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## THE PRESIDENCY

No. 169

18 February 2009

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

**No. 65 of 2008: Criminal Procedure Amendment Act, 2008.**



**AIDS HELPLINE: 0800-123-22 Prevention is the cure**

**GENERAL EXPLANATORY NOTE:**

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_             Words underlined with a solid line indicate insertions in existing enactments.

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# ACT

**To amend the Criminal Procedure Act, 1977, to provide for the postponement of certain criminal proceedings against an accused person in custody awaiting trial through audiovisual link; to further regulate the falling away of certain convictions as previous convictions after the expiry of a fixed period; to provide for the expungement of criminal records of certain persons in respect of whom certain sentences have been imposed after the compliance with certain requirements and the expiry of a fixed period; to provide for the expungement of certain criminal records of persons under legislation enacted before the Constitution of the Republic of South Africa, 1993, took effect; and to provide for matters connected therewith.**

**P**ARLIAMENT of the Republic of South Africa enacts as follows:—

**Insertion of sections 159A, 159B, 159C and 159D in Act 51 of 1977**

**1.** The following sections are hereby inserted in the Criminal Procedure Act, 1977 (hereinafter referred to as the principal Act), after section 159:

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**“Postponement of certain criminal proceedings through audiovisual link**

**159A.** (1) For purposes of this section and sections 159B, 159C and 159D, unless the context indicates otherwise—

- (a) **‘appropriate person’** means any court official or any other person at the court point and remote point who is required to be, or may be, present at the proceedings, including the presiding officer, the prosecutor, the accused person’s legal representative, any technical assistant, the clerk of the court, any witnesses, and members of the public who are entitled to be present;
- (b) **‘audio link’** means a live telephone link between the court point and the remote point which are both equipped with facilities which will enable audio communication between all appropriate persons at the court point and the remote point;
- (c) **‘audiovisual link’** means a live television link between the court point and the remote point which are both equipped with facilities which will enable all appropriate persons at the court point and the remote

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- point to follow the proceedings and see and hear all the appropriate persons;
- (d) **'court point'** means the courtroom or other place where the court having jurisdiction is sitting;
  - (e) **'correctional facility'** means a correctional facility as defined in the Correctional Services Act, 1998 (Act No. 111 of 1998), but does not include a police cell or lock-up; and
  - (f) **'remote point'** means the room or place at the designated correctional facility where the accused person appearing through audiovisual link is located.
- (2) An accused person—
- (a) who is over the age of 18 years;
  - (b) who is in custody in a correctional facility in respect of an offence;
  - (c) who has already appeared before a court;
  - (d) whose case has been postponed and who is in custody pending his or her trial; and
  - (e) who is required to appear or to be brought before a court in any subsequent proceedings (whether before, during or after the trial or conviction and sentence) for the purpose of—
    - (i) a further postponement of the case; or
    - (ii) consideration of release on bail in terms of section 60, 63, 63A, 307, 308A or 321, where the granting of bail is not opposed by the prosecutor or where the granting of bail does not require the leading of evidence,
- is not required to appear or to be brought physically before the court but may, subject to the provisions of this section, sections 159B, 159C and 159D, appear before court by audiovisual link and is deemed to be physically before court, unless the court directs, in the interests of justice, that he or she appears or be brought physically before it.
- (3) Any proceedings in terms of subsection (2) shall be regarded as having been held in the presence of the accused person if, during the proceedings, that person—
- (a) is held in custody in a correctional facility; and
  - (b) is able to follow the court proceedings and the court is able to see and hear the accused person by means of audiovisual link.
- (4) The remote point shall be regarded as being a part of the court.

### **Requirements for audiovisual appearance by accused person**

- 159B.** (1) An accused person appearing before a court by audiovisual link must do so from a place at which the requirements referred to in subsections (2) and (3) and section 159C are complied with.
- (2) The Minister may, subject to the provisions of this section, designate any correctional facility which has been suitably equipped as a place where proceedings in terms of section 159A can be held.
- (3) Both the court point and the remote point in the correctional facility designated in terms of subsection (2) must be equipped with facilities that, in accordance with any requirements prescribed by regulations and any directions of the court referred to in section 159C, allow—
- (a) private communication to take place between the accused person and any legal practitioner representing that person in the proceedings at the court point; and
  - (b) documents to be transmitted between both points by the persons referred to in paragraph (a)—
    - (i) at any time during the proceedings;
    - (ii) during any adjournment of the hearing in the proceedings referred to in paragraph (a); or
    - (iii) at any time on the day of a hearing, shortly before or after the hearing.

