

SOUTH AFRICA / JUDGMENT

**L.M v S (A390/2011) [2012] ZAWCHC
176; 2013 (1) SACR 188 (WCC); [2013]
1 All SA 110 (WCC) (23 October 2012)**
[2012] ZAWCHC 176

COURT

Western Cape High Court, Cape Town

BEFORE

Desai, Gamble, Henney

CASE / FILE NUMBER

A390/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

(Coram: Desai J, et Gamble J, et Henney J)

[Reportable]

Case Number: A390/2011

In the Special Review of:

LMAccused

and

THE STATERespondent

1) The Faculty of Law, University of the Western Cape: Children

Right's project of the Community Law Centre 1st Amicus

2) Centre for Child Law 2nd Amicus

3) Minister of Justice and Constitutional Development

Coram: Desai J, et Gamble J, et Henney J

Judgment by: Henney, J

For the Accused: Adv M. Calitz

Instructed by: Legal Aid South Africa

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For the Respondent: Adv S Raphels

Instructed by: The Director of Public Prosecutions:

Western Cape

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For the 1st Amicus: Ms M Mudarikwa

The Faculty of Law, University of the Western Cape: Children Right's project of the Community Law Centre

For the 2nd Amicus: Ms Ann Skelton

Centre for Child Law

Minister of Justice and Constitutional Development: Adv D Potgieter SC

Date(s) of Hearing 28 MAY 2012

Judgment delivered on 23 OCTOBER 2012

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(Coram: Desai J, et Gamble J, et Henney J)

Case Number: A390/2011

LMAccused

THE STATERespondent

1) The Faculty of Law, University of the Western Cape: Children Right's project of the Community Law Centre 1st Amicus

JUDGMENT DELIVERED ON 23 OCTOBER 2012

HENNEY, J

Background:

- [1] The accused in this matter, a 15 year old teenager, was convicted in the Child Justice Court held at the Magistrates Court in Cape Town of possession of one "stop" of dagga in contravention of Section 4(b) of Act 140 of 1992. He was legally represented and assisted by his mother during the proceedings.
- [2] In terms of Section 78(1) of the Child Justice Act 75 of 2008 ("CJA") read with Section 297 (1)(a) (i) of the Criminal Procedural Act 51 of 1977 ("CPA"), the passing of sentence was postponed for a period of one (1) year on the following conditions: (i) the accused submits himself to the control of a probation officer; and (ii) in terms of Section 297 (1)(a)(i) of the CPA the accused is ordered to appear before the court, if called upon to do so, before the expiration of the period of postponement.

This specific matter was referred by the Cape Town Magistrate's Court to this court by means of a Special Review.

- [3] The Magistrate of Cape Town in his submission raises several important questions about the reviewability of matters under the CJA and specifically, whether this matter is subject to automatic review. Some of the important questions raised were the following:
- (a) Are all matters in which children under the age of 16 years at the time of the commission of the offence are sentenced to any sentence subject to review, notwithstanding that the accused was legally represented?
 - (b) in cases where children of 16 years or older but under the age of 18 years at the time of the commission of the offence, are sentenced to any form of imprisonment that is not wholly suspended or where they are sentenced to an order of compulsory residence in a child or Youth Care sentence, and irrespective of the duration of the sentenced, are such matters subject to review notwithstanding that the accused was legally represented?
 - (c) Are the provisions of section 85 of the CJA applicable to children convicted and sentenced in the Regional Court?
 - (d) What is the effect of section 85 of the CJA on a suspended sentence imposed on a child who was 16 years or older but under 18 years at the time of the commission of the offence where such sentence would otherwise be reviewable in terms of the CPA?
 - (e) Is a fine imposed on a child subject to review?
- [4] A further question that was raised during argument before us is whether a suspended sentence of imprisonment, which when put into operation, would result in the imposition of a sentence of imprisonment not wholly suspended, would be subject to review in terms of section 85.

- [5] A Full Bench of this court was convened by the Judge President of this Division to decide upon issues which were raised. This was as a result of a decision by Dlodlo J in the matter of *State v John Pierre Ruiter*
- [2011] ZAWCHC 265 (14 June 2011) where the learned judge came to the following conclusion (at para "3") regarding the reviewability of cases where children are involved (and are legally represented) in terms of section 85 of the Child Justice Act, Act 75 of 2008 ("CJA"). "The High Court is the upper jurisdiction of all minors within its jurisdictional area. For that reason and that one alone I am of the view that cases provided for or referred to in Section 85 of the Act under consideration should always be the subject of automatic review in the ordinary course regardless of whether or not the said minor child was legally represented at trial".
- [6] This Court, due to the importance of the issues that had to be considered, invited certain parties to join as amici and to present arguments, namely, the Faculty of Law - University of the Western Cape, Children's Right Project of the Community Law Centre, and The Centre for Child Law. The Minister of Justice and Constitutional Development also elected to join the proceedings due to the importance of the issues raised and the impact the Court's decision would have on the administration of justice.
- [7] This Court requested Counsel to address it on a number of questions in order to fully understand the implications of section 85 of the CJA and how it should be interpreted in accordance with the provisions of Section 302 of the CPA. We are indebted to counsel for their useful assistance to the court in this regard.
- [8] The questions posed in this case, revolve around one single issue, namely, under what circumstances the CPA, as opposed to the CJA, would be applicable in cases involving children who are in conflict with the law and who are accused of committing offences.
- Applicable Legal Provisions
- [9] It will therefore be convenient to firstly deal with this issue with reference to the applicable legal provisions in the CJA as well as the CPA. The purpose of the CJA is set out in the preamble¹.
- [10] In order to achieve this purpose, the CJA repealed any law to the extent where such law is inconsistent with its terms.
- [11] Section 99(1) of the CJA provides that all laws specified in Schedule 4 of the CJA are repealed or amended to the extent set out in the third column of Schedule 4.
- [4] A further question that was raised during argument before us is whether a suspended sentence of imprisonment, which when put into operation, would result in the imposition of a sentence of imprisonment not wholly suspended, would be subject to review in terms of section 85.

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[2011] ZAWCHC 265 (14 June 2011) where the learned judge came to the following conclusion (at para "3") regarding the reviewability of cases where children are involved (and are legally represented) in terms of section 85 of the Child Justice Act, Act 75 of 2008 ("CJA").

"The High Court is the upper jurisdiction of all minors within its jurisdictional area. For that reason and that one alone I am of the view that cases provided for or referred to in Section 85 of the Act under consideration should always be the subject of automatic review in the ordinary course regardless of whether or not the said minor child was legally represented at trial".

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Applicable Legal Provisions

[9] It will therefore be convenient to firstly deal with this issue with reference to the applicable legal provisions in the CJA as well as the CPA. The purpose of the CJA is set out in the preamble¹.

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[11] Section 99(1) of the CJA provides that all laws specified in Schedule 4 of the CJA are repealed or amended to the extent set out in the third column of Schedule 4.

