REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No's : 97/18, 98/18, 99/18 and 100/18

In the matter between:

THE STATE

and

LM AND 3 OTHERS	Child Offenders
DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MINISTER OF SOCIAL DEVELOPMENT	Third Respondent
MINISTER OF HEALTH	Fourth Respondent
MINISTER OF BASIC EDUCATION	Fifth Respondent
MINISTER OF POLICE	Sixth Respondent

and

CENTRE FOR CHILD LAW	*Amicus Curiae*

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 31 July 2020.

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This matter has a long history, which we summarise below. At its heart it raises issues of fundamental importance to the children to whom this review relates (who have already been released), and to all children similarly situated. The issues include: (i) the applicability to children of the 'crime' of contravening section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 ('*Drug Trafficking Act*'); and, (ii) the section's constitutionality. In this regard it needs to be emphasized that this case concerns the decriminalisation of the use and possession of cannabis by children and not the legalisation thereof.

[2] In this judgement we traverse the lawfulness of the use of processes and procedures under the South African Schools Act[1] which have been used to draw children into the criminal justice system; the constitutionality of any evidence obtained by the South African Police Services (and the National Prosecuting Authority); the interpretation by the prosecutors in exercising their statutory mandate of certain of the provisions of the Child Justice Act 75 of 2008, as amended ('*the Child Justice Act*') including the question of whether a child found to have committed an offence listed in 'Schedule 1' to the Child Justice Act may be ordered to undergo a period of compulsory residence as part of his/her diversion programme.

---

[1] South African Schools Act 84 of 1996, as amended ('*SASA*').

[3] It needs to be emphasized that neither this Court nor any of the respondents encourage nor condone the use or possession of cannabis by children. The selling or provision of cannabis to children remains an offence. The question is whether criminal-type penalties should be imposed on children when, given recent developments in our law relating to cannabis, adults are not visited with such penalties for the same conduct.

Facts underpinning the 5 February 2019 judgment

[4] The matter has its genesis in an urgent review concerning 4 children, which came before magistrates for diversions in terms of section 41 of the Child Justice Act. The 4 children were alleged to have committed offences referred to in Schedule 1 of the Child Justice Act[2]. They had all tested positive for cannabis which tests had been performed at school. They were accordingly alleged to have been in possession of cannabis which constitutes an offence in terms of Schedule 1 of the Child Justice Act.

[5] The children and their parents appeared before the magistrates who were all, individually and separately, handed draft court orders in terms of section 42(1) of the Child Justice Act, and agreements in terms of which the children and their parents agreed, amongst other things, to undergo diversion programmes ('*the diversion agreements'*). The diversion agreements were then made orders of court. In other instances, not the 4 matters serving before this court, the matters would be postponed for a period of time for the children to adhere to the terms of the diversion agreements. Where the children adhered to the conditions, such adherence would

[2] A schedule 1 offence, includes *inter alia* – theft (if the amount involved does not exceed R2 500); fraud, extortion, forgery and uttering (if the amount involved does not exceed R1 500); malicious injury to property (if the amount involved does not exceed R1 500); assault; perjury; contempt of court; blasphemy; *crimen iniuria*; defamation; trespass; public indecency; any offence under any law relating to the illicit possession of dependence producing drugs and where the quantity involved does not exceed R500 in value. (emphasis provided)

be noted on the record as *'completed program successfully. Enquiry closed.*' The 4 matters under consideration were matters where the children had allegedly not complied with the diversion agreements. The prosecutor sought to invoke more onerous diversion programmes as contemplated in terms of section 58(4)(c) of the Child Justice Act. The children were referred to the Department of Social Development where probation officers consulted with both the parents and the children and then made written recommendations. In all 4 matters these reports form part of the current records. In all 4 instances serving before us, the recommendations were compulsory residence at Walter Sisulu Youth Care Centre or Mogale Leseding Child and Youth Care Centre owned and operated by BOSASA ('*BOSASA*').

[6] In the 4 matters under consideration, the children and parents appeared before the magistrates who received the probation officers' reports. The prosecutor asked for the recommendation to be endorsed by the court. The children and parents were asked whether they consented to receipt of the reports as evidence and whether they consented to the requested order, all of which they did. The children were then referred to BOSASA or Walter Sisulu Youth Care Centre for an unspecified period by order of court. The matters were remanded for 6 months.

[7] On 5 February 2019, this court held that section 41 of the Child Justice Act, where the alleged offences fall within the ambit of Schedule 1 of the Child Justice Act, does not permit for compulsory residence as an option and further, that section 58(2) of the Child Justice Act had not been complied with. We set aside the orders granted in the Krugersdorp Magistrate's Court committing the 4 children to compulsory residence at BOSASA and Walter Sisulu Youth Care Centre, ordered their immediate release from such facilities and that the children were to appear for

enquiries in terms of section 58 of the Child Justice Act to be held after notice of the date of the hearings were given.

The 7 February 2019 addendum

[8] Mr Khan, the acting senior Magistrate of Krugersdorp ('*Mr Khan'*), drew attention to the fact that these 4 matters for review, emanate from informal diversions run as a special project by the Senior Prosecutor, Johannesburg ('*the drug child programme'* as it was unfortunately referred to by some). Mr Khan quite properly, raised the concern that there may be other children who are detained under this project under similar circumstances to those children forming the subject matter of the review. Short of inspecting all relevant files in Krugersdorp and other surrounding courts, he had no means of identifying these children. He accordingly approached this Court for an addendum to the previous order, which order would come to the assistance of such unidentified children. Prompted by Mr Khan's approach, and on 7 February 2019, we granted the following order:

> "[11] A rule nisi is hereby issued calling on all affected parties to show cause on 14 February 2019, why this order should not be made final:
>
> 11.1 BOSASA and Walter Sisulu Correctional Facilities are ordered to conduct an audit of all children referred to them in terms of section 41 of the Child Justice Act 75 of 2008, as amended ('*the CJA'*), by no later than 15 February 2019;
>
> 11.2 If the audit discloses that either BOSASA or Walter Sisulu Correctional Facilities are housing children referred to them in terms of section 41 of the CJA, such children are, without delay, to be brought before the Child Justice Magistrate who initially referred such child or, if such Magistrate is not available, a magistrate of similar standing, to conduct an enquiry in terms of section 58(2) of the CJA.
>
> 11.3 The orders granted in paragraphs 11.1 and 11.2 shall operate with immediate effect.

11.4 Mr Kahn is directed to place this order and the judgment handed down on 5 February 2019, before the Magistrate's Commission for distribution to all relevant parties.

11.5 Mr Kahn is directed to cause a copy of this order to be delivered to the operational heads of both BOSASA and Walter Sisulu Correctional Facilities."

Litigation history after the addendum

[9] On 8 February 2019, Mr Khan confirmed that he had commissioned a magistrate to deliver copies of the judgments to BOSASA and had faxed them to the Walter Sisulu Youth Care Centre.

[10] On 14 February 2019 the rule was extended to 6 March 2019 and the Director of Public Prosecutions ('*the DPP*') and any affected party were authorised to file written submissions and/or affidavits. The DPP was required to deliver copies of such order to the operational heads of both BOSASA and Walter Sisulu Youth Care Centre. Mr Khan was directed to place the order before the Magistrate's Commission for distribution to all relevant parties.

[11] The heads of argument filed on behalf of the DPP revealed that it contended that section 54(3) of the Child Justice Act should be interpreted to include compulsory residence or as it termed it - '*a temporary residence order'*. It prayed that the *rule nisi* not be made final and that this court reconsider its judgment[3] dated 5 February 2019 in respect of paragraphs [12] and [13] thereof being those dealing with compulsory residence. It further prayed that this court '*finds that Section 54(3) of the 'CJA' supplements and broadens the provisions and diversion options as set out in section 53 of the 'CJA' to allow for an individualization of diversion options, which*

[3] It is doubtful whether this court could 'overturn' its own decision – *Moyo v S* 2018 SACR 658 (GJ) - but in the event of this court having been persuaded that it had erred, other remedies were available to correct the decision.

might include temporary residence, which is appropriate and in the best interest of the child, even in the instance of Schedule 1 offences.'

[12] This prompted this Court's approach to the Centre for Child Law ('*the amicus'*). The DPP did not object to the *amicus'* admission and the rule was extended to 16 May 2019 to afford the *amicus* the opportunity to make submissions.

[13] Submissions from the *amicus* were received on 8 May 2019 and the DPP requested time to respond thereto. On 16 May 2019, the rule was extended to 20 June 2019 to accommodate this request. The DPP filed a response thereto on 5 June 2019 which submissions were withdrawn. Nothing turns on this withdrawal.

[14] On 20 June 2019, the Minister of Justice and Correctional Services was joined as a respondent to the proceedings as the *amicus* had raised, amongst other things, the constitutionality of section 4(b) of the Drug Trafficking Act *viz-a-vis* children and the Minister was invited to file written submissions on that issue and any other matter that had arisen from the submissions filed.

[15] Para 11.1 of the *rule nisi* was deleted in its entirety and replaced with the following:

> "11.1 BOSASA and Walter Sisulu Correctional Facilities are ordered to conduct an audit of all children referred to them in terms of section 41 and/or 54(3) and/or 58 of the Child Justice Act 75 of 2008 ('*CJA*') and/or for the possession of cannabis in terms of which they were diverted to undergo compulsory residence at either BOSASA or Walter Sisulu Correctional Facility."

[16] This occurred because, up and until that stage, the Court had been informed that there were no other children (other than the 4 originally identified) who had allegedly committed Schedule 1 offences and who had been diverted to undergo compulsory residence. It became apparent that the wording of the original order might have been interpreted restrictively and paragraph 11.1 was accordingly

deleted in its entirety and replaced to ensure proper compliance with the spirit of the order.