(4) The court must, at every appearance of an accused person in terms of section 159A, inquire into the physical and mental well-being of the accused person and for that purpose may, where necessary, direct that the facilities referred to in section 159C be used in such a manner which will enable the presiding officer to satisfy himself or herself as to the accused person's well-being as that presiding officer would be able to do if the accused person were physically before the court. 5

#### **Technical requirements for use of audiovisual link**

**159C.** (1) For the purposes of proceedings in terms of section 159A, both the court point and the remote point must be equipped with facilities that enable all appropriate persons— 10

- (a) at the court point to see and hear a person appearing before the court or making a submission or any other appropriate person at the remote point and to follow the proceedings; and
- (b) at the remote point to see and hear all appropriate persons at the court point and to follow the proceedings. 15

(2) (a) In the event of—

- (i) an interruption of an audiovisual link;
- (ii) an audiovisual link being of a poor quality which, in the opinion of the court, is not in the interests of justice to continue the proceedings by way of audiovisual link; or 20
- (iii) any of the facilities referred to in subsection (1) malfunctioning,

the court must, subject to paragraph (b), direct that the matter stand down and cause the accused person to be brought physically before the court on the day in question. 25

(b) If it is not reasonably practicable to bring the accused person to court on the day, as provided for in paragraph (a), the court must, prior to the expiry of the existing court order for the accused person's detention, postpone the proceedings in the absence of the accused person, to the next court day. 30

(3) The Minister may make any regulations necessary to give effect to the technical requirements referred to in subsection (1).

(4) A court may, in order to ensure a fair trial, give any directions in any case as it may deem necessary, which may not be inconsistent with any provision of this Act or any regulation made thereunder. 35

#### **Protection of communication between accused person and legal representative**

**159D.** Without limiting any other protection applying to it, a communication by audio link or audiovisual link, or a document transmitted between an accused person and his or her legal representative as provided for in section 159B(3), is confidential and inadmissible in any proceedings as if the communication took place or the document was produced while they were in the presence of each other." 40

#### **Substitution of section 271A of Act 51 of 1977, as inserted by section 12 of Act 5 of 1991 and amended by section 6 of Act 4 of 1992** 45

2. The following section is hereby substituted for section 271A of the principal Act:

#### **"Certain convictions fall away as previous convictions after expiration of 10 years**

**271A.** Where a court has convicted a person of— 50

- (a) [an] any offence [for] in respect of which [the punishment] a sentence [may be a period] of imprisonment for a period exceeding six months without the option of a fine, may be imposed [and] but—
- (i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or
  - (ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or
- (b) any [other] offence [than that for] in respect of which [the punishment] a sentence [may be a period] of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,
- that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period [such] the person has been convicted of an offence [for] in respect of which [the punishment] a sentence [may a period] of imprisonment for a period exceeding six months without the option of a fine, may be imposed.”.

### Insertion of sections 271B, 271C, 271D and 271E in Act 51 of 1977

3. The following sections are hereby inserted in the principal Act, after section 271A:

#### “Expungement of certain criminal records

- 271B.** (1) (a) Where a court has imposed any of the following sentences on a person convicted of an offence, the criminal record of that person, containing the conviction and sentence in question, must, subject to paragraph (b) and subsection (2) and section 271D, on the person’s written application, be expunged after a period of 10 years has elapsed after the date of conviction for that offence, unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine:
- (i) A sentence postponing the passing of sentence in terms of section 297(1)(a) where that person was discharged in terms of section 297(2), without the passing of sentence, or where that person was not called upon to appear before the court in terms of section 297(3);
  - (ii) a sentence discharging that person with a caution or reprimand in terms of section 297(1)(c);
  - (iii) a sentence in the form of a fine only, not exceeding R20 000;
  - (iv) a sentence of corporal punishment before corporal punishment was declared to be unconstitutional as a sentencing option;
  - (v) any sentence of imprisonment with the option of a fine, not exceeding R20 000;
  - (vi) any sentence of imprisonment which was suspended wholly;
  - (vii) a sentence of correctional supervision, referred to in section 276(1)(h) or (i); or
  - (viii) a sentence of periodical imprisonment, referred to in section 276(1)(c).
- (b) A person—
- (i) who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders, as provided for in section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); or
  - (ii) whose name has been included in the National Child Protection Register as a result of a conviction for an offence, as provided for in section 120(1)(b) of the Children’s Act, 2005 (Act No. 38 of 2005), does not qualify to have the criminal record in question expunged in terms of this section, unless his or her name has been removed from the National Register of Sex Offenders, as provided for in section 51 of the Criminal

Law (Sexual Offences and Related Matters) Amendment Act, 2007, or section 128 of the Children's Act, 2005, as the case may be.

(2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (1), issue a certificate of expungement, directing that the criminal record of that person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1).

(3) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (2) to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D.

**Expungement of certain criminal records under legislation enacted before the Constitution of the Republic of South Africa, 1993, took effect**

**271C.** (1) Where a court has convicted a person of any of the following offences, the criminal record, containing the conviction and sentence in question, of that person in respect of that offence must be expunged automatically by the Criminal Record Centre of the South African Police Service, as provided for in section 271D:

- (a) A contravention of section 1 of the Black Land Act, 1913 (Act No. 27 of 1913);
- (b) a contravention of section 12 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);
- (c) a contravention of section 5(1), read with section 5(2), or section 6, read with section 6(2), of the Blacks (Urban Areas) Consolidation Act, 1945 (Act No. 25 of 1945);
- (d) a contravention of section 8(1), read with section 8(3), of the Coloured Persons Settlement Act, 1946 (Act No. 7 of 1946);
- (e) a contravention of section 2 or 4 of the Prohibition of Mixed Marriages Act, 1949 (Act No. 55 of 1949);
- (f) a contravention of section 11 of the Internal Security Act, 1950 (Act No. 44 of 1950);
- (g) a contravention of section 10(6) and (7), 11(4), 14, 15, 16, 20(1), 28(7), 29(1) or 30 of the Black Building Workers Act, 1951 (Act No. 27 of 1951);
- (h) a contravention of section 15 of the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952 (Act No. 67 of 1952);
- (i) a contravention of section 2 of the Criminal Law Amendment Act, 1953 (Act No. 8 of 1953);
- (j) a contravention of section 2(2) of the Reservation of Separate Amenities Act, 1953 (Act No. 49 of 1953);
- (k) a contravention of section 16 of the Sexual Offences Act, 1957 (Act No. 23 of 1957);
- (l) a contravention of section 46 of the Group Areas Act, 1966 (Act No. 36 of 1966);
- (m) a contravention of section 2 or 3 of the Terrorism Act, 1967 (Act No. 83 of 1967); or
- (n) a contravention of section 2 read with section 4(1), of the Prohibition of Foreign Financing of Political Parties Act, 1968 (Act No. 51 of 1968).

(2) (a) Where a court has convicted a person of contravening any provision of—

- (i) an Act of Parliament or subordinate legislation made thereunder;
- (ii) an ordinance of a provincial council;
- (iii) a municipal by-law;
- (iv) a proclamation;
- (v) a decree; or
- (vi) any other enactment having the force of law,

other than those provisions referred to in subsection (1), which were enacted in the former Republic of South Africa, the former Republic of Transkei, Bophuthatswana, Ciskei or Venda, or in any former self-governing territory, as provided for in the Self-governing Territories Constitution Act, 1971 (Act No. 21 of 1971), before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), took effect, which created offences that were based on race or which created offences, which would not have been considered to be offences in an open and democratic society, based on human dignity, equality and freedom, under the constitutional dispensation after 27 April 1994, the criminal record, containing the conviction and sentence in question, of that person must, on the person's written application, subject to subsection (3) and section 271D, be expunged.

(b) Where the criminal record of a person referred to in subsection (1) has not been expunged automatically as provided for in that subsection, the criminal record of that person must, on his or her written application, subject to subsection (3) and section 271D, be expunged.

(3) The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (2)(a) or (b), issue a certificate of expungement, directing that the criminal record of the person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1) or subsection (2)(a), as the case may be.

(4) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (3) or (5)(b) to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D.

(5) (a) In the case of a dispute or any uncertainty as to whether an offence is an offence as referred to in subsection (1) or (2)(a) or not, the matter must be referred to the Minister for a decision.

(b) If the Minister decides that the offence is an offence as referred to in subsection (1) or (2)(a), he or she must issue a certificate of expungement, directing that the criminal record of the person be expunged.

### **Expungement of certain criminal records by Criminal Record Centre**

**271D.** (1) The head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a person if—

- (i) he or she is furnished with a certificate of expungement by the Director-General: Justice and Constitutional Development as provided for in section 271B(2) or section 271C(3) or by the Minister as provided for in section 271C(5); or
- (ii) that person qualifies for the automatic expungement of his or her criminal record as provided for in section 271C(1).

(2) The head of the Criminal Record Centre of the South African Police Service must, on the written request of a person who—

- (a) has applied to have his or her criminal record expunged in terms of section 271B or section 271C(2); or
- (b) qualifies to have his or her criminal record expunged automatically in terms of section 271C(1),

in writing, confirm that the criminal record in question has been expunged.

(3) Any person who—

- (a) without the authority of a certificate of expungement as provided for in section 271B, 271C or this section; and
- (b) intentionally or in a grossly negligent manner, expunges the criminal record of any person or confirms that a criminal record has been expunged as provided for in subsection (2), is guilty of an

offence and is liable on conviction to a fine or to imprisonment for a period |  
not exceeding 10 years or to both a fine and that imprisonment.

### Regulations

**271E.** The Minister—

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| (a) must make regulations regarding—   | 5  |
| (i) the form on which a person’s written application for the expungement of his or her criminal record must be made, as provided for in section 271B(1)(a) and section 271C(2)(a) and (b);   |    |
| (ii) the certificate of expungement to be issued by the Director-General: Justice and Constitutional Development or the Minister, as provided for in section 271B(2) and section 271C(3) and (5)(b); and   | 10 |
| (iii) the manner in which the Director-General must submit certificates of expungement that have been issued, to the head of the Criminal Record Centre of the South African Police Service, as provided for in section 271B(3) and section 271C(4); and | 15 |
| (b) may make regulations regarding any other matter which is necessary or expedient in order to achieve the objects of sections 271B, 271C and <u>271D.</u> ”  | 20 |

### Short title and commencement

- 4.** (1) This Act is called the Criminal Procedure Amendment Act, 2008, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.
- (2) Different dates may be fixed in respect of different areas in the Republic. 25