- [12] Section 4(3)(a) of the CJA states that, "The Criminal Procedure Act applies with the necessary changes as may be required by the context to any person referred to in this section, except insofar as this Act provides for amended, additional or different provisions or procedures in respect of that person". SS 4(3)(b) of that Act states that, ... "For the purposes of paragraph (a), Schedule 5 to this Act, which is not part of this Act and does not have the force of law, contains an exposition of the interface between the Criminal Procedure Act and this Act".
- [13] In an explanatory note to Schedule 5, it is stated that the said section should be seen in the context of the CJA creating numerous new procedures which are not evident from the exposition.
- [14] The explanatory note stresses that the Schedule does not form part of the Act, does not have the force of the law and that it is merely intended to provide guidance and clarity in respect of the procedure contained in both acts. Schedule 5 is divided into 3 columns. The first two columns refer to the particular section and the third column refers to the extent that the CPA had been affected by the CJA. If there is no indication in the third column to what extent an applicable section of the CPA would be affected by the CJA, that section of the CPA would still apply in respect of children. As such, in the light of Schedule 5 read together with sec 4(3)(a) at the CJA, it is clear that where the CJA omits to lay down a specific procedure, the CPA would be applicable.
- [15] Elsewhere in the CJA, with specific relevance to this case, Chapter 9 (and in particular sec 63(1)(b)) provides that the Child Justice Court must apply the relevant provisions of the CPA relating to the plea and trial of accused persons as extended or amended by the provisions set out in Chapter 9 and 10. It is further stated (sec 63(2)) that where a child and adult are charged together in the same trial in respect of the same facts in terms of Section 155, 156 and 157 of the CPA, the court must apply the provisions of the CJA in respect of the child and the provisions of the CPA in respect of the adult accused.
- [16] In terms of sections 83(1) a child may not waive his right to legal representation in certain circumstances. Section 83(1) however provides that where a child does not wish to have a legal representative or declines to give instructions, a legal

representative must be appointed by the Legal Aid Board (Legal Aid South Africa) to assist the court in the prescribed manner. What "Assistance in a prescribed manner entails is set out in Chapter 10 Regulation 48 of the Regulations relating to Child

Justice published under GN R251 in GG 33067 dated 31 March 2010. "48. Legal representative appointed to assist court

- (1) A legal representative appointed in terms of section 83 of the Act to assist the court must—
 - (a) attend all the court proceedings in respect of the case unless excused by the court;
 - (b) address the court on any matter requested by the court;

- (c) have access to the documents and statements in the docket to the extent permissible in criminal proceedings; and
 - (d) ensure that the best interests of the child are upheld at all times.(2) A legal representative appointed to assist the court may—
 - (a) address the court on the merits and procedural aspects of the case;
 - (b) address the court on the sentence to be imposed;
 - (c) cross-examine a witness in relation to the evidence adduced by the witness;
 - (d) discredit the evidence of a witness;
 - (e) raise an objection to a question posed to the child or state witness;
 - (f) question the admissibility of evidence led by the state;
 - (g) present evidence that will be in the best interests of a child; or
 - (h) assist in any other manner as the court may request.
 - (3) A legal representative may attend the proceedings of a preliminary inquiry if so requested by the inquiry magistrate".
- [17] The practical effect of Chapter 11 is that a child who appears before a Child Justice Court is effectively never without some form of legal representation. Even if the child waives the right to legal representation, a legal representative will be appointed, whose role would be to proactively assist the court in the manner as set out in regulation 48 in order to ensure that a child accused has a fair trial.
- [18] An important deviation from the provisions of the CPA is contained in Chapter 10, which deals with the sentencing of a child in terms of the CJA in terms of section 68. A Child Justice Court is obliged to impose a sentence in accordance with Chapter
10. Only where the CJA expressly empowers a court to do so, may a child be sentenced in accordance with the provisions of the CPA.
- [19] It is clear from the above provisions that the CJA creates a separate and distinct system of criminal justice for children, the legal mechanisms and processes of which may indeed be different from those set out in the CPA. Against this background it would be prudent to discuss the reviewability of cases where a juvenile has been convicted and sentenced in terms of the CJA. Reviewability of matters in terms of the CJA and the CPA
- [20] Section 85 of the CJA deals with the review of criminal matters involving a child accused. Section 85: Automatic Review in certain cases "(1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence—

- (a) under the age of 16 years; or
 - (b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2)
 - (j) of the Children's Act, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence".
- [21] Section 302 of the CPA deals generally with reviews in cases of criminal proceedings in Magistrate's Courts. "302 (1) (a) Any sentence imposed by a magistrate's court
- (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191 (2) (j) of the Children's Act, 2005 (Act No. 32 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer; [Sub para(i) substituted by S13(a) of Act No 26 of 1987 and para (p) of the 4th schedule of Act 75 of 2008] (ii) which, in the case of a fine, exceeds the amount determined by the Minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i), (iii) ... shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.
- (2) For the purposes of subsection (1)—
- (a) each sentence on a separate charge shall be regarded as a separate sentence, and the fact that the aggregate of sentences imposed on an accused in respect of more than one charge in the same proceedings exceeds the periods or amounts referred to in that subsection, shall not render those sentences subject to review in the ordinary course
 - (b)
- (3) The provisions of subsection (1) shall only apply—
- (a) with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser."
- [22] Section 99 of the CJA provides that the laws specified in Schedule 4 to the CJA are repealed or amended to the extent set out in column 3 of the Schedule. Schedule 4, item (p) amends section 302(1)(a) of the CPA by substituting paragraph (i).
- [23] The effect of the amendment, it seems, was only to include detention in a Child and Youth Care Centre, as a reviewable sentence. It does not effectively exclude those cases referred to in section 85 of the CJA from automatic review. These are the reviewability of all cases sentenced by a Child Justice Court in respect of accused who are,

- (i) under the age of 16 years at the time of the commission of the offence and (ii) 16 years or older but under the age of 18 years and have been sentenced to any form of imprisonment not wholly suspended, or (iii) any sentence of compulsory residence in a Child and Youth Care Centre, providing a programme provided for in section 191 (2)(j) of the Children's Act, irrespective of the duration of the sentence.

[24] The question that remains to be answered is the following. To what extent does section 85 of the Child Justice Act provide children in conflict with the law with the right of automatic review in situations where section 302 of the Criminal Procedure Act does not provide such protection? More specifically, would the CJA provide protection in the following instances: (a) Where a child has enjoyed legal representation?

(b) Where the criminal matter involving the child was heard in a Regional Court?

(c) Where the duration of the sentence handed down, firstly, is less than three months, (if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years), and secondly, if the duration of the sentence is less than six months, if the sentence is imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer?

[25] In the judgment of *S v Fortuin* [2011] ZANCHC 28 (11 November 2011) Olivier J addressed in detail the extent of a child's automatic right of appeal, and in particular, the question whether the provision in section 302(3)(a) that legally represented minors do not have an automatic right of review also has a bearing on Section 85 of the Child Justice Act. The Court pointed out at paragraph [49] that "a child appearing before a Child Justice Court will in effect never be without legal representation". In arriving at such conclusion, the Court pointed out that in terms of the CJA, should a child not have legal representation, the Magistrate must refer the child to the Legal Aid Board². Further, the CJA provides that a child may not waive the right to legal representation³, while, at the same time, acknowledging that a child may "not wish to have a legal representative"⁴ or may decline "to give instructions to an appointed legal representative"⁵. In such circumstances, the Legal Aid Board must appoint a legal representative "to assist the court in the prescribed manner".

