justification for treating parties to civil proceedings differently from parties to criminal matters, and that it amounted to a violation of the right to equality guaranteed by ss9(1) and (2) of the Constitution.[129] The essence of the argument and its relevance to the study is that if reasons of refusal of an application or petition for leave to appeal are given in the civil matters, the same should apply in the criminal cases.

The Constitution demands consideration of international and foreign law by courts, forums and tribunals.[130] Therefore, it is permissible and appropriate to consider foreign jurisprudence on the right to reasons and the corresponding duty to give reasons when refusal of petition for leave to appeal has occurred, and to understand the approach of foreign courts in this regard. It is acknowledged that foreign law and court decisions are not binding but have a persuasive force in South Africa.[131] According to s39 of the Constitution, when interpreting the Bill of Rights, a court 'must consider international'[132] and 'may consider foreign law'.[133]

Thus, foreign law can only possess persuasive force, whereas international law may have binding force like national law.[134] This distinguishes international law from foreign law, and the distinction should be recognized in constitutional interpretation as well as in the interpretation and application of all statutes.[135] 'Foreign law consists of legal principles and laws of a certain foreign nation or, in certain instances, a defined collective of states that adhere to a common legal framework or set of rules within a particular area of law.'[136] For the purposes of this study, foreign law and jurisprudence are considered in relation to the right fair trial and right to access to courts, and the right to reasons for refusal of a petition for leave to appeal.

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[128] Ibid para 9.
[129] Ibid para 10.
[130] Constitution s 39(1).
[131] C Rautenbach 'The South African Constitutional Court's Use of Foreign Precedent in Matters of Religion: Without Fear or Favour?' (2015) 18 (5) *PELJ* 1546 at 1548.
[132] Constitution s39(1)(b).
[133] Ibid s39(1)(c).
[134] Rautenbach op cit note 134 at 1548.
[135] Ibid.
[136] Frederic L. Kirgis 'Is Foreign Law International Law?' (2005) 33 Volume: 9 ASIL Insights, Available at https://www.asil.org/insights/volume/9/issue/33/foreign-law-international-law accessed on 07 October 2024.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is, in relation to South Africa, foreign law, and has persuasive force hence it is considered in this study. The right to reasons for judicial decisions is guaranteed and enshrined in article 6(1) of the European Convention of Human Rights as follows: 'In the determination of any criminal charge against him, everyone is entitled to a fair hearing by a tribunal established by law.' Article 6(1) of the European Convention applies to disputes concerning petitions and applications for leave to appeal proceedings.[137] In accordance with article 6(1), courts are required to provide adequate justifications for their decisions.[138] In *Gorou v Greece*,[139] the European Court of Human Rights emphasized that article 6(1) of the Convention mandates courts to provide reasons for their decisions, yet it does not necessitate a comprehensive response to each argument presented.

The duty of a court to fulfil the obligation to provide reasons could only be assessed in the context of the specific circumstances of a case.[140] In a petition or application for leave to appeal, article 6(1) of the European Convention does not require that refusal of such petition and application be accompanied by detailed reasons.[141] The core principle underlying the implementation of article 6 is fairness. Nonetheless, the definition of a fair trial cannot be governed by a singular, fixed principle, but fairness is determined by the specific merits of each case.[142]

It has also been opined as follows:

> 'In each case, the Court's primary concern is to evaluate the overall fairness of the criminal proceedings. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings, and not because of an isolated consideration of one particular aspect or one particular incident.'[143]

The right to reasons for a court's judgment, including leave to appeal refusal, is incorporated into a right to fair trial in terms of article 6(1) of the Convention and therefore courts and tribunals must

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[137] *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205 para 54.
[138] *H v Belgium* 1987 10 EHRR 339 para 53; European Court on Human Rights Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Civil Lim) (2017) para 426.
[139] *Gorou v Greece* [2009] ECHR 48 para 41.
[140] Ibid.
[141] *Kukkonen v Finland* (No. 2) [2009] ECHR 13 para 24.
[142] European Court of Human rights 'Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb)' 29 February 2024 at 134. Available at *https://ks.echr.coe.int* accessed on 24 August 2024.
[143] Ibid at 7 para 2

provide acceptable reasons for their decisions, as per established case law.[144] Therefore, it is now appropriate to present the findings and analysis of the study.