[17] As a result of this amendment, Ms Mogale, representing Walter Sisulu Youth Care Centre, had, during the month of June 2019, caused 8 more children falling within the ambit of the order to be taken to Mr Khan. Such children had been ordered to undergo compulsory residence contrary to the 5 February 2019 order.

[18] The rule was extended to 19 September 2019 to allow the Minister of Justice and Correctional Services to file submissions.

[19] On 17 September 2019, the DPP filed heads of argument in which it conceded that compulsory residence was not competent and that the judgment of 5 February 2019 had correctly summarised the legal position. Prior to this concession, the DPP had sought to distinguish between temporary and compulsory residence but after enquiries were made by Mr Badenhorst, counsel representing the DPP, it was established that the relevant Youth Care Centres did not cater for temporary voluntary residence but only for compulsory residence. The DPP conceded that any less restrictive means outside the criminal justice system would be in the best interests of a child using dependence producing substances and the position adopted until then in respect of the interpretation of the relevant provisions, was abandoned.

[20] The Minister of Justice and Correctional Services filed its submissions late (which was condoned), but in his submissions had requested the joinder of the Minister of Social Development, the Minister of Health, the Minister of Basic Education and the Minister of Police (collectively '*the other Ministers*'). The DPP supported this request. The rule was accordingly yet again extended to 18 March

2020 to afford all an opportunity to file affidavits or submissions. Para 11.1A was added to the order:

> 11.1A The respective Heads and/or Acting Head of the BOSASA Youth Development Centre and Walter Sisulu Child and Youth Care Centre are to appear on 18 March 2020, in person, to present the audit to the court and provide all supporting documents for the children so identified.
>
> 3. The Office Manager of the Krugersdorp Magistrates' Court is to provide certified copies of all registers, charge sheets and documentation relevant to all children, referred to BOSASA Youth Development Centre and Walter Sisulu Child and Youth Centre under the Drug Child Program, to the Director of Public Prosecutions, Johannesburg within 20 days of date of receipt of this order.

[21] On 18 March 2020, the other Ministers sought further time within which to file their submissions and/or affidavits which indulgence was granted.

[22] By virtue of the absence of information forthcoming from BOSASA and Walter Sisulu Youth Care Centres, the relevant paragraphs in the rule were amended to read:

> "11.1 Mogale Child and Youth Care Centre and Walter Sisulu Child and Youth Care Centre are ordered to conduct an audit of all children referred to them in terms of section 41 and/or 54(3) and/or 58 of the Child Justice Act 75 of 2008 ("CJA") and/or for the possession of cannabis in terms of which they were diverted to undergo compulsory residence at either MCYCC or Walter Sisulu Correctional Facility.
>
> 11.1A The respective Heads and/or Acting Head of Mogale Child and Youth Care Centre and Walter Sisulu Child and Youth Care Centre are to appear on 2 June 2020, in person, to present the audit to the court and provide all supporting documents for the children so identified.
>
> 11.1B The respective Heads and/or Acting Head of Mogale Child and Youth Care Centre and Walter Sisulu Child and Youth Care Centre must provide the audit information to the Director of Public Prosecutions, Johannesburg within 30 days of date of receipt of this order.

11.1C The respective Heads and/or Acting Head of the Mogale Child and Youth Care Centre and Walter Sisulu Child and Youth Care Centre must with immediate effect release all children that were ordered to undergo compulsory residence in terms of section 41 of the CJA where the charges fell within the ambit of Schedule 1 of the CJA.

11.1D The respective Heads or Acting Head of the Mogale Child and Youth Care Centre and Walter Sisulu Child and Youth Care Centre provide a list of all the children released in terms of paragraph 11.1C containing the names of children and the dates on which they were released.

11.1E The respective Heads or Acting Head of the Mogale Child and Youth Care Centre and Walter Sisulu Child andYouth Care Centre are interdicted and restrained pending finalisation of this matter from receiving any further children referred to them in terms of section 41 of the CJA where the charges fell within the ambit of Schedule 1 of the CJA.

3. The Director of Public Prosecution, Johannesburg shall file with the Court a summary from the documents obtained from the Office Manager of the Krugersdorp Magistrates' Court relevant to all children referred to Mogale Child and Youth Care Centre and Walter Sisulu Child and Youth Care Centre under the Drug Child Program, to the Director of Public Prosecutions, Johannesburg within 30 days. The summary must include the audit information received from Mogale Child Youth Care Centre and Walter Sisulu Child and Youth Care Centre."

[23] Mr Badenhorst, representing the DPP, advised this Court that children alleged to have committed Schedule 1 offences were still being referred to the relevant Youth Care Centres despite the judgment having been given to the Magistrate's Commission that compulsory residence for Schedule 1 offences was not competent. This revelation necessitated the interdict formulated in paragraph 11.1E. The Court requested Mr Badenhorst to contact Mr Barnard, a magistrate serving on the Magistrate's Commission, and to forward him the judgment of 5 February 2019 together with the addendum dated 7 February 2019 and the order of 18 March 2020. This was duly done.

[24] The rule was extended to 2 June 2020. The results of the audit by BOSASA and Walter Sisulu Youth Care Centres as well as paragraph 3 of the order are discussed further on in this judgment.

Section 4(b) of the Drug Trafficking Act

[25] This court, in its judgment dated 5 February 2019, made the following observation:

> "… The 4 children involved appear, from the probation officer's report, to have been tested at school and tested positively for dagga [cannabis]. In view of the decision of *Minister of Justice and Constitutional Development … v Prince* …, CCT 108/17, decided on 18 September 2018, the question arises whether they committed an offence at all, and whether these proceedings were appropriate, at all. … ."

[26] This raised two distinct issues: First, is it still a criminal offence for children to use or be found in possession of cannabis? Second, is it permissible for a child to be '*referred*' to the criminal justice system after failing a drug test administered by his/her school?

[27] All the Ministers joined, the DPP and the *amicus* were in agreement that section 4(b) of the Drug Trafficking Act, in so far as it applies to children, is unconstitutional. The Minister of Justice and Correctional Services advanced reasons for contending so and the other Ministers, although approaching the problem from their unique and different perspectives, supported his views.

[28] All the Ministers emphasised in the written submissions and at the hearing (which views were echoed by the DPP and the *amicus*) that they do not condone the use of cannabis by children but that a child-oriented approach should be followed to deal with drug use and abuse which should include drug awareness and educational programs, treatment and rehabilitation. They were in agreement that there are other measures available to deal with children who use or who are addicted to cannabis

and which will not expose them to the penal consequences of the criminal justice system but will achieve the same objective of protecting children from drug use and abuse.

[29] The Minister of Police's position is that he does not support or encourage the use/and or possession of cannabis by children, that it is a gateway to "hardcore" drugs, that drug use (cannabis included) often leads to crime and that drug use (including cannabis) is harmful to the health and well-being of children.

[30] It was accepted and indeed emphasised that the selling and provision of cannabis to minors and the use and possession in public, is and will continue to be a criminal offence.

[31] It is important to emphasise that this case does not engage with questions like whether children should use or possess cannabis or whether the use of cannabis is good or bad for the health and social well-being of children. The central question in this case relating to the use or possession of cannabis by children is a narrow one and deals with the constitutional validity of section 4(b) of the Drug Trafficking Act in respect of the use and possession of cannabis by children.

[32] Once again, this case is not about the legalisation of cannabis for children. It is rather about decriminalising its use and/or possession so that other, more appropriate assistance may be rendered to children.

***Prince* and the crime of possession (or use) of cannabis: A legal quagmire for children**

[33] The Constitutional Court, in the matter of *Prince*,[4] provisionally decriminalised the use or possession of cannabis by an adult in private and for his/her own

---

[4] *Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* 2018 (6) SA 393 (CC) (*"Prince"*).

consumption;[5] and the cultivation of cannabis by an adult in private and for his/her own consumption.[6]

[34] The judgment and order of the Constitutional Court expressly related to adults only.[7] It did not engage at all with, debate, or otherwise rule on the constitutionality of the criminalisation of cannabis-related offences *viz-a-vis* children. This was to be expected. It is so that *"*[*a*] *court may not ordinarily raise and decide a constitutional issue, in abstract, which does not arise on the facts of the case in which the issue is sought to be raised"*.[8] The facts, in that particular matter, related exclusively to adults.

[35] The problem in doing so, however, is that the judgment (and consequent order) of the Constitutional Court leaves children in an invidious position: those who use and/or possess cannabis are treated as criminals and criminally prosecuted for this behaviour whereas their adult counterparts are not. The use and/or possession of cannabis, is in fact, now considered to be socially, morally, and legally acceptable for this class of people.

[36] The problem with this situation is that the criminality attached to the conduct of possessing and/or using and/or cultivating cannabis is no longer based on deviant behaviours that are considered to violate prevailing social norms but rather based on age and timing. This is constitutionally indefensible.

---

5 *Prince* para 129(10) read with 129(12) and (13).

6 *Prince* para 129(11) read with 129(12) and (13).

7 The Constitutional Court in this regard, and for the avoidance of doubt, makes this abundantly clear at para 108 where it states:

> *"The effect of the reading-in adopted above is that whenever the impugned provisions prohibit the use or possession or cultivation of cannabis, an exception is created with the result that the use or possession of cannabis in private or cultivation of cannabis in a private place for personal consumption in private is no longer a criminal offence. All the time this is so only in respect of an adult and not a child."* (emphasis provided)

8 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC) at para 42.