As such, the Court held (at paragraph [49]) that "a child appearing before a Child Justice Court will in effect never be

without legal representation. The duties and rights of a legal representative appointed to assist the court will, for all practical

purposes, be the same as in the case of an own legal representative."

- [26] The Court concluded: "[51] The legislature must be presumed to have been aware of the provisions of sections 82 and 83 (and of what it intended to be prescribed in respect of a representative to assist the court) when enacting section 85 of the CJA. To interpret section 85(1) of the CJA as excluding cases where the child was legally assisted would indeed render the provisions of the proviso to section 85(1) meaningless to a large extent, and defeat the clear intention to afford children additional protection by means of automatic review".
- [27] By interpreting section 85(1) in such a manner that cases where a child is legally represented would also be subject to review in terms thereof would be to give effect to the express intentions as set out in the preamble of the CJA to afford children in conflict with the law "special protection" and "special safeguards".
- [28] The judgment in *S v Nakedi* [2012] ZANWHC 5 (2 January 2012) also dealt with the question as to whether cases involving children who are legally represented are subject to automatic review in terms of section 85, particularly in the light of section 302 of the CPA. Gutta J drew attention to item (p) of Schedule 4 read with section 99(1) of the CJA, which in essence substitutes or amends section 302C (1)(a)(ii) of the CPA, and held that this amendment is indicative of the fact that the remaining provisions of section 302 are applicable, thereby excluding the referral of cases for automatic review where the accused are legally represented. She therefore concluded that the automatic review provisions involving children in terms of section 85 of the CJA only apply to children who were not assisted by a legal representative. In *S v Sekoere* [2012] ZAFSHC (14/06/2012) Lekale J endorsed the view as expressed by Gutta J.
- [29] In the judgment in *S v Stander* 2012 (1) SACR 595 (ECP) in the Eastern Cape Division of the High Court, the court followed the decision and reasoning in the Fortuin case and disagreed with the conclusion of Gutta J in the Nakedi decision.
- [30] In the recent decision of the North Gauteng High Court in *S v FM* [2012] ZAGPPHC 180 (20 August 2012) Tuchten J, also writing for a Full Bench, had to deal with the question whether a matter in which the child accused was legally represented and had been sentenced in the Regional Court was subject to automatic review under section 85 of the CJA, the matter having been referred for consideration to the High Court by the Regional Magistrate.
- [31] The court concluded at paragraph [38] of the judgment that section 85(1) of the CJA should be interpreted so as to provide for automatic review in respect of all children who are sentenced to any form of imprisonment not wholly suspended, or any sentence of compulsory residence in a Child and Youth Care Centre. This would include children who are sentenced in the Regional Court.

Analysis

- [32] There is a consistent refrain in all the cases referred to above, apart from the *Nakedi* case, that on a proper interpretation of the CJA and after having regard to the paramountcy principle contained in section 28 of the Constitution⁶, the CJA must be interpreted in accordance with this Section. In interpreting the CJA in this manner it would be consistent with the approach laid down by Constitutional Court in *Investigating Directorate: SEO v Hyundai Motor Distributors* 2001 (1) 7 SA 545 where Langa DP (as he then was) stated at [22] - [23] the following: "[22] The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."
- [23] In *De Lange v Smuts NO and Others*, Ackermann J stated that the principle of reading in conformity does 'no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution.' Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."
- [33] Where there is a conflict between the CJA and CPA, the application of the CJA should be preferred above the CPA. I say so for the following

reasons

- [33.1] As a starting point it would seem that children who are in conflict with the law and are accused of having committed an offence, should be dealt with in terms of the CJA; [33.2] Where the CJA expressly states so, the CPA is applicable;
- [12] Section 4(3)(a) of the CJA states that, "The Criminal Procedure Act applies with the necessary changes as may be required by the context to any person referred to in this section, except insofar as this Act provides for amended, additional or different provisions or procedures in respect of that person".
- SS 4(3)(b) of that Act states that, ... "For the purposes of paragraph (a), Schedule 5 to this Act, which is not part of this Act and does not have the force of law, contains an exposition of the interface between the Criminal Procedure Act and this Act".

- [13] In an explanatory note to Schedule 5, it is stated that the said section should be seen in the context of the CJA creating numerous new procedures which are not evident from the exposition.
- [14] The explanatory note stresses that the Schedule does not form part of the Act, does not have the force of the law and that it is merely intended to provide guidance and clarity in respect of the procedure contained in both acts. Schedule 5 is divided into 3 columns. The first two columns refer to the particular section and the third column refers to the extent that the CPA had been affected by the CJA. If there is no indication in the third column to what extent an applicable section of the CPA would be affected by the CJA, that section of the CPA would still apply in respect of children. As such, in the light of Schedule 5 read together with sec 4(3)(a) at the CJA, it is clear that where the CJA omits to lay down a specific procedure, the CPA would be applicable.
- [15] Elsewhere in the CJA, with specific relevance to this case, Chapter 9 (and in particular sec 63(1)(b)) provides that the Child Justice Court must apply the relevant provisions of the CPA relating to the plea and trial of accused persons as extended or amended by the provisions set out in Chapter 9 and 10. It is further stated (sec 63(2)) that where a child and adult are charged together in the same trial in respect of the same facts in terms of Section 155, 156 and 157 of the CPA, the court must apply the provisions of the CJA in respect of the child and the provisions of the CPA in respect of the adult accused.
- [16] In terms of sections 83(1) a child may not waive his right to legal representation in certain circumstances. Section 83(1) however provides that where a child does not wish to have a legal representative or declines to give instructions, a legal

representative must be appointed by the Legal Aid Board (Legal Aid South Africa) to assist the court in the prescribed manner. What "Assistance in a prescribed manner entails is set out in Chapter 10 Regulation 48 of the Regulations relating to Child

Justice published under GN R251 in GG 33067 dated 31 March 2010.

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- (a) attend all the court proceedings in respect of the case unless excused by the court;
 - (b) address the court on any matter requested by the court;
 - (c) have access to the documents and statements in the docket to the extent permissible in criminal proceedings; and
 - (d) ensure that the best interests of the child are upheld at all times.
- (2) A legal representative appointed to assist the court may—
- (a) address the court on the merits and procedural aspects of the case;

- (b) address the court on the sentence to be imposed;
 - (c) cross-examine a witness in relation to the evidence adduced by the witness;
 - (d) discredit the evidence of a witness;
 - (e) raise an objection to a question posed to the child or state witness;
 - (f) question the admissibility of evidence led by the state;
 - (g) present evidence that will be in the best interests of a child; or
 - (h) assist in any other manner as the court may request.
- (3) A legal representative may attend the proceedings of a preliminary inquiry if so requested by the inquiry magistrate".
- [17] The practical effect of Chapter 11 is that a child who appears before a Child Justice Court is effectively never without some form of legal representation. Even if the child waives the right to legal representation, a legal representative will be appointed, whose role would be to proactively assist the court in the manner as set out in regulation 48 in order to ensure that a child accused has a fair trial.
- [18] An important deviation from the provisions of the CPA is contained in Chapter 10, which deals with the sentencing of a child in terms of the CJA in terms of section 68. A Child Justice Court is obliged to impose a sentence in accordance with Chapter
10. Only where the CJA expressly empowers a court to do so, may a child be sentenced in accordance with the provisions of the CPA.
- [19] It is clear from the above provisions that the CJA creates a separate and distinct system of criminal justice for children, the legal mechanisms and processes of which may indeed be different from those set out in the CPA. Against this background it would be prudent to discuss the reviewability of cases where a juvenile has been convicted and sentenced in terms of the CJA.