6 FINDINGS AND ANALYSIS

The study reveals two significant findings, and each analysed in brief.

First, there is no constitutional or statutory provision that creates a peremptory duty on judges to furnish reasons when they refuse a petition for leave to appeal in the High Court, Supreme Court of Appeal and the Constitutional Court. The absence of statutory obligation to give reasons by judges is used as a basis to keep and protect the long-standing practice of not providing reasons of refusal of a petition for leave to appeal. This is evidenced by the position initially expounded in *Mphahlele v First National Bank,* where Goldstone J, stated that, there is no provision in the Constitution that expressly requires judges to provide reasons for the decisions they make.[145] In *Liesching and Others v S and Another (2018)*, the same reason, that there is no obligation provided by any rule for judges to give reasons, was used in favour of not giving reasons of refusal of the petition for reconsideration.[146] Furthermore, an argument was advanced that s17 of the Superior Courts Act does not require any judge of any court, including, the Supreme Court of Appeal, to furnish reasons when refusing a petition for leave to appeal, and therefore the President of the Supreme Court of appeal should similarly not be required to offer reasons when dismissing a petition for reconsideration.[147]

Second, it is an important finding that there is long standing practice of not providing reasons of refusal of petitions for leave to appeal in the higher courts. The Supreme Court of Appeal has been leading on this due to the long-standing practice that reasons are not furnished in matters where a petition for leave to appeal is refused.[148] This appears to be the case even in the High Court and Constitutional Court. Even though the Constitutional Court has never made any adverse findings

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[144] Ibid para 195.
[145] *Mphahlele* supra note 8 para 12.
[146] *Liesching* supra note 40 para 53.
[147] Ibid.
[148] *Mphahlele* supra note 8 para 2.

against this practice, it has some concerning pitfalls as it militates against the expectation of the public and interested litigants the culture of justification.

Although refusal of petitions for leave to appeal in the Supreme Court of Appeal is often not accompanied by reasons due to the long-standing practice, there are however instances where reasons are provided. For example, in *Liesching and Others v S and Another*, [149] decided on 15 November 2016, the President of the Supreme Court of Appeal declined to grant a petition for reconsideration by the Supreme Court of Appeal. The reason for such refusal was that Chapter 5 of the Superior Courts Act and s17(2)(f) were not applicable to the applicants' case.[150] At least, in this instance, reasons for the refusal of the petition was provided.

In contrast, in *Liesching and Others v the State,* decided on 28 August 2018,[151] the Acting President refused the petition because she did not find sufficient grounds to exercise her discretion.[152] In this instance, there were no reasons advanced for the refusal of the petition except the mention of 'no exceptional circumstances.' This leads to question about the approach or criteria which is used to determine what cases deserve reasons and it goes against the principle of equality, that everyone should be treated fairly when it comes to the law.

As outlined below, the tests and thresholds for granting petition for leave to appeal vary according to seniority of the court, albeit, common to all is the reasonable prospect of success. Hence, an accused person needs to know the reasons for which his petition for leave to appeal was refused, so that he can inform himself whether the issues raised in the appeal court were the same issues that the court considered when refusing him leave.[153] This is important because different courts apply different tests to consider petition for leave to appeal, and this may require the accused person to modify their approach to the appeal court.[154]

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[149] *Liesching and Others v S and Another* 2017 (2) SACR 193 (CC).
[150] Ibid.
[151] *Liesching* supra note 40.
[152] Ibid para 53.
[153] Melissa Burch 'Scripting the conviction: Power and resistance in the management of criminal stigma' (2021) 123 *American Anthropologist* 645-57 at 652.
[154] Cameron, Edwin 'The crisis of criminal justice in South Africa' (2020) 137 *South African Law Journal* 32-71 at 46.

The primary criterion for a petition for leave to appeal is whether the petitioner has reasonable prospect of success on appeal.[155] The High Court requires an additional test for granting petition for leave to appeal, which is 'the presence of compelling reasons for the appeal to be considered'.[156] In the Supreme Court of Appeal, 'the general principle is that in addition to reasonable prospects of success, an applicant for special leave to appeal must show that there are special circumstances which merit a further appeal'.[157] Special circumstances are considered as '(i) where the appeal raises a substantial point of law; (ii) where the matter turns on factual issues but the prospects of success are so strong that the refusal of leave would result in a manifest denial of justice; (iii) where the matter is of very great importance to the parties or to the public.'[158] The failure to furnish reasons for a denial of leave to appeal may itself give rise to an inference that there was a failure to apply the correct leave to appeal test. These are therefore cogent reasons for creating a positive obligation on all courts to give reasons for refusing leave to appeal in any criminal case.