Possession and/or use of cannabis: A "status offence" in respect of children

[37] A status offence is an offence that *'criminalises actions for only certain groups of people, most commonly because of their religion, sexuality or age'*. In apartheid South Africa, several such offences existed, these included: the failure of Black South African's to carry a reference book whenever travelling outside of the designated homelands created by the apartheid state;[9] the prohibition of interracial marriages;[10] and the use of 'European' amenities by 'Non-Europeans'.[11]

[38] The use of status offences is not, however, limited to promoting racial segregation. They are also frequently used to render activities that would otherwise be lawful for adults, unlawful (and criminal) for children. A case in point, the criminalisation of possession and/or use of cannabis (following the *Prince* decision) by children under the Drug Trafficking Act. These types of offences, regardless of content or apparent purpose, are internationally and regionally condemned.

The International and Regional Legal Standard

[39] Section 39(1)(b) of the Constitution requires that every court must consider international law when interpreting the Bill of Rights and section 233 states that, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

---

9 The offences were contained in the Native Urban Areas Consolidation Act 25 of 1945.

10 Prohibition of Mixed Marriages Act 55 of 1949.

11 Reservation of Separate Amenities Act 49 of 1953.

[40] It is accepted, at the level of international law, that status offences violate several fundamental rights of children.[12] And as a consequence, they must be abolished.

[41] The protections against non-discrimination and the guarantee of equality are in line with, and give effect to, South Africa's obligations under international and regional law. In respect of international law, South Africa has ratified the International Covenant on Civil and Political Rights, 1966 ('*the ICCPR*') and the United Nations Convention on the Rights of the Child, 1989. In the region, the relevant instruments are the African Charter on Human and Peoples' Rights, 1981 ('*the African Charter*') and the African Charter on the Rights and Welfare of the African Child, 1990 ('*the ACRWAC*').

[42] The United Nations Guidelines on the Prevention of Juvenile Delinquency provides, in this regard, as follows:

> "In order to prevent further stigmatisation, victimisation and criminalisation of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalised if committed by an adult is not considered an offence and not penalised if committed by a young person."[13]

[43] The United Nations Convention on the Rights of the Child has similarly repeated this call for the abolition of status offences. In its General Comment 10 it makes the following pertinent remarks:

> "It is quite common that criminal codes contain provisions criminalising behavioural problems of children, such as vagrancy, truancy, runaways and other acts, which often are the result of psychological or socio-economic problems. … The

---

[12] The rights violated include: art. 2, 3, 4, 16, 37 and 40 of the United Nations Convention on the Rights of the Child. (United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, pg. 3).

[13] *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, Resolution 45/112, Adopted by the General Assembly, 14 December 1990.

> Committee recommends that the State parties abolish the provisions on status offences in order to establish equal treatment under the law for children and adults."[14]

[44] The Convention has not been the only body to call for the complete abolishment of status offences. The United Nations Human Rights Council similarly reiterated this stance. It resolved the following:

> "[The Council] [c]alls upon States to enact or review legislation to ensure that any conduct not considered a criminal offence or not penalised if committed by an adult is also not considered a criminal offence and not penalised if committed by a child, in order to prevent the child's stigmatisation, victimisation and criminalisation".[15]

[45] The call to abolish status offences is not only accepted at the level of international law; closer to home regional bodies have similarly formed the view that the status offences violate the rights of children and consequently must be abolished.[16] In this regard: The "*Guidelines on Action for Children in the Justice System in Africa*", which were officially endorsed by the African Committee of Experts on the Rights and Welfare of the Child on 11 July 2012, provide that:

> "No child shall be subject to arbitrary arrest or detention. Offences which can be committed only by children ('status offences') shall be expunged from the statutes."[17]

---

[14] United Nations Committee on the Rights of the Child, *General Comment No. 24 (201x), replacing General Comment No. 10 (2007): Children's rights in juvenile justice*, 25 April 2007, CRC/C/GC/24.

[15] United Nations Human Rights Council, *Human rights in the administration of justice, including juvenile justice*, resolution 24/12 adopted by the Human Rights Council, 8 October 2013, A/HRC/RES/24/12.

[16] The rights violated include: art. 3, 4, 10 and 17. (Organisation of African Unity, *African Charter on the Rights and Welfare of the Child,* 11 July 1990, CAB/LEG/24.9/49 (1990)).

[17] *Guidelines on Action for Children in the Justice System in Africa*, Art. 47, African Child Policy Forum (2011).

[46] Similarly, at the Second Meeting of the Specialised Technical Committee on Health, Population and Drug Control the following recommendations were made:

> "Member States to respect Justice for Children: by decriminalising status offences and minor drug offences for children and youth; introducing alternatives to prosecution and imprisonment for children and youth."[18]

[47] In its recent report on status offences, the Child Rights International Network ('*CRIN*') makes several important observations that underscores the calls by international and regional bodies to abolish status offences. The report says the following:

> *"*Status offences criminalise actions for only certain groups of people, most commonly because of their religion, sexuality or age. Curfews, truancy laws and vagrancy offences can penalise children just for being in public, while "disobedience" laws can transform activities that would be perfectly lawful for an adult into a criminal offence.
>
> Even where a status offence does not explicitly single out children, children will often be disproportionately affected and those children with the lowest levels of resources and the least available support from home or family environments will be the most affected. Because police are given great discretion to question and investigate children's activities, especially when they are without adult supervision, disadvantaged and street children are targeted because they are forced to spend more time in public spaces and face entrenched cultural biases that equate poverty with criminality.
>
> Most importantly, regardless of their backgrounds or situations at home, status offences are a violation of all children's rights. They violate children's rights because they target what adults consider to be problematic behaviour in children but

[18] *Youth, Health and Development: Overcoming the Challenges towards Harnessing the Demographic Dividend*, Item 15(iv), Report of the Ministers' Meeting (2017), STC-HPDC-2/MIN/RPT.

> acceptable once above the age of majority. Thus, limits are placed on children's behaviour that are not tolerated by adults."[19]

[48] At the level of international and regional law, it is clear that status offences must be abolished. The import of this is that we are obliged to view these offences through the prism of abolition when evaluating their constitutionality.[20]

Status Offences and the Constitution

[49] In much the same way as status offences violate the rights of children at the level of international and regional law, so too do status offences (and in this regard the criminalisation of cannabis-related offences specifically) violate the constitutional rights of children in the South African context.

[50] Children are the individual bearers of rights. This was made plain in *Teddy Bear Clinic for Abused Children* where Khampepe J reaffirmed that: -

> "… children enjoy each of the fundamental rights in the Constitution that are granted to 'everyone' as individual bearers of human rights. This approach is consistent with the constitutional text and gives effect to the express distinction that the Bill of Rights makes between granting rights to 'everyone' on the one hand, and to adults only on the other hand. For instance, the right to vote is expressly limited to adult citizens in terms of section 19(3) of the Constitution, whereas there is no limitation in relation to the rights to dignity and privacy [and equality]." [21](footnotes omitted)

[51] In addition, children also enjoy specific rights that are independent of the other rights they enjoy.[22] These include the right to family care or parental care, or to

---

[19] *Discrimination and Disenfranchisement: A Global Report on Status Offences,* Child Rights International Network, 3rd Ed, pg. 5.

[20] See s 39(1)(b) of the Constitution. See also, ss 232-3 of the Constitution.

[21] *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*, 2013 (12) BCLR 1429 (CC)

[22] See generally, s 28(1) of the Constitution.

appropriate alternative care when removed from the family environment;[23] to be protected from maltreatment, neglect, abuse or degradation;[24] not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time.[25]

[52] A child, moreover, enjoys the right to have his/her best interests considered of paramount importance.[26] The import and nature of this right was described in *Fitzpatrick* as follows:

> *"*Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to those rights enumerated in section 28(1) and section 28(2) [and] must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)."[27]

[53] *Skelton* correctly goes onto add that: -

> "… As much as s[ection] 28(2) is a self-standing right, it also appears alongside and strengthens other rights. Thus the Constitutional Court had drawn best interests of the child into cases pertaining to the right to family or parental care; international child abduction; child pornography; the right to housing and shelter and eviction; adoption of children by unmarried fathers, by same-sex couples and by foreign couples; inheritance under customary law; the right to access health care in the form of preventive anti-retroviral medicines; the right to social assistance; the right of children to privacy and dignity; the testimony of child victims and witnesses; the right not to be evicted from a public school on private property without consideration

---

[23] See s 28(1)(b) of the Constitution.

[24] S 28(1)(d) of the Constitution.

[25] S 28(1)(g) of the Constitution.

[26] S 28(2) of the Constitution.

[27] *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at para 17. See also, *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC) at para 35.

> of best interests; the right of children to have their removal from families reviewed by a court; the right children not to be treated as criminals for engaging in consensual sexual activity; the right of a child sex offender not to be automatically placed on the sex offenders register; and the rights of children not to be detained except as a measure of last resort."[28] (footnotes omitted)

[54] It follows then that when considering whether status offences, generally and the criminalisation of cannabis-related offences specifically, are unconstitutional this court must interpret the affected rights expansively and through the rubric of 'best interests'.[29]

[55] Several children's rights are directly violated by the criminalisation of cannabis-related offences on account of the (alleged) offenders age.

Equality

[56] The criminalisation of the use and possession of cannabis violates a child's right to equality. Section 9 of the Constitution provides, in relevant part, as follows:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> …

---

[28] Skelton A "Constitutional Protection of Children's Rights" in Boezaart T (ed), *Child Law in South Africa*, 2nd Ed (2017) at 346-7.

[29] *Teddy Bear Clinic for Abused Children* (supra note 21) at para [41].