Reviewability of matters in terms of the CJA and the CPA

[20] Section 85 of the CJA deals with the review of criminal matters involving a child accused.

Section 85: Automatic Review in certain cases

"(1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence—

- (a) under the age of 16 years; or

- (b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2)

- (j) of the Children's Act,

the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence".

[21] Section 302 of the CPA deals generally with reviews in cases of criminal proceedings in Magistrate's Courts.

"302 (1) (a) Any sentence imposed by a magistrate's court

- (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191 (2) (j) of the Children's Act, 2005 (Act No. 32 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer; [Sub para(i) substituted by S13(a) of Act No 26 of 1987 and para (p) of the 4th schedule of Act 75 of 2008]

(ii) which, in the case of a fine, exceeds the amount determined by the Minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i),

(iii) ...

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.

(2) For the purposes of subsection (1)—

- (a) each sentence on a separate charge shall be regarded as a separate sentence, and the fact that the aggregate of sentences imposed on an accused in respect of more than one charge in the same proceedings exceeds the periods or amounts referred to in that subsection, shall not render those sentences subject to review in the ordinary course

(b)

(3) The provisions of subsection (1) shall only apply—

- (a) with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser."

[22] Section 99 of the CJA provides that the laws specified in Schedule 4 to the CJA are repealed or amended to the extent set out in column 3 of the Schedule. Schedule 4, item (p) amends section 302(1)(a) of the CPA by substituting paragraph (i).

[23] The effect of the amendment, it seems, was only to include detention in a Child and Youth Care Centre, as a reviewable sentence. It does not effectively exclude those cases referred to in section 85 of the CJA from automatic review. These are the reviewability of all cases sentenced by a Child Justice Court in respect of accused who are,

(i) under the age of 16 years at the time of the commission of the offence and (ii) 16 years or older but under the age of 18 years and have been sentenced to any form of imprisonment not wholly suspended, or (iii) any sentence of compulsory residence in a Child and Youth Care Centre, providing a programme provided for in section 191 (2)(j) of the Children's Act, irrespective of the duration of the sentence.

[24] The question that remains to be answered is the following. To what extent does section 85 of the Child Justice Act provide children in conflict with the law with the right of automatic review in situations where section 302 of the Criminal Procedure Act does not provide such protection? More specifically, would the CJA provide protection in the following instances:

(a) Where a child has enjoyed legal representation?

(b) Where the criminal matter involving the child was heard in a Regional Court?

(c) Where the duration of the sentence handed down, firstly, is less than three months, (if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years), and secondly, if the duration of the sentence is less than six months, if the sentence is imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer?

[25] In the judgment of *S v Fortuin* [2011] ZANHC 28 (11 November 2011) Olivier J addressed in detail the extent of a child's automatic right of appeal, and in particular, the question whether the provision in section

302(3)(a) that legally represented minors do not have an automatic right of review also has a bearing on Section 85 of the Child Justice Act. The Court pointed out at paragraph [49] that "a child appearing before a Child Justice Court will in effect never be without legal representation". In arriving at such conclusion, the Court pointed out that in terms of the CJA, should a child not have legal representation, the Magistrate must refer the child to the Legal Aid Board². Further, the CJA provides that a child may not waive the right to legal representation³, while, at the same time, acknowledging that a child may "not wish to have a legal representative"⁴ or may decline "to give instructions to an appointed legal representative"⁵. In such circumstances, the Legal Aid Board must appoint a legal representative "to assist the court in the prescribed manner".

As such, the Court held (at paragraph [49]) that "a child appearing before a Child Justice Court will in effect never be

without legal representation. The duties and rights of a legal representative appointed to assist the court will, for all practical

purposes, be the same as in the case of an own legal representative."

[26] The Court concluded:

"[51] The legislature must be presumed to have been aware of the provisions of sections 82 and 83 (and of what it intended to be prescribed in respect of a representative to assist the court) when enacting section 85 of the CJA. To interpret section 85(1) of the CJA as excluding cases where the child was legally assisted would indeed render the provisions of the proviso to section 85(1) meaningless to a large extent, and defeat the clear intention to afford children additional protection by means of automatic review".

[27] By interpreting section 85(1) in such a manner that cases where a child is legally represented would also be subject to review in terms thereof would be to give effect to the express intentions as set out in the preamble of the CJA to afford children in conflict with the law "special protection" and "special safeguards".

[28] The judgment in *S v Nakedi* [2012] ZANWHC 5 (2 January 2012) also dealt with the question as to whether cases involving children who are legally represented are subject to automatic review in terms of section 85, particularly in the light of section 302 of the CPA. Gutta J drew attention to item (p) of Schedule 4 read with section 99(1) of the CJA, which in essence substitutes or amends section 302C (1)(a)(ii) of the CPA, and held that this amendment is indicative of the fact that the remaining provisions of section 302 are applicable, thereby excluding the referral of cases for automatic review where the accused are legally represented. She therefore concluded that the automatic review provisions involving children in terms of section 85 of the CJA only apply to children who were not assisted by a legal representative. In *S v Sekoere* [2012] ZAFSHC (14/06/2012)

Lekale J endorsed the view as expressed by Gutta J.

[29] In the judgment in *S v Stander* 2012 (1) SACR 595 (ECP) in the Eastern Cape Division of the High Court, the court followed the decision and reasoning in the Fortuin case and disagreed with the conclusion of Gutta J in the Nakedi decision.

[30] In the recent decision of the North Gauteng High Court in *S v FM* [2012] ZAGPPHC 180 (20 August 2012) Tuchten J, also writing for a Full

Bench, had to deal with the question whether a matter in which the child accused was legally represented and had been sentenced in the Regional Court was subject to automatic review under section 85 of the CJA, the matter having been referred for consideration to the High Court by the Regional Magistrate.

[31] The court concluded at paragraph [38] of the judgment that section 85(1) of the CJA should be interpreted so as to provide for automatic review in respect of all children who are sentenced to any form of imprisonment not wholly suspended, or any sentence of compulsory residence in a Child and Youth Care Centre. This would include

children who are sentenced in the Regional Court.

Analysis

[32] There is a consistent refrain in all the cases referred to above, apart from the *Nakedi* case, that on a proper interpretation of the CJA and after having regard to the paramountcy principle contained in section 28 of the Constitution⁶, the CJA must be interpreted in accordance with this Section.

In interpreting the CJA in this manner it would be consistent with the approach laid down by Constitutional Court in *Investigating Directorate: SEO v Hyundai Motor Distributors* 2001 (1) 7 SA 545 where Langa DP (as he then was) stated at [22] - [23] the following:

"[22] The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

[23] In *De Lange v Smuts NO and Others*, Ackermann J stated that the principle of reading in conformity does

'no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution.'

Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."

[33] Where there is a conflict between the CJA and CPA, the application of the CJA should be preferred above the CPA. I say so for the following

reasons

[33.1] As a starting point it would seem that children who are in conflict with the law and are accused of having committed an offence, should be dealt with in terms of the CJA;

[33.2] Where the CJA expressly states so, the CPA is applicable;

[33.3] Where the CJA does not expressly state that the CPA would be applicable, and makes provision for a specific procedure, the CJA enjoys preference; [33.4] Where the CJA and the CPA contain provisions dealing with a similar issue, the provision referred to in the CJA is applicable if there is a conflict between the two provisions.

- [34] By applying these principles, content will be given to the purpose of an Act that seeks to establish a separate criminal justice system for children. This is evident on a reading of the whole CJA.
- [35] It is clear that the CJA must take precedence over the CPA to the extent that the former specifically provides for different procedures in respect of children. This must be borne in mind when evaluating the interaction between section 85 of the CJA and section 302 of the CPA.
- [36] Section 85(1) of the CJA distinguishes between two classes of children: on the one hand, a child under the age of 16 years, and on the other, a child who is "16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191
- (2) (j) of the Children's Act
- [37] The proviso to this section provides that in respect of both of these classes of children, "the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence." (emphasis added). I would suggest that in respect of the second group of children, it is the clear intention of the legislature that in relation to a sentence of any form of imprisonment or "compulsory residence", no matter what the length of the sentence, and irrespective of the experience of the judicial officer imposing such sentence, the accused is granted a right of automatic review.
- [38] In my view, the use of the words, "irrespective of the duration of the sentence", in the proviso which clearly refer to sentences involving some form of detention, and the fact that no mention is made of the years of experience of the judicial officer imposing sentence, must now mean that an accused who has been given a sentence of imprisonment or "compulsory detention" is no longer restricted in the right of automatic review in the manner envisioned in terms of section 302 of the CPA. In other words, in sentences in which imprisonment either (a) "exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years", or (b) exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer", the right to automatic review is available.
- [39] I am further of the view that in respect of children under the age of 16 years, all sentences, including non-custodial sentences, are now automatically reviewable.⁸ I say so having regard to the clear wording of section 85(1) of the CJA which provides that if a child was at the time of the offence "under the age of 16 years . . . the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence." (emphasis added)

- [40] It will be noted that the form of sentence referred to in respect of children under the age of 16, is not restricted to a term of imprisonment or detention. And the words "irrespective of the duration of the sentence", clearly apply specifically to the category of accused described in section 85(1)(b). I agree with Olivier J in Fortuin, that to hold otherwise would be to render the express distinction between two age groups by the Legislature meaningless. "Therefore, in deciding whether a sentence granted to children falling under the two categories listed in section 85 would be automatically reviewable, neither the duration of the sentence granted, nor the length of time a judicial officer had held the substantive rank of Magistrate, are relevant considerations."⁹
- [41] Furthermore, I agree with the finding of Oliver J in Fortuin that matters falling under section 85(1) will be automatically reviewable irrespective of whether the child accused was legally represented or not. The reason provided for such a finding, I believe, is convincing.
- [42] As I have previously mentioned, the effect of such provisions and regulations in relation thereto is that no child appearing in a Child Justice Court will ever be without legal representation or legal assistance. The question then is why the legislature, knowing of the peremptory provisions of section 82 and 83, would still provide for the automatic review of cases in terms of section 85 if there was no need to do so, particularly since all children appearing in a Child Justice Court would be legally represented or legally assisted? This is therefore a clear indication that only in those instances mentioned in terms of section 85(1) and 85(2) that section 302(3) of the CPA would not be applicable.
- [43] Of course, not all matters involving children will be automatically reviewable in terms of section 85(1) of the CJA - the right of automatic review is limited to those children falling under the categories set out at section 85(1)(a) and section 85(1)(b), namely: children under the age of 16 years, and children "16 years or older but under the age of 18 years" and who have been "sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2) (j) of the Children's Act";
- [44] Accordingly, in the case of any suspended sentence (regardless of the length thereof) imposed on children of 16 years or older but under 18 years, such a child would not have an automatic right of review under section 85 of the CJA.
- [45] In a case where a sentence had been imposed on a child between the ages of 16 years and 18 years other than that referred to in terms of section 85(1)(b), the provisions of section 302 would be applicable to a child accused. In a case, where such a child is legally represented and a suspended sentence is imposed in terms of section 78(1) of the CJA read with section 29(1) of the CPA, such a sentence would not be subject to automatic review, because it is not a sentence as referred in terms of section 85(1)(b).

- [46] Accordingly all sentences not falling within the ambit of section 85 are not subject to automatic review because of the fact that in all cases where a child appears in a Child Justice Court such child would either be legally represented or assisted in the manner set out in regulation 48 of the Regulations. Reviewability of suspended sentence of imprisonment after it has been put into operation
- [47] It is trite that when a suspended sentence is put into operation after it is found that the conditions thereof have been breached, such an order enforcing the suspended sentence is not subject to automatic review. No appeal lies against such enforcement either. Hiemstra's Criminal Procedure at 28 - 29 states: "A/o appeal against or automatic review of putting into operation—The view has long been held that the putting into operation of a suspended sentence is not automatically reviewable (S v Helm 1980 (3) SA 605 (T) at 605H; Gasa v Regional Magistrate for the Regional Division of Natal 1979 (4) SA 729 (N) at 732E-F)".
- [48] The question which is unclear is whether, in respect of children of 16 years or older but under 18 years, a suspended sentence, after it has been put into operation after a breach of the conditions thereof can be considered a sentence in the form of imprisonment that is not wholly suspended for the purposes of automatic review in terms of section 85(1)(b) of the CJA.
- [49] It is clear that there is a difference between the actual imposition of a sentence of imprisonment and the putting into operation of a sentence that was suspended in terms of section 297(9)(a)(ii) of the CPA. The effect, however, of imposing a sentence of actual imprisonment and the putting into operation of a sentence that was suspended would be the same, i.e. the imposition of a term of imprisonment that is not wholly suspended.
- [50] In my view, if the purpose of the CJA was to afford children in conflict with the law "special protection" and "special safeguards", such purpose would be defeated if a sentence of imprisonment which came about as a result of the putting into operation of suspended sentence is out of reach of a special review in terms of section 85.
- [51] The very essence of the protection afforded by section 85(1)(b) is to subject any sentence of imprisonment not wholly suspended to automatic review by a Judge of the High Court. It would therefore be absurd and not in keeping with the spirit of the CJA and the provisions of section 28 of the Constitution to exclude such a sentence from automatic review when all other sentences of imprisonment not wholly suspended are subject to review. Reviewability of Fines in terms of the CJA
- [52] If a fine is imposed as a sentence on a child, such fine would be imposed in terms of section 74 of the CJA. The provisions of section 276(1)(f) of the CPA that empower a court to impose a fine are not applicable. This would mean that where a child is in default of the payment of a fine a period of imprisonment cannot be used as an alternative to the payment of such fine as provided for in terms of section 287 of the CPA, or any of the other mechanisms to recover or enforce a fine in terms of the CPA¹².