The duty to give reasons has long been considered an important safeguard to ensure that 'justice is not only done but is also seen to be done',[159] which view this study agrees with. It advances the notion of transparency which is a fundamental aspect of the rule of law.[160] Judges should be made to account by being obligated to provide reasons for refusing leave to appeal.[161] As a result, it is important to make recommendations as outlined in the following section.

7 RECOMMENDATIONS

First, I recommend that the Superior Courts Act should be amended to include a provision setting out a minimum requirement for providing reasons for refusal of petitions for leave to appeal. This proposed amendment can give a more systematic and comprehensive regime for applying judicial discretion. In s17 of the Superior Courts Act, there is no obligation for judges to provide reasons

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[155] *S v Radebe* 2017 (1) SACR 619 (SCA) para 5.
[156] Superior Courts Act s17(1)(a).
[157] *Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* 2017 (2) SACR 384 (SCA) para 21.
[158] Ibid.
[159] Smuha, Nathalie A 'Beyond a human rights-based approach to AI governance: Promise, pitfalls, plea' (2021) 34 *Philosophy & Technology* 91-104 at 101.
[160] Greenstein, Stanley 'Preserving the rule of law in the era of artificial intelligence (AI)' (2022) 30 *Artificial Intelligence and Law* 291-323 at 295.
[161] Barocas, Solon, Selbst Andrew D & Raghavan Manish 'The hidden assumptions behind counterfactual explanations and principal reasons' (Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency).

when refusing a petition for leave to appeal. Secondly, Unlike in the lower courts, where magistrates are statutorily obligated to give reasons for refusing application for leave to appeal, judges in the higher courts are not required by any statute to give reasons for refusing leave to appeal petition from lower courts.

As a result, it is proposed and recommended that s316 of the Criminal Procedure Act be revised to include a duty or obligation on judges to give reasons for refusing petition for leave to appeal from lower courts. Lastly, it is imperative that a consistent approach in the Criminal Procedure Act and Superior Court Act be established to set a standard of giving reasons for refusal of a petition for leave to appeal, considering the obligation that public power is fulfilled when exercising judicial function. Not only would prospective appellants who wish to invoke human rights protection as stipulated in the Constitution benefit from such enactment, but it could also serve as a legislative endowment on the realisation of a meaningful and effective right to access the courts through leave to appeal. The proposed statutory revisions will enhance the legitimacy, acceptability, and significance of the obligation to provide reasons for refusal of leave to appeal.

8 CONCLUSIONS

This study looks at the requirement of leave to appeal and how it fits within the South African Constitutional framework. It examines a duty to give reasons for refusal of petitions for leave to appeal. Although it is trite and settled law that the requirement of leave to appeal is not inconsistent with the Constitution, this study seeks to critically analyse the duty to provide reasons for refusal of petition for leave to appeal in criminal cases.

The study concludes that judges are not compelled by any law to provide reasons when refusing a petition for leave to appeal from the lower courts, but magistrates are statutorily obligated to give reasons for rejecting leave to appeal. As the Constitutional Court has underscored, the doctrine of separation of powers requires that the judiciary accept the responsibility of protecting and enforcing the Constitution.[162] Therefore, members of society have the expectation that their disputes, be they civil or criminal, will be resolved fairly and reasonably, with full awareness on the part of the litigants and the public at large that judicial power will only be exercised within its

[162] *Glenister v President of the Republic of South Africa and Others 2009* (1) SA 287 (CC) para 34.

proper limits. The practice of refusing leave to appeal without giving reasons unjustifiably limits the right of access to courts, and breaches other rights enshrined in the Constitution. Although the leave to appeal requirement does not violate the Constitution, failing to provide reasons for refusal of petition for leave to appeal could compromise the fair administration of justice.

Lastly, introducing a statutory obligation compelling judges to provide reasons for refusal of a petition for leave to appeal would ensure that petitioners know the reasons for the refusal of their petitions. The practice of not providing reasons for refusal of petitions for leave to appeal, despite being in operation for long a time, continues to be a subject of legal interest, and it therefore certainly needs revisiting.

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