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."[30]

[57] In *Harksen* the Constitutional Court set out a three-stage test for establishing whether the right to protection from unfair discrimination has been violated.[31] In this regard it held:

"… the stages of enquiry which become necessary where an attack is made on a provision in reliance of section 8 of the interim Constitution … [are]:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(b)(i) First, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness is presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause."[32]

---

[30] S 9 of the Constitution.

[31] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC).

[32] *Harksen* (*supra* n 31) at para [50].

[58] Applying the test enunciated by the court to the matter at hand, it is plain that section 4(b) of the Drug Trafficking Act unfairly discriminates against a child on the basis of age. First, the provision singles out, following the reading-in by the Constitutional Court in *Prince*, children. There can be no underlying purpose for doing so. It must be remembered that the crime was created in response to society's intolerance for that type of behaviour. The underlying rationale (or societal norm) is no longer, and consequently there can be no legitimate rational purpose. Second, there can be no debate that it amounts to discrimination and, moreover, that it amounts to unfair discrimination on a prohibited ground. The provision, as it stands, criminalises children simply for being children.

[59] Although there is a legitimate governmental purpose to protect children from the use and abuse of substances that are harmful to them, putting them through the criminal justice system as far as the use or abuse of cannabis is concerned, is not an effective and appropriate manner to achieve this purpose. The Ministers conceded that whereas the continued limitation of excluding children from the reaches of the *Prince* judgment would have a purpose ie to protect children against drug use which may lead to drug abuse, the means currently employed are not rationally connected to the purpose. The Ministers conceded that the discrimination is unfair because it does not meet the limitations test set out in section 36(1) in that there are less restrictive means available to achieve the purpose such as the Prevention of and Treatment for Substance Abuse Act, 70 of 2008 ('***the PTSAA***').

[60] It follows then that the provision falls foul of the equality provision and should, for this reason alone, be declared unconstitutional.

Best Interest principle

[61] The criminalisation of the use and/or possession of cannabis violates the *"best-interest"* or *"paramountcy"* principle.[33] The imposition of criminal liability may, at worst, lead to imprisonment, and, at best to diversion. There can be no debate that exposure to the criminal justice system, generally, is deeply traumatising for children. In respect of arrest, our Constitutional Court has held:

> "It is trite that an arrest is an invasive curtailment of a person's freedom. Under any circumstances an arrest is a traumatising event. Its impact and consequences on children may be long-lasting if not permanent. The need for our society to be sensitive to a child's inherent vulnerability is behind section 28(2) of the Constitution."[34]

[62] The same sentiments apply in respect of both the arraignment and the 'punishment' (especially when this involves some form of detention).

[63] It is further salutary to have regard to the decision of *M*, where the Constitutional Court held that –

> "… foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma".[35]

[64] It follows then that criminalising children for cannabis related offences, even under the guise of prevention and/or deterrence, will have a profound disproportionate negative effect on them. The criminalisation, moreover, is a form of stigmatisation which is both degrading and invasive. Children accused of such offences risk being labelled and excluded by their peers in circumstances where as a society, we have accepted this type of behaviour.

---

[33] S 28(2) of the Constitution which provides that *"[a] child's best interests are of paramount importance in every matter concerning the child"*.

[34] *Raduvha v Minister of Safety and Security* 2016 (2) SACR 540 (CC) at para [57].

[35] *S v M* 2008 (3) SA 232 (CC) at para [19].

[65] It is worth always remembering that the criminalisation has the net-effect of treating children more severely than an adult would be treated in identical circumstances.[36]

[66] We conclude that the criminalisation of these offences violates the best interests of the child.

Right not to be detained except as a measure of last resort

[67] Section 28(1)(g) guarantees the right of every child not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time and has the right to be kept separately from detained persons over the age of 18 years and treated in a manner, and kept in conditions, that take account of the child's age. The arrest would – as the African Union has noted – deprive them of their freedom in circumstances that is arbitrary and capricious.

Is the limitation justifiable?

[68] It being established that the criminalisation of cannabis-related offences *viz-a-vis* children limits the rights of children, the next question is whether such a limitation is justifiable. In this regard it is worthwhile to note that:

> "A limitation will not be proportional if other, less restrictive means could be used to achieve the same ends. And if it is disproportionate, it is unlikely that the limitation will meet the standard set by the Constitution, for section 36 'does not permit a sledgehammer to be used to crack a nut'. A provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused. However, this court has held that the state ought to be given a margin of appreciation in relation to whether there are less restrictive means available to achieve the stated purpose."[37] (footnotes omitted)

---

[36] See generally, s 3(b) of the Child Justice Act.

[37] *Teddy Bear Clinic* (*supra* n 21) at para [95].

[69] There are several alternative *"less restrictive means"* available to prevent children from using cannabis to the extent that it is harmful to them. The PTSAA and the Children's Act, 38 of 2005 ('*the CA*'), provide for measures to deal with drug users outside the criminal justice system. Both the CA[38] and the PTSAA[39] provide for prevention, early intervention, treatment and rehabilitation processes and mechanisms to deal with children who are in need of treatment for addiction to a dependence-producing substance, in appropriate circumstances.

[70] The objects of the Child Justice Act in terms of section 2(a) is to protect the rights of children as provided for in the Constitution. Section 2(c) provides for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities and encourage these children to become law-abiding and productive adults. Section 2(d) prevents children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion.

[71] The PTSAA identifies key Departments that must collaborate or work in partnership with the Department of Social Development to address substance abuse. Each of these Departments is represented in the Central Drug Authority which coordinates activities and programmes aimed at addressing substance abuse. Each

---

[38] Section 53 of the CA affords *locus standi* to anyone acting in the best interests of a child to approach the court who may adjudicate any matter involving the protection and well-being of a child. A child in need of care and protection includes a child that is addicted to a dependence producing substance and who is without any support to obtain treatment for such dependency [section 150(1)(d)]. Section 156(1)(j) provides that if the court finds that the child is in need of care and protection, the court may make an order that is in the best interests of the child, which may include an order that the child be admitted as an inpatient or outpatient to an appropriate facility if the court finds that the child is in need of treatment for addiction to a dependence producing substance. Section 156(4) provides that even if the court were to find that the child was not in need of care and protection, it could make such an order if satisfied of the need for treatment.

[39] See, amongst other sections, ss28, 32, 33 and 35.

of these Departments is mandated to develop and implement a sector drug master plan based on activities that are within the Departments' mandate. In this regard, the Department of Health has a Health Sector Drug Master Plan. The current plan that is being implemented by all nine Provincial Departments of Health was adopted on 7 December 2018.

[72] The processes and mechanisms provided for in the CA and the PTSAA are available to all children both within and outside the child justice system.

[73] Clearly the existing prevention, early intervention, treatment and rehabilitation processes provided for in the CA and the PTSAA can and should be strengthened through consultation with the Departments of Basic Education, Health and Social Development and South African Police Services. These Ministers were accordingly invited to assist the court to consider this issue.

[74] The Minister of Basic Education explained in much detail the national strategy for the prevention and management of alcohol and drug use amongst learners in schools which strategy offers the framework for the development of, and implementation of, plans at provincial, district and school levels. It is part of a national inter-departmental co-ordinated response to alcohol and drug abuse in South Africa and in all sectors of the society. It is also in line with the National Drug Masterplan that provides the blueprint and vision for the country's approach to alcohol and drugs. It is part of the Care and Support for Teaching and Learning ('*CSTL*') programme which is a SADC initiative, aimed at realising the education rights of all children including the most vulnerable, through schools becoming inclusive centres of learning, care and support. The strategy sets out, amongst other things, the background; determinants of substance abuse; the consequences of substance abuse; the policy mandate; the applicable principles which are informed

by international and national interventions and guidelines; and the overall strategy which outlines the role and responsibilities of the different levels of government as well as important stakeholders.

[75] A Guide has been developed as part of the implementation of the CSTL programme and the National Strategy for the Prevention and Management of Alcohol and Drug Use amongst learners in school. It recognises that drug use is a significant problem in South African schools and a contributing factor to violence and crime that also affects the entire school community and can lead to academic difficulties, absenteeism and drop-out from schooling. Drug testing has been identified as an important part of ensuring the welfare of learners at schools and to support the safety and emotional and psychological well-being of learners. The Minister explained that it is, however, a measure of last resort for helping children who appear to be struggling with drug use and abuse.

[76] The Department of Social Development is the lead department in the fight against substance abuse. It provides both technical and financial support to the Central Drug Authority, as well as providing funding to community-based organisations that are involved in the fight against substance abuse. The Department discourages the use of Youth Care Centres for children who are dependent on substances. It holds the view that Youth Care Centres are intended for children who are in conflict with the law, and not children who are dependent on substances. The overall approach of the Department is that substance abuse requires treatment and rehabilitation, and not criminalisation.

[77] The Minister of Basic Education stated that there is no evidence suggesting that the criminal justice system is the correct deterrent for drug use. Exposure to the criminal justice system may be one of the many ways through which the children are

drawn to drug use and such exposure is quite prevalent within the criminal justice system such as prisons.

[78] Our conclusion is that the constitutional question arises squarely from the facts of the matter.[40] That, and considering the stance adopted by the DPP, it would be in the interests of justice for this court to decide the issue.[41] The *amicus* as well as all Ministers were *ad idem* that this case is not directed at allowing children to consume cannabis (not legalisation) rather it is that criminalisation for the sake of prevention is not the answer to this issue.

[79] The PTSAA has created a carefully calibrated system to deal with the prevalence of drugs in our communities. It treats the behaviours not as criminal but through the lens of public health. It, in so doing, recognises that this is the most appropriate way to deal with this issue.