- [53] I consider that the provisions of section 79 of the CJA would be applicable where a child is unable to pay a fine. In terms of section 79: "[79] Failure to comply with certain sentences.— (1) If a probation officer reports to a child justice court that a child has failed to comply with a community-based sentence imposed in terms of section 72, or a restorative justice sentence imposed in terms of section 73, or has failed to pay a fine. restitution or compensation provided for in section 74, the child may, in the prescribed manner, be brought before the child justice court which imposed the original sentence for the holding of an inquiry into the failure of the child to comply, (own underlining)
- (2) If, upon the conclusion of the inquiry, it is found that the child has failed to comply with the sentence provided for in subsection (1), the child justice court may confirm, amend or substitute the sentence".
- [54] Where a sentence of a fine has been imposed on a child who was under the age of 16 years when the offence was committed, such a case would be subject to automatic review in terms of section 85(1)(a) of the CJA because, as I have demonstrated above, all cases involving children under the age of 16 years, irrespective of the sentence or order imposed, are subject to automatic review in terms of section 85(1)(a) of the CJA.
- [55] In the case of a child who is 16 years or older but under the age of 18 years at the time of the commission of the offence and in respect of whom a sentence of a fine has been imposed in terms of section 74 of the CJA, such sentence is not subject to automatic review, because it cannot be enforced with a term of imprisonment which is not wholly suspended. Furthermore, the mechanism created in terms of section 79 of the CJA does not sanction imprisonment as the alternative where a child is in default of the payment of a fine.
- [56] It is questionable whether the provisions of section 302(1)(a)(ii)13 of the CPA dealing with the automatic reviews in relation to a sentence of a fine would be applicable in the light of the provisions of section 82 and 83 of the CJA, which have the effect that it is theoretically impossible for a child to be without legal representation or legal assistance. If a child should for some or other reason not be legally represented then the imposition of a fine as a sentence would be subject to automatic review in terms of sec 302(1)(a)(ii) and the provisions of Section 79 of the CJA will act as a further safeguard. Reviewability of Regional Court Cases
- [57] A final question that arises is whether the provisions of section 85 of the CJA apply to children convicted in the Regional Court. It is clear that sentences subject to review in the ordinary course in terms of section 302 of the CPA only include sentences imposed by a Magistrate in a Magistrate's Court. In this regard, section 302(1)(a) refers to "any sentence imposed by a magistrate". "Magistrate" in terms of the definitions section of the CPA "includes an additional magistrate and an assistant magistrate but not a regional magistrate." (Emphasis added)

- [58] As far as automatic review in terms of section 85 of the CJA is concerned, it is quite clear that sentences imposed by a regional magistrate are also subject to review, contrary to the position in terms of section
302. Section 85(1) of the CJA deals with "the review of criminal proceedings in the lower courts." The term, "lower courts", is not defined in the CJA. However, section 1 of the CJA does define a "child justice court" to be "any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child."
- [59] "Lower Court" is defined in the Criminal Procedure Act as "any court established under the provisions of the Magistrates' Courts Act, 1944 (Act 32 of 1944)." The term, "regional court" is defined in the CPA, as "a court established for a regional division under the provisions of the Magistrates' Courts Act, 1944 (Act 32 of 1944)." As such, a regional court is considered as a "lower court" in terms of the CPA.
- [33.3] Where the CJA does not expressly state that the CPA would be applicable, and makes provision for a specific procedure, the CJA enjoys preference;
- [33.4] Where the CJA and the CPA contain provisions dealing with a similar issue, the provision referred to in the CJA is applicable if there is a conflict between the two provisions.
- [34] By applying these principles, content will be given to the purpose of an Act that seeks to establish a separate criminal justice system for children. This is evident on a reading of the whole CJA.
- [35] It is clear that the CJA must take precedence over the CPA to the extent that the former specifically provides for different procedures in respect of children. This must be borne in mind when evaluating the interaction between section 85 of the CJA and section 302 of the CPA.
- [36] Section 85(1) of the CJA distinguishes between two classes of children: on the one hand, a child under the age of 16 years, and on the other, a child who is "16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191
- (2) (j) of the Children's Act
- [37] The proviso to this section provides that in respect of both of these classes of children, "the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence." (emphasis added). I would suggest that in respect of the second group of children, it is the clear intention of the legislature that in relation to a sentence of any form of imprisonment or "compulsory residence", no matter what the length of the sentence, and irrespective of the experience of the judicial officer imposing such sentence, the accused is granted a right of automatic review.

- [38] In my view, the use of the words, "irrespective of the duration of the sentence", in the proviso which clearly refer to sentences involving some form of detention, and the fact that no mention is made of the years of experience of the judicial officer imposing sentence, must now mean that an accused who has been given a sentence of imprisonment or "compulsory detention" is no longer restricted in the right of automatic review in the manner envisioned in terms of section 302 of the CPA. In other words, in sentences in which imprisonment either (a) "exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years", or (b) exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer", the right to automatic review is available.
- [39] I am further of the view that in respect of children under the age of 16 years, all sentences, including non-custodial sentences, are now automatically reviewable.⁸ I say so having regard to the clear wording of section 85(1) of the CJA which provides that if a child was at the time of the offence
- "under the age of 16 years . . . the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of
- the sentence."(emphasis added)
- [40] It will be noted that the form of sentence referred to in respect of children under the age of 16, is not restricted to a term of imprisonment or detention. And the words "irrespective of the duration of the sentence", clearly apply specifically to the category of accused described in section 85(1)(b). I agree with Olivier J in Fortuin, that to hold otherwise would be to render the express distinction between two age groups by the Legislature meaningless. "Therefore, in deciding whether a sentence granted to children falling under the two categories listed in section 85 would be automatically reviewable, neither the duration of the sentence granted, nor the length of time a judicial officer had held the substantive rank of Magistrate, are relevant considerations."⁹
- [41] Furthermore, I agree with the finding of Oliver J in Fortuin that matters falling under section 85(1) will be automatically reviewable irrespective of whether the child accused was legally represented or not. The reason provided for such a finding, I believe, is convincing.
- [42] As I have previously mentioned, the effect of such provisions and regulations in relation thereto is that no child appearing in a Child Justice Court will ever be without legal representation or legal assistance. The question then is why the legislature, knowing of the peremptory provisions of section 82 and 83, would still provide for the automatic review of cases in terms of section 85 if there was no need to do so, particularly since all children appearing in a Child Justice Court would be legally represented or legally assisted? This is therefore a clear indication that only in those instances mentioned in terms of section 85(1) and 85(2) that section 302(3) of the CPA would not be applicable.