The Medicines and Related Substances Control Act 101 of 1965 (‘*the Medicines Act*’)

[80] The Medicines Act criminalises the use and/or possession of certain substances.[42] Historically cannabis was listed as a Schedule 7 substance, but since *Prince*, is no longer mentioned. It would follow then, and at least insofar as the provisions that were discussed and evaluated in *Prince* are concerned, that they are no longer of any consequence as they no longer criminalise the possession and/or use of cannabis by anyone.

[81] Section 22A(16) still criminalises the possession of cannabis without the possession of a prescription issued by an authorised prescriber. It provides:

---

[40] *Director of Public Prosecution, Transvaal* (*supra* n 84) at para [33].

[41] See *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC) regarding the inevitable issue of dealing with a matter *per se* in the abstract and the desirability to deal with it promptly.

[42] Section 22A(9) read with sections 29(k) and 30(1).

> "Notwithstanding anything to the contrary contained in this section –
>
> (a) any person may possess a Schedule 0, Schedule 1 or Schedule 2 substance for medicinal purposes;
>
> (b) <u>any person may possess a Schedule 3, Schedule 4, Schedule 5 or Schedule 6 substance if he or she is in possession of a prescription issued by an authorised prescriber</u>;
>
> …".
>
> (emphasis added)

[82] Schedule 6, in turn, lists cannabis or more particularly:

> "(-)-transdelta-9-tetrahydrocannabinol), except:
>
> (a) in raw plant material and processed products manufactured from such material, intended for industrial purposes and not for human or animal ingestion, containing 0,2 % percent or less of tetrahydrocannabinol;
>
> (b) processed products made from cannabis containing 0,001 percent or less of tetrahydrocannabinol; or
>
> (c) when raw plant material is cultivated, possessed, and consumed by an adult, in private for personal consumption."

[83] The question arose whether this court should similarly deal with it in light of the concessions made by the DPP and the various Ministers.

[84] It is common cause that none of the children, who form the subject matter of this litigation, were charged with (or diverted for) contravening any of the provisions of the Medicines Act. It consequently was not *per se* an issue that was raised and/or dealt with by any of the parties (or the *amicus*).

[85] That, however, does not mean that the court cannot *mero motu* raise it. In this regard, the decision of the Constitutional Court in the matter of *Director of Public Prosecutions, Transvaal*[43] is instructive:

> "The High Court correctly identified the circumstances in which a court may, of its own accord, raise and decide a constitutional issue. There are two situations in which a court may, of its own accord, raise and decide a constitutional issue. The first is where it is necessary for the purpose of disposing of the case before it, and the second is where it is otherwise necessary in the interests of justice to do so. It will be necessary for a court to raise a constitutional issue where the case cannot be disposed of without the constitutional issue being decided. And it will ordinarily be in the interests of justice for a court to raise, of its own accord, a constitutional issue where there are compelling reasons that this should be done. The first of these instances does not give rise to any problem. It is the second that requires some attention.
>
> …
>
> It must be stressed that the constitutional issue sought to be raised must arise on the facts of the case before the court. In addition, the parties must be afforded an adequate opportunity to deal with the issue. A court may not ordinarily raise and decide a constitutional issue, in abstract, which does not arise on the facts of the case in which the issue is sought to be raised. A court may therefore, of its own accord, raise and decide a constitutional issue where (a) the constitutional question arises on the facts; and (b) a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so."[44] (own emphasis provided)

[86] It would, in our view, have been in the interests of justice to deal with the issue despite it not being squarely raised by any of the parties. We say so as a consequence of, at least, the following: central to this matter is the question of whether (or not) children should be prosecuted for cannabis related offences. The most obvious source for this offence is the Drug Trafficking Act. It is for this reason

---

[43] *Director of Public Prosecutions, Transvaal* (*supra* n 8).

[44] Ibid at [39] and [42].

that this statute featured so heavily. It would, however, make no logical sense to find it not to be appropriate but then leave a provision in the law that nevertheless permits such prosecution; the well-made concession by the government respondents that criminalisation is not the answer to dealing with children caught either using or in possession of cannabis finds equal application to criminalisation under the Medicines Act; and the best interests of children who may come into conflict with the provision require a determination of the issue. In this regard, the following remarks of Cameron J in *Centre for Child Law* are apposite:

> "Before considering the issues, it is convenient to mention at the outset that in this Court the Minister did not persist with his challenge to the Centre's legal standing, or with the contention that the issues were purely academic. That approach was in my view correct. Although the Centre did not act on behalf of (or join) any particular child sentenced under the statute as amended, its provisions are clearly intended to have immediate effect on its promulgation. So the prospect of children being sentenced under the challenged provisions was immediate, and the issue anything but abstract or academic. The Centre's stated focus is children's rights, and in this case it has standing to protect them. It was thus entitled to take up the cudgels. To have required the Centre to augment its standing by waiting for a child to be sentenced under the new provisions would, in my view, have been an exercise in needless formalism.
>
> This Court has in any event previously indicated that it may be incumbent on it to deal with the substance of a dispute about the constitutionality of legislation a High Court has declared unconstitutional, even in the absence of a party with proper standing. This is for good public policy reasons, mainly to rescue disputed provisions from the limbo of indeterminate constitutionality or, as it was expressed in Phaswane, to achieve "the constitutional purpose of avoiding disruptive legal uncertainty". Although this Court will not do so in every case where the High Court ought not to have decided the question, in general, "the only circumstances in which a court may not deal substantively with an application for confirmation is where no uncertainty will arise". These reasons apply even more strongly in a case

concerning penal provisions, which have imminent and adverse effects on those the statute targets. That is the case here."[45]

[87] All the Ministers were opposed to a declaration of invalidity in respect of this section and on 24 June 2020 sought leave to file further submissions. This opportunity was granted and on 13 July 2020, instead of dealing with the substance of the argument, repeated the procedural skittles they had set out in their submissions dated 24 June 2020 because it was raised by the court too late in the day, none of the children were charged under the Medicines Act, does not arise on the facts and that interested parties were not notified in terms of Rule 16A regarding the constitutional challenge of the Medicines Act.

[88] The DPP has conceded that the section in the Medicines Act is unconstitutional. Given this concession, no prosecutions should follow. Given the history of this matter and the path it has travelled one would hope that should a decision be taken to prosecute a child for a contravention of section 22A(16) read with section 29(k) and 30(1) of the Medicines Act, that all relevant parties will be notified to ensure a constitutional challenge is initiated.

Drug testing at schools

[89] In each of the four matters in this review the child was 'referred'[46] to the criminal justice system as a consequence of testing positive for cannabis during a drug test administered by their school, the Pro-Practicum School.[47] The children

---

[45] *Centre for Child Law v Minister of Justice and Constitutional Development* (*supra* n 41) at paras 11-2.

[46] The term 'referred" is used as it is unclear from the parts of the record whether the children concerned were arrested in terms of s20 of the Child Justice Act, summoned in terms of s19 of the Child Justice Act, or issued with a written notice to appear in terms of s 18 of the Child Justice Act.

[47] The children were, at the time, aged 16, 14, 15 and 15, respectively.

were thereafter diverted and ordered, on strict and onerous conditions, to attend the *"Drug Child Programme"*[48] for a period of three months.

[90] Drug testing at schools is comprehensively regulated by the South African Schools Act.[49] Section 8A of SASA provides, in relevant part, as follows:

> "(3)(a) A search contemplated in subsection (2) may only be conducted after taking into account all relevant factors, including –
>
> (i) the best interests of the learners in question or of any other learner at the school;
>
> (ii) the safety and health of the learners in question or of any other learner at the school;
>
> (iii) reasonable evidence of illegal activity; and
>
> (iv) all relevant evidence received.
>
> (b) When conducting a search contemplated in subsection (2), the principal or his or her delegate must do so in a manner that is reasonable and proportional to the suspected illegal activity.
>
> …
>
> (8) The principal or his or her delegate may at random administer a urine or other non-invasive test to any group of learners that is on fair and reasonable grounds suspected of using illegal drugs, after taking into account all relevant factors contemplated in subsection (3).
>
> …
>
> (14) No criminal proceedings may be instituted by the school against a learner in respect of whom –
>
> (a) a search contemplated in subsection (2) was conducted and a dangerous object or illegal drug was found; or
>
> (b) a test contemplated in subsection 8 was conducted, which proved to be positive." (own emphasis added)

---

[48] A programme designed and implemented by the prosecutors situated at the Krugersdorp Court some 15 years ago.

[49] South African Schools Act 84 of 1996 ("SASA").

[91] The regulations promulgated in accordance with these sections go on to add that:

> "10. **Notice to parents and disciplinary proceedings**
>
> …
>
> 10.3 If the learner has tested positive for illegal drugs, a discussion must be held with the parent so that he or she may understand the consequences of the use of illegal drugs. The principal may, if the parent so requests, refer the learner to a rehabilitation institution for drug counselling.
>
> 10.4 The principal or his or her delegate may initiate disciplinary proceedings against the learner in whose possession a dangerous object has been found or who has tested positive for illegal drugs. No criminal proceedings may be instituted against the category of learners.
>
> …
>
> 11. **Counselling**
>
> 11.1 Counselling must be done by social workers and NGOs as identified in the National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions, promulgated under General Notice No. 3427 of 2002 (*Government Gazette* No. 24172 of 13 December 2002.)
>
> The Prevention of and Treatment for Substance Abuse Bill, 2008 [Act 70 of 2008], is serving before Parliament. Once enacted, the provisions of this legislation will play an important role in identifying treatment centres and facilities to assist the school in dealing with the problem of drug abuse.
>
> 11.2 Schools must identify social workers in their own provincial departments, and must obtain the contact details of those social workers. If those officials cannot assist, schools must seek the cooperation of social workers connected to the national Department of Social Development and its provincial offices, and of NGOs that offer such services at rates that parents can afford. This would fall under the provisions of regulation 9 (5) and (6) of the Regulations for Safety Measures at Public Schools, published in

Government Gazette No. 22754, under Government Notice No. 1040 of 12 October 2001.

12. **Outcome must be kept confidential**

12.1 Only learner and his or her parent must be informed about the outcome of the drug test.

12.2 The identity of the learner may not be revealed, except to his or her parent."[50] (own emphasis added)

[92] The SASA and its regulations, accordingly, make several things abundantly plain. Namely, in order for a principal to invoke the provision and consequently test a pupil for drugs she must entertain a reasonable suspicion.[51] If there is no reasonable suspicion, then the search would not be allowed and the results would be susceptible to being challenged in a court.[52] No criminal proceedings may be instituted against the learner regardless of whether she is found in possession of an illegal drug or simply tests positive for such illegal drug. The tests, as a rule, remain strictly confidential. The appropriate response to a learner found in possession of an illegal drug or who has tested positive for such an illegal drug is to address the issue, first-and-foremost, with her parent and, if so requested, refer the child for counselling and/or to a rehabilitation centre. The only sanction authorised is the institution of disciplinary proceedings against the child.

[93] Ms KP Mackenzie, a social worker at the Pro-Practicum School deposed to an affidavit on 25 February 2019 in which she explained that the Pro-Practicum School

---

[50] "*Devices to be used for Drug Testing and the Procedures to be followed*" GN 1140 in GG 31417 of 19 September 2008.

[51] The term 'reasonable suspicion' ought to bear the same meaning as that given to it within the context of arrest under section 40(1)(b) of the Criminal Procedure Act 51 of 1977. The meaning has been comprehensively addressed in several decisions. See for example, *De Klerk v Minister of Police* 2018 (2) SACR 28 (SCA); *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA); *Minister of Safety and Security v Seymour* [2007] 1 All SA 558 (SCA).

[52] See, generally, *Guide to Drug Testing in South African Schools*, Department of Basic Education, 2013.

adopted the Drug Child Programme during 2012 - a programme run by Mrs M Erasmus, a senior state prosecutor; Mrs J Steyn, a state advocate and a team of volunteers. She stated that the Drug Child Programme supports the parents of learners who are using drugs and substances and who are in need of help and support. She said that the parents and guardians of these learners are often desperate for assistance and support. This has resulted in Pro-Practicum School's Code of Conduct adapting and including the Drug Child Programme. She provided statistics as proof of the tremendous impact the Drug Child Programme has had which revealed that between 2014 and 2019: 819 learners had had drug tests performed on them; 178 were referred to the criminal justice system or, as she explains, '*placed on the DCP Programme'*; and 24 learners appear to have received compulsory residence as a result of these drug tests.

[94] The consequence of the use by the DPP of this inadmissible evidence is that 178 learners have been referred to the criminal justice system and diverted in instances not permitted by the SASA and where it is likely that no *prima facie* case against them had been made; 24 learners have been unlawfully detained for failing to allegedly comply with diversion orders that were, most likely, void *ab initio*.

The misapplication and misunderstanding of the Child Justice Act

[95] A concerning feature of the matters on review is the apparent disregard by the decision makers for the constitutional imperatives that should guide the decisions of the stakeholders and the statutory processes outlined by the Child Justice Act. Some of the most egregious are highlighted.

Obligation to assess a child[53]

[96] Section 34(1) of the Child Justice Act in relevant parts provides as follows:

---

[53] Section 34 of the Child Justice Act.

> "Every child who is alleged to have committed an offence must be assessed by a probation officer … unless assessment has been dispensed with in terms of section 41(3)."

[97] In terms of section 41(3) of the Child Justice Act this may only be dispensed with when it is in the best interests of the child to do so and then these reasons must be expressly recorded. The *pro forma* court orders of the respective children record the following: *"[w]hereas, after due consideration of the nature of the offence, possible delays in having the child assessed …, the desire of all relevant parties to deal with this matter in a swift manner and an (sic) unilateral (sic) agreement by all parties that it would be in the best interests of the child to deal with this matter without such assessment …"*. This falls foul of what is actually required. Why it would be in the best interests of the particular child is not addressed at all. Dispensing with a fundamental prerequisite to the entire process cannot be done on a generic basis. Expediency alone is insufficient.

Informal Diversion

[98] The DPP, throughout the submissions filed, makes mention of the *'informal diversion'* of matters by the prosecutor to the Drug Child Programme. The term *'informal diversion'* is not defined (or used) in the Child Justice Act. In terms of section 41(1):

> "A prosecutor may divert a matter involving a child who is alleged to have committed an offence referred to in Schedule 1 and may, for this purpose, select any level one diversion option set out in section 53(3) or any combination thereof …"

[99] The section 53(3) diversion options are:

> "(a) an oral or written apology to a specified person or persons or institution;
> (b) a formal caution, with or without conditions;

(c) placement under a supervision and guidance order;
(d) placement under a reporting order;
(e) a compulsory school attendance order;
(f) a family time order;
(g) a peer association order;
(h) a good behaviour order;
(i) an order prohibiting the child from visiting, frequenting or appearing at a specified place;
(j) referral to counselling or therapy;
(k) compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose;
(l) symbolic restitution to a specified person, persons, group of persons or community, charity or welfare organisation or institution;
(m) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored;
(n) community service under the supervision or control of an organisation or institution, or a specified person, persons or group of persons identified by the probation officer;
(o) provision of some service or benefit by the child to a specified victim or victims;
(p) payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this; and
(q) where there is no identifiable person, persons or group of persons to whom restitution or compensation can be made, provision of some service or benefit or payment of compensation to a community, charity or welfare organisation or institution."

[100] A child is, accordingly, diverted or not. If diverted, however, the prosecutor is bound to comply strictly with all the relevant provisions of the Child Justice Act. Importantly, in this regard a prosecutor may only divert a child if the factors referred to in section 52(1)(a) to (d) have been met,[54] which factors are:

---

[54] Sec. 41(1)(a) of the Child Justice Act.

> "(1) A matter may, after consideration of all relevant information presented at a preliminary inquiry, or during a trial, including whether the child has a record of previous diversions, be considered for diversion if:
> (a) the child acknowledges responsibility for the offence;
> (b) the child has not been unduly influenced to acknowledge responsibility;
> (c) there is a prima facie case against the child;
> (d) the child and, if available, his or her parent, an appropriate adult or a guardian, consent to diversion "

A Child in Need of Care and Protection

[101] If the prosecutor is of the opinion that the child is in need of care and protection then the matter may not be diverted but rather referred to a preliminary enquiry for consideration of a possible referral to the Children's Court.[55] Section 41(4) of the Child Justice Act expressly requires a prosecutor not to divert where it appears that the child is in need of care and protection.

Accreditation

[102] Only if all the requirements are met may a prosecutor divert a child. In diverting the child, however, section 56(1) of the Child Justice Act directs that –

> "a prosecutor … may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited in terms of this section and has a valid certificate of accreditation, referred to in subsection 2(e)."

[103] The reason for this is to ensure that children are not exposed to exploitive or harmful diversion programmes. It also ensures that there is some measure of independent oversight.

---

[55] Sec. 41(4) of the Child Justice Act.

[104] There is nothing in the reams of annexures filed by the DPP that suggests that the programme is accredited or, at the very least, that it has applied for accreditation in terms of the Child Justice Act.

[105] The programme, accordingly, and at least from the documents available, seems to operate outside of the strictures of the Child Justice Act. This is impermissible. It matters not how noble the aim is; the law exists for a reason and the prosecutors (and the office of the DPP) are not simply entitled to ignore it. This would do violence to the rule of law.

Diversion options

[106] A prosecutor, when diverting a matter in terms of section 41(1) of the Child Justice Act, is entitled to select any level one diversion option (as provided for in section 53(3) of the Child Justice Act) or any combination of these options. The decision must be guided, first and foremost, by '*best interests*'.

[107] In the matters on review, the terms of the diversion order (i.e. the selected diversion options) are recorded in a *pro forma* document that reads, in relevant part, as follows:

> "9) I understand that should I adhere to the following diversion order for a period of at least three months, I may not be prosecuted further in the above said matter:
>
> a) I will not use any drugs for the said period and submit myself to random urine/blood testing during this period by my school, the SAPS or persons dealing with my rehabilitation/counselling.
>
> b) I further submit myself to the authority of my parents/guardian and teachers in all respects and with specific reference to
>
> - [f]amily time as directed by my parent/guardian
> - [p]eer group association in that I will refrain from socialising with persons as directed by my parents/guardian/teacher or counsellor

- [v]isitng or frequenting a specific place as directed by my parent/guardian/teacher or counsellor.

c) I will attend school regularly and will also absent myself from school for medical reasons or with permission of my parents.

d) I will not be late for school or specific classes or absent myself from specific classes.

e) I will attend counselling (at school or NICRO or any other prescribed organisation or a counsellor of choice) as prescribed on a regular basis and will not absent myself from such without permission from my parents, counsellor or headmaster.

f) I will not behave in any fashion that will require discipline from my school e.g. disrupt a class, be rude to teachers, not do my assignments or homework, etc.

g) My school marks will improve by at least 10% over the next 3 months.

h) I will partake in some form of sport or cultural activity and attend it on a regular basis.

i) I will subject myself to community service at my school as prescribed by my headmaster or a person delegated by him to do so and or as directed by Drug Child Task Team/Court.

j) I will make restitution to the victim of this offence/the community, charity or welfare organisation.

k) Learners from Pro-Practicum School has to attend the drug session every Tuesday 14h00 at Me Mckenzie at school;

l) I will submit a report from my parent/guardian, counsellor, coach and or school on my progress and compliance with my diversion options every month upon attending to the prosecutor."