- [43] Of course, not all matters involving children will be automatically reviewable in terms of section 85(1) of the CJA - the right of automatic review is limited to those children falling under the categories set out at section 85(1)(a) and section 85(1)(b), namely: children under the age of 16 years, and children "16 years or older but under the age of 18 years" and who have been "sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2) (j) of the Children's Act"
- [44] Accordingly, in the case of any suspended sentence (regardless of the length thereof) imposed on children of 16 years or older but under 18 years, such a child would not have an automatic right of review under section 85 of the CJA.
- [45] In a case where a sentence had been imposed on a child between the ages of 16 years and 18 years other than that referred to in terms of section 85(1)(b), the provisions of section 302 would be applicable to a child accused. In a case, where such a child is legally represented and a suspended sentence is imposed in terms of section 7810anc" HREF="#sdfootnote10sym">10 of the CJA read with section 29711anc" HREF="#sdfootnote11sym">11 of the CPA, such a sentence would not be subject to automatic review, because it is not a sentence as referred in terms of section 85(1)(b).
- [46] Accordingly all sentences not falling within the ambit of section 85 are not subject to automatic review because of the fact that in all cases where a child appears in a Child Justice Court such child would either be legally represented or assisted in the manner set out in regulation 48 of the Regulations.

Reviewability of suspended sentence of imprisonment after it has been put into operation

- [47] It is trite that when a suspended sentence is put into operation after it is found that the conditions thereof have been breached, such an order enforcing the suspended sentence is not subject to automatic review. No appeal lies against such enforcement either.

Hiemstra's Criminal Procedure at 28 - 29 states:

"A/o appeal against or automatic review of putting into operation—The view has long been held that the putting into operation of a suspended sentence is not automatically reviewable (S v Helm 1980 (3) SA 605 (T) at 605H; Gasa v Regional Magistrate for the Regional Division of Natal 1979 (4) SA 729 (N) at 732E-F)".

- [48] The question which is unclear is whether, in respect of children of 16 years or older but under 18 years, a suspended sentence, after it has been put into operation after a breach of the conditions thereof can be considered a sentence in the form of imprisonment that is not wholly suspended for the purposes of automatic review in terms of section 85(1)(b) of the CJA.

- [49] It is clear that there is a difference between the actual imposition of a sentence of imprisonment and the putting into operation of a sentence that was suspended in terms of section 297(9)(a)(ii) of the CPA. The effect, however, of imposing a sentence of actual imprisonment and the putting into operation of a sentence that was suspended would be the same, i.e. the imposition of a term of imprisonment that is not wholly suspended.
- [50] In my view, if the purpose of the CJA was to afford children in conflict with the law "special protection" and "special safeguards", such purpose would be defeated if a sentence of imprisonment which came about as a result of the putting into operation of suspended sentence is out of reach of a special review in terms of section 85.
- [51] The very essence of the protection afforded by section 85(1)(b) is to subject any sentence of imprisonment not wholly suspended to automatic review by a Judge of the High Court. It would therefore be absurd and not in keeping with the spirit of the CJA and the provisions of section 28 of the Constitution to exclude such a sentence from automatic review when all other sentences of imprisonment not wholly suspended are subject to review.

Reviewability of Fines in terms of the CJA

- [52] If a fine is imposed as a sentence on a child, such fine would be imposed in terms of section 74 of the CJA. The provisions of section 276(1)(f) of the CPA that empower a court to impose a fine are not applicable. This would mean that where a child is in default of the payment of a fine a period of imprisonment cannot be used as an alternative to the payment of such fine as provided for in terms of section 287 of the CPA, or any of the other mechanisms to recover or enforce a fine in terms of the CPA¹².
- [53] I consider that the provisions of section 79 of the CJA would be applicable where a child is unable to pay a fine. In terms of section 79:

"[79] Failure to comply with certain sentences.—(1) If a probation officer reports to a child justice court that a child has failed to comply with a community-based sentence imposed in terms of section 72, or a restorative justice sentence imposed in terms of section 73, or has failed to pay a fine.

restitution or compensation provided for in section 74, the child may, in the prescribed manner, be brought before the child justice court which imposed the original sentence for the holding of an inquiry into the failure of the child to comply, (own underlining)

- (2) If, upon the conclusion of the inquiry, it is found that the child has failed to comply with the sentence provided for in subsection (1), the child justice court may confirm, amend or substitute the sentence".

- [54] Where a sentence of a fine has been imposed on a child who was under the age of 16 years when the offence was committed, such a case would be subject to automatic review in terms of section 85(1)(a) of the CJA because, as I have demonstrated above, all cases involving children under the age of 16 years, irrespective of the sentence or order imposed, are subject to automatic review in terms of section 85(1)(a) of the CJA.
- [55] In the case of a child who is 16 years or older but under the age of 18 years at the time of the commission of the offence and in respect of whom a sentence of a fine has been imposed in terms of section 74 of the CJA, such sentence is not subject to automatic review, because it cannot be enforced with a term of imprisonment which is not wholly suspended. Furthermore, the mechanism created in terms of section 79 of the CJA does not sanction imprisonment as the alternative where a child is in default of the payment of a fine.
- [56] It is questionable whether the provisions of section 302(1)(a)(ii)13 of the CPA dealing with the automatic reviews in relation to a sentence of a fine would be applicable in the light of the provisions of section 82 and 83 of the CJA, which have the effect that it is theoretically impossible for a child to be without legal representation or legal assistance. If a child should for some or other reason not be legally represented then the imposition of a fine as a sentence would be subject to automatic review in terms of sec 302(1)(a)(ii) and the provisions of Section 79 of the CJA will act as a further safeguard.

Reviewability of Regional Court Cases

- [57] A final question that arises is whether the provisions of section 85 of the CJA apply to children convicted in the Regional Court. It is clear that sentences subject to review in the ordinary course in terms of section 302 of the CPA only include sentences imposed by a Magistrate in a Magistrate's Court. In this regard, section 302(1)(a) refers to "any sentence imposed by a magistrate". "Magistrate" in terms of the definitions section of the CPA "includes an additional magistrate and an assistant magistrate but not a regional magistrate." (Emphasis added)
- [58] As far as automatic review in terms of section 85 of the CJA is concerned, it is quite clear that sentences imposed by a regional magistrate are also subject to review, contrary to the position in terms of section
302. Section 85(1) of the CJA deals with "the review of criminal proceedings in the lower courts." The term, "lower courts", is not defined in the CJA. However, section 1 of the CJA does define a "child justice court" to be "any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child."
- [59] "Lower Court" is defined in the Criminal Procedure Act as "any court established under the provisions of the Magistrates' Courts Act, 1944 (Act 32 of 1944)." The term, "regional court" is defined in the CPA, as "a court established for a regional division under the provisions of the Magistrates' Courts Act, 1944 (Act 32 of 1944)." As such, a regional court is considered as a "lower court" in terms of the CPA.

- [60] One must therefore conclude that a reference to lower courts" in section 85 of the CJA includes regional courts, and, as such, sentences imposed by regional courts are also subject to automatic review. The choice of the words by the legislature is, in my view, also of significance - "lower courts" are spoken of, as opposed to "magistrates courts". This is indicative of the legislature's intention.
- [61] Furthermore, on the basis of logic and pure common sense, it could not have been the intention of the legislature to deny children in conflict with law the right to automatic review in respect of sentences imposed by regional courts. This is in light of the fact that in regional courts generally more serious offences are heard, and there is a higher likelihood that a sentence of imprisonment, not wholly suspended, would be imposed.
- [62] I therefore conclude that the provisions of section 85 of the CJA are applicable to children convicted in the Regional Court.