[108] Three issues bear emphasis in relation hereto. First, the use of a standardised order for all children falls foul of the '*best interests*' standard. In this regard the Constitutional Court has held that: -

> "… the law ought to make allowances for an individuated approach to child offenders. The best-interest standard should be flexible because individual circumstances will determine which factors secure the best interests of a particular child. In *M*, this court held:
>
> > 'A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interest of the child concerned.'
>
> Individualised justice is foreseen in the Child Justice Act. It requires that certain guiding principles are taken into account in the implementation of criminal justice concerning children. These include that all 'consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence, and the interests of society'."[56]

[109] Second, the prosecutor, rather than selecting one (or one or more in combination) imposes almost every level one diversion option available to him/her in terms of the Child Justice Act.[57] The proverbial book is thrown at these children for good measure. They must, for example perform undefined *'community service'* for an undetermined amount of hours at the discretion (and whim) of their principal and/or his delegate; ensure, regardless of aptitude, an increase in their school marks by at least 10%; and partake in some form of sports or cultural event regularly, even if neither interests them.

[110] Third, it is a fundamental principle of the Child Justice Act that a *"[a] child must not be treated more severely than an adult would have been treated in the same circumstances"*.[58] If regard is had to the nature of the offence (testing positive

---

[56] *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC) at pars 38-9. See also, *Director of Public Prosecution, Transvaal* (*supra* n 8) at para 119 where the Constitutional Court held that individualised justice is required to avert injustice.

[57] See, in this regard, s53(3) read with s54(2)(a) of the Child Justice Act.

[58] S3(b) of the Child Justice Act.

for cannabis) it is safe to conclude that an adult would, at worst, have been required (prior to the legalisation) to have done some form of specified community service. The terms of the order go far beyond this and are incredibly onerous. They are, moreover, and considering the expansive wording, susceptible to being abused by those charged with enforcing it.

[111] The court order is consequently flawed.

Duration of residential order

[112] The residential diversion programmes ultimately imposed on the children, assuming they were competent, were indeterminate in length (i.e. there was no fixed duration). There can, and leaving aside the lawfulness of the use of such process for the moment, never be a justification for this type of an order: First, it violates a fundamental tenet of the principles of diversion under the Child Justice Act, namely that the diversion option must be proportionate to the nature of the offence. It is no answer to say that the diversion option, despite the trivial nature of the offence, is in the child's best interests. If that understanding were true, it would mean that in all cases children should be detained, as a matter of first resort, as this would assist them in their rehabilitation. Second, it violates a child's right only to be detained as an absolute measure of last resort and then only for the shortest appropriate period of time. Third, there can be no debate that diversion constitutes punishment; the fact that it is indeterminate would, in the circumstances, and considering the nature of the offence, amount to cruel, inhuman and degrading punishment at the very least.

Compliance with section 58(2) of the Child Justice Act

[113] Section 58(2) provides:

> "(2) When a child appears before the magistrate, inquiry magistrate or child justice court pursuant to a warrant of arrest or summons, the magistrate,

> inquiry magistrate or child justice court must inquire into the reasons for the child's failure to comply with the diversion order and make a determination whether or not the failure is due to the child's fault."

[114] Compliance with section 58(2) was dealt with in the 5 February 2019 judgment. In brief: when there has been non-compliance with a diversion order, the Child Justice Court must enquire into the reasons for the child's failure and make a determination whether or not the failure is due to the child's fault. In the 4 cases under review, there was no record of this having occurred.

Compulsory residence as a diversion option for schedule 1 offences

[115] The submissions filed by the DPP initially made an impassioned plea for this court to find that the use of temporary albeit compulsory residence is allowed under the Child Justice Act for all matters where a child has failed to comply with a non-custodial diversion programme.

[116] In this regard, the DPP argued that section 58(4)(c) read with section 54(3) of the CJA: "*allows for compulsory residence of a drug addict child (sic) who has committed a schedule 1 offence and is in need of drug rehabilitation at Bosasa or any other Treatment Centre".*

[117] The DPP in its third supplementary heads of argument dated 20 June 2019 conceded that this court on 5 February 2019 correctly found that compulsory residence is not a competent diversion option where the child is alleged to be guilty of a Schedule 1 offence, that level 1 diversion does not permit for compulsory residence, and that the immediate release of these children was in accordance with the law.[59]

[118] The court was, at this juncture, advised that all children falling within that net had been released. The court, despite this assurance, directed that an audit be

[59] Para 8, paginated p 492.

conducted which would document all the children referred to BOSASA and Walter Sisulu Youth Care Centre in terms of section 41 and/or 54(3) and/or 58 of the Child Justice Act and/or for the possession of cannabis in terms of which they were diverted to undergo compulsory residence at either of such institutions. The respective heads of such centres were ordered to be present at court at the next hearing, being 18 March 2020, and the Office Manager of the Krugersdorp Magistrate's Court was to make all documents referring the children to such institutions under the Drug Child Programme available to the DPP within a certain period of time.

[119] On 18 March 2020 it became apparent that children having allegedly committed Schedule 1 offences were still being diverted by the various magistrate's courts for compulsory residence. This court then interdicted the respective heads of the centres from receiving any further children referred to them in terms of section 41 of the Child Justice Act where the charges fall within the ambit of Schedule 1 of the Child Justice Act.

Results of the audit

[120] On 2 June 2020 and at the hearing of this matter, Walter Sisulu Youth Care Centre provided a list of all children released on 20 March 2020. The only supporting documentation presented was release notes. These release notes revealed that the list containing the names of 22 children, was incomplete, and that 3 more children had been released. The release notes further revealed that:

1. despite this court's judgment of 5 February 2019 and the order dated 7 February 2019 having been placed before the Magistrate's Commission for distribution to all relevant parties, the practice of ordering compulsory residence for Schedule 1 child offenders in

terms of section 41 and 58 of the Child Justice Act, continued until 20 March 2020.

2. The children were not taken back to court to be dealt with in accordance with the law, but were released to people whose relationship to the child in question does not appear and the location to which the child was taken is not documented.

3. The children alleged to have been guilty of the offence of possession of drugs or cannabis and referred for compulsory residence, had spent on average 4,75 months at the Youth Care Centres. This is exceedingly harsh if regard is had in particular to the provisions of section 3(b) of the Child Justice Act which provides that a child should not be treated more severely than an adult would have been treated in the same circumstances. Section 20(1) also provides that in the absence of compelling reasons, a child who committed a Schedule 1 offence should not be arrested, and section 21(1) provides that when considering the release or detention of a child who has been arrested, preference should be given to releasing the child.

[121] The inadequacy of the documents supplied was taken up with the two representatives present at court, Ms Maluleke and Mr Mavhunga. They contended that the balance of the documents were provided to Adv Badenhorst, the representative of the DPP, already during September 2019. This can certainly not be so if regard is had to the date of admission of all the children save for one.[60]

[60] All the children listed at paginated p 780, save for child 2, were admitted after September 2019.

[122] We accept for current purposes that non-compliance with this court's orders was due to administrative difficulties but frown upon the tardiness with which both BOSASA and Walter Sisulu Youth Care Centres approached this task.

[123] BOSASA too provided an audit of children referred to it[61] in terms of section 41 and/or 54(3) and/or 58 of the Child Justice Act. Ms Monale, advised this court that all the children had been released between 20 and 24 March 2020. Some startling revelations were made:

1. Each one of the 17 children listed had been referred for compulsory residence despite the alleged offences falling within Schedule 1;
2. In respect of child 3 and 17, the magistrates had interpreted section 53(1)(a) of the Child Justice Act diversion option being '*a compulsory school attendance order*', to include a compulsory residential order. This interpretation is wrong.
3. In respect of children 7,8,9,11,12,14,15 and 16, the magistrates had interpreted section 53(1)(e) of the Child Justice Act diversion option, being '*a reporting order*', to include a compulsory residential order. It does not. This interpretation is wrong.
4. In respect of children 6,8,13,15,16 and 17, the magistrates had interpreted section 53(1)(f) of the Child Justice Act diversion option, being '*a supervision and guidance order*', to include a compulsory residential order. It does not. This interpretation is wrong.
5. If regard is had to the nature of the offences, they are generally very trivial in nature. By way of example: child 5 was allegedly guilty of stealing goods to the value of R200 and was to undergo compulsory

[61] Paginated p 778.

residence for a period of 4 months. If an adult first offender had committed the offence, she would most certainly not have been incarcerated for that period or at all.

[124] There are some case which are particularly egregious. They are:

1. Child 1: He was alleged to have committed malicious injury to property where the damage inflicted amounted to R300. His compulsory residence diversion order was to run from 6 November 2019 to 6 November 2020 (1 year). The facts underpinning this are the following: He broke a window and threw bottles at his stepfather because his stepfather did not want him near him. Having regard to the description of the offence and the other facts recorded in the probation officer's report, the prosecutor ought to have concluded that this was a child in need of care and protection as contemplated in section 41(4) of the Child Justice Act and ought to have referred the matter for a preliminary inquiry for consideration of referring it to a Children's Court.

2. Child 2: This child is alleged to have been in contempt of an order obtained against him by his mother. He was referred for compulsory residence for a period of 7 months where he did not even admit the offence levelled against him and which admission is a pre-requisite for a diversion order to be granted. Once again, having regard to the description of the offence and the other facts recorded in the probation officer's report, the prosecutor ought to have concluded that this was a child in need of care and protection as contemplated in section 41(4) of the Child Justice Act and ought to have referred

the matter for a preliminary inquiry for consideration of referring it to a Children's Court.

3. Child 17 – he had broken the window to gain access to his own home. For this he had to undergo 6 months compulsory residence. Once again, having regard to the description of the offence and the other facts recorded in the probation officer's report, the prosecutor ought to have concluded that this was a child in need of care and protection as contemplated in section 41(4) of the Child Justice Act and ought to have referred the matter for a preliminary inquiry for consideration of referring it to a Children's Court.

4. Child 7 – He allegedly stole a hair clipper to the value of R150 and had to undergo 6 months compulsory residence. No adult would have received a period of 6 months incarceration.

[125] BOSASA and Walter Sisulu Youth Care Centres are not soft options. They are very structured institutions within fenced environments. Going there involves the deprivation of liberty. It involves being placed with other youthful offenders who have committed more serious offences.

Compliance with paragraph 3 of the Order

[126] In order to establish the identity of the children who were incorrectly referred for compulsory residence, paragraph 3 was included in the order dated 19 September 2019 and then amended at the request of the DPP on 7 October 2019. The order, quoted before, reads:

> "3. The Office Manager of the Krugersdorp Magistrates' Court is to provide certified copies of all registers, charge sheets and documentation relevant to all children, referred to BOSASA Youth Development Centre and Walter Sisulu Child and Youth

> Centre under the Drug Child Program, to the Director of Public Prosecutions, Johannesburg within 20 days of date of receipt of this order."

[127] Paragraph 3 of the order of 18 March 2020 was amended to include a directive that the DPP would provide a summary of the documents provided to it.

[128] The final hearing of this matter was on 2 June 2020. On 3 June 2020, Mr Badenhorst provided a document dealing with compliance of paragraph 3.

[129] What is clear from the summary, is that Adv Badenhorst had gone to great lengths to find the documents. The magistrate who had dealt with these matters at the Krugersdorp Magistrate's Court, one Ms Ismail, was alleged at some stage to have held the register as well as court records but those were never produced. Ms Erasmus and Adv Drotsky conducted a search for the relevant documents at the Krugersdorp Magistrate's Court but left empty-handed. They ought to have retrieved, at the very least, the documents underpinning the summary provided by Ms MacKenzie in her affidavit dated 25 February 2019[62]. It is startling that these children were processed through our courts without a single piece of documentary evidence to support that. This is particularly so where section 60 of the Child Justice Act expressly requires that a register of children be kept in respect of whom a diversion order has been made.

Conclusion

[130] The *amicus* requested that the court make the following additional declaratory orders:

> 1. 'It is declared:
>
> 1.1 That section 8A of the South African Schools Act 84 of 1996 ("**SASA**") absolutely prohibits the referral of any child subjected to a drug test and/or

[62] paginated p 132 of the court bundle

drug search conducted in terms of the provisions of SASA to the criminal justice system.

1.2. That section 22 of the Criminal Procedure Act 51 of 1977 ("**CPA**") does not authorise and empower a member of the South African Police Service ("**SAPS**") to conduct a search of a learner at the request of a person. The jurisdictional requirements mentioned in the provision must first be satisfied.

1.3. That section 36D of the CPA does not empower a member of the SAPS and/or an authorised person to administer a drug test on a learner unless the jurisdictional requirements set-out in that provision have been met in full.

2. It is declared that the rights of the learners of the Pro-Practicum School have been violated by the implementing agents of the Drug Child Programme and/or the Pro-Practicum School insofar as it (or they) have subjected the children to compulsory drug testing and/or drug searches in contravention of section 8A of the SASA, section 22 of the CPA, and/or section 36D of the CPA. The rights violated, include:

2.1 The righty to equality – section 9 of the Constitution.

2.2 The right to dignity – section 10 of the Constitution.

2.3 The right to freedom and security of the person – section 12 of the Constitution.

2.4 The right to privacy – section 14 of the Constitution.

2.5 The right to have their best interests considered of paramount importance in any matter concerning him/her – section 28(2) of the Constitution.

2.6 The right to a fair trial – section 35 of the Constitution.

3. The implementing agents of the Drug Child Programme and/or the Pro Practicum School are to:

3.1 Immediately amend the programme and/or school disciplinary code to ensure that it –

3.1.2 accords with the declarations contained in paragraph 1 and

3.1.3 cures the violations set out in paragraph 2.

3.2 Within one-month file with this court, and serve on the offices of the *amicus curiae*, an affidavit wherein they confirm what steps have been taken to rectify the identified issues and attach a copy of the revised Drug Child Programme and disciplinary code to the affidavit(s). *('requested additional relief')*

[131] No dispute as to the interpretation of the sections referred to in paragraph 1.2 and 1.3 of the requested additional relief has arisen and no declaration as to the correct interpretation is accordingly necessary. In this court's view, it will suffice to circulate this judgment to the appropriate role players to ensure the proper application of the relevant sections. It is for this reason, amongst others, that the orders granted in paragraphs [132], [135] and [136] have been included.

[132] **Pro-Practicum School was not joined as a party to these proceedings and this court accordingly considers the relief suggested in paragraph 3 of the Amicus's requested additional relief, inappropriate. This order will be served on the principal.**

[133] Although the representatives of BOSASA and Walter Sisulu Youth Care Centres present at court on 18 March 2020 were invited an afforded an opportunity to obtain legal representation, this did not occur. They did not oppose the granting of the final interdict against the operational heads of BOSASA and Walter Sisulu Youth Care Centres as formulated in paragraph 11.1E of the rule but they were never formally joined to these proceedings and this court accordingly considers it inappropriate to confirm the rule in that respect.

[134] The Ministers initially requested that the order declaring section 4(b) of the Drugs and Drug Trafficking Act in respect of children invalid, be suspended for a period of 24 months to enable Parliament to rectify the constitutional defects. The court called for further submissions relating to this request, amongst other things,

having regard to paragraph [2] of the *Prince* judgment and section 172(2) of the Constitution. It was not persisted with as clearly, the order granted by this court in respect thereof will not take effect for as long as it has not been confirmed by the Constitutional Court. Had it been within this court's powers to do so, it would have exercised its discretion in favour of such suspension particularly as this court was told an amended Bill is currently being promoted to cabinet for permission to introduce it to Parliament which deals with children and there are no plans at this stage of approaching the constitutional court for an extension ('*the law reform process*'). **However, this court considers it just and equitable to issue a temporary moratorium on the prosecution and/or diversion of any child found using and/or being in possession of cannabis pending the law reform process being completed. This will allow for children to still be dealt with in terms of the PTSAA or the CA while preventing the avoidable trauma of an arrest and subsequent detention.**

[135] Finally, this court wishes to express its gratitude to the Centre for Child Law and in particular, Mr Courtenay, who in the finest traditions of the legal profession, assisted this court in dealing with these important issues.

Order

We accordingly make the following order:

1. It is declared that section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992, as amended is inconsistent with the Constitution of the Republic of South Africa, 1996 ('*Constitution*') and invalid to the extent that it criminalises the use and/or possession of cannabis by a child.

2. **Pending the completion of the law reform process referred to in paragraph [134] of this judgment, to correct the constitutional defects set out in paragraph 1 hereof, no child may be arrested and/or prosecuted and/or diverted for contravening the impugned provision. This moratorium does not, in any way, prevent and/or prohibit any person from making use of any civil process and/or procedure to ensure a child receives appropriate assistance and/or interventions for cannabis use or dependency.**

3. The orders in paragraphs 1 and 2 are hereby referred to the Constitutional Court in terms of section 172(2) of the Constitution.

4. It is declared:

   4.1. That section 53(2) read with section 53(3) of the Child Justice Act 75 of 2008 ('*Child Justice Act*') does not permit, under any circumstances whatsoever, for a child accused of committing a schedule 1 offence to undergo any diversion programme involving a period of temporary residence.

   4.2. That section 58(4)(c) of the Child Justice Act does not authorise and/or empower a prosecutor or child justice court to refer a child, accused of committing a schedule 1 offence, and who failed to adhere to a previous diversion order, to undergo any further diversion programme involving a period of temporary residence.

5. This judgment, and order, is to be made available to –

   5.1. the South African Judicial Education Institute for it to circulate it amongst its members, and particularly, its members who sit in the child justice court; and

5.2. the National Director of Public Prosecutions for her to circulate it to all prosecutors who are involved in preliminary enquiries and/or child justice courts.

6. This order is to be served on the respective Heads and/or Acting Heads of the Mogale Child and Youth Care Centre and Walter Sisulu Child and Youth Care Centre within 5 days of the granting of this order. To this end, the office of the Director of Public Prosecutions is to make the necessary arrangements for this to occur.

7. This order is to be served on the principal of the Pro-Practicum School within 5 days of the granting of this order. To this end, the office of the Director of Public Prosecutions is to make the necessary arrangements for this to occur.

8. This order is to be placed before the Magistrate's Commission for distribution to all relevant parties. To this end, the office of the Director of Public Prosecutions is to make the necessary arrangements for this to occur.

9. There is no order as to costs.

_____
I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree

_____

R MOKGOATLHENG
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the DPP: Adv J Badenhorst

Counsel for the Second Respondent: Adv H Rajah

Counsel for third to Sixth Respondents: Adv J Ramaepadi SC

Counsel for the Amicus Centre for Child Law: Adv M Courtenay

Date of final hearing: 2 June 2020

Date of receipt of final further submissions: 13 July 2020

Date of Judgment: 31 July 2020