Conclusion

- [63] Concerns were raised as to the possible harmful impact on the criminal justice system should it be held that section 85 (1) of the Child Justice Act also applies to sentences imposed on children by Regional Courts, and sentences imposed on children who are legally represented. The fear is that High Courts will be flooded with reviews, resulting in unmanageable workloads for judges and other court staff. As part of their submission before us, the Ministry of Justice and Constitutional Development included statistics of cases finalized by the Magistrate's Courts in terms of the CJA in this division. I am not convinced that the figures indicate that such a fear is warranted.
- [64] Even if it were indeed the case that the workload of judges would be increased, it is my view that the change would be minimal, and in any case this fact alone cannot serve as a legally and constitutionally permissible reason not to have these matters considered on review. This fact was conceded by counsel who appeared on behalf of the Minister. For the sake of clarity for all concerned, I summarize my conclusions as follows:
- 1) All cases are subject to automatic review in terms of the provisions of section 85 of the CJA where a child was: 1.1. under the age of 16 years at the time of his or her commission of the offence, irrespective of the sentence; 1.2. 16 years and older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended or any sentence of compulsory residence in a Child and Youth Care Centre providing a programme for in section 191(2)0 of the Children's Act; 1.3. sentenced to a period of imprisonment after a suspended sentence had been put into operation in terms of section 297(9)(a)(ii) of the CPA; 1.4. This would be irrespective; 1.4.1. of the duration of the sentence and the length of time a judicial officer has held the substantive rank of Magistrate; or

- [60] One must therefore conclude that a reference to lower courts" in section 85 of the CJA includes regional courts, and, as such, sentences imposed by regional courts are also subject to automatic review. The choice of the words by the legislature is, in my view, also of significance - "lower courts" are spoken of, as opposed to "magistrates courts". This is indicative of the legislature's intention.
- [61] Furthermore, on the basis of logic and pure common sense, it could not have been the intention of the legislature to deny children in conflict with law the right to automatic review in respect of sentences imposed by regional courts. This is in light of the fact that in regional courts generally more serious offences are heard, and there is a higher likelihood that a sentence of imprisonment, not wholly suspended, would be imposed.
- [62] I therefore conclude that the provisions of section 85 of the CJA are applicable to children convicted in the Regional Court.

Conclusion

- [63] Concerns were raised as to the possible harmful impact on the criminal justice system should it be held that section 85 (1) of the Child Justice Act also applies to sentences imposed on children by Regional Courts, and sentences imposed on children who are legally represented. The fear is that High Courts will be flooded with reviews, resulting in unmanageable workloads for judges and other court staff. As part of their submission before us, the Ministry of Justice and Constitutional Development included statistics of cases finalized by the Magistrate's Courts in terms of the CJA in this division. I am not convinced that the figures indicate that such a fear is warranted.
- [64] Even if it were indeed the case that the workload of judges would be increased, it is my view that the change would be minimal, and in any case this fact alone cannot serve as a legally and constitutionally permissible reason not to have these matters considered on review. This fact was conceded by counsel who appeared on behalf of the Minister.

For the sake of clarity for all concerned, I summarize my conclusions as follows:

- 1) All cases are subject to automatic review in terms of the provisions of section 85 of the CJA where a child was:
 - 1.1. under the age of 16 years at the time of his or her commission of the offence, irrespective of the sentence;
 - 1.2. 16 years and older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended or any sentence of compulsory residence in a Child and Youth Care Centre providing a programme for in section 191(2)0 of the Children's Act;
 - 1.4. This would be irrespective;

1.4.1. of the duration of the sentence and the length of time a judicial officer has held the substantive rank of

Magistrate; or

1.4.2. if the child was legally represented¹⁴; or 1.4.3. if the child had been sentenced by a Regional Court.

- 2) The provisions of section 302 of the CPA are not applicable to any child that was under the age of 16 years when he or she committed the offence;
- 3) The provisions of section 85(1)(b) of the CJA are not applicable to a child who at the time when the offence was committed was 16 years, but not older than 18 years, and on whom a sentence other than that contemplated in section 85(1)(b) is imposed, which includes a fine and a suspended sentence.

[65] After having concluded that all matters involving children under the age of 16 years would be subject to review irrespective of the sentence imposed and the fact that they were legally represented, this matter that serves before us had been properly submitted for review to this Court.

[66] Order After having considered the merits of this case, I conclude that the proceedings in the Magistrate's Court were in accordance with justice. HENNEY, J Judge of the High Court I agree and it is so ordered. DESAI, J Judge of the High Court I agree. GAMBLE, J Judge of the High Court

1.4.2. if the child was legally represented¹⁴; or

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[65] After having concluded that all matters involving children under the age of 16 years would be subject to review irrespective of the sentence imposed and the fact that they were legally represented, this matter that serves before us had been properly submitted for review to this Court.

[66] Order

After having considered the merits of this case, I conclude that the proceedings in the Magistrate's Court were in accordance with justice.

Judge of the High Court

I agree and it is so ordered.

DESAI, J

I agree.

GAMBLE, J

1To establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic; to provide for the minimum age of criminal capacity of children; to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system; to make special provision for securing attendance at court and the release or detention and placement of children; to make provision for the assessment of children; to provide for the holding of a preliminary inquiry and to incorporate, as a central feature, the possibility of diverting matters away from the formal criminal justice system, in appropriate circumstances; to make provision for child justice courts to hear all trials of children whose matters are not diverted; to extend the sentencing options available in respect of children who have been convicted; to entrench the notion of restorative justice in the criminal justice system in respect of children who are in conflict with the law; and to provide for matters incidental thereto.

2Section 82(1) of the CJA.

3Section 83(1).

4Section 83(2).

5Section 83(2).

6Sec 28 of the Constitution 1. Every child has the right - a. to a name and a nationality from birth; b. to family care or parental care, or to appropriate alternative care when removed from the family environment; c. to basic nutrition, shelter, basic health care services and social services; d. to be protected from maltreatment, neglect, abuse or degradation; e. to be protected from exploitative labour practices; f. not to be required or permitted to perform work or provide services that i. are inappropriate for a person of that child's age; or ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; g. 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 i. kept separately from detained persons over the age of 18 years; and ii. treated in a manner, and kept in conditions, that take account of the child's age; h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and i. not to be used directly in armed conflict, and to be protected in times of armed conflict. 2. A child's best interests are of paramountly importance in every matter concerning the child. (OWN UNDERLINING)

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 - a. to a name and a nationality from birth;
 - b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
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 - i. are inappropriate for a person of that child's age; or
 - ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - g. 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
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 - ii. treated in a manner, and kept in conditions, that take account of the child's age;
 - h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - i. not to be used directly in armed conflict, and to be protected in times of armed conflict.
2. A child's best interests are of paramountly importance in every matter concerning the child.
(OWN UNDERLINING)

7See also *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC) as referred to by Langa DP in the Hyundai matter.

8See *S v Fortuin* at [15].

9See *S v Fortuin* at paragraph [17].

10The provision in the CJA dealing with the postponement and suspension of a sentence.

11The provision of the CPA dealing with suspension of a sentence.

12See also sec 288 (recovery of a fine) and sec 289 (enforcement of fine); See also Schedule 5 of the CJA.

13In terms of GG24393 dated 24 February 2003, a fine imposed of more than R3000 would be subject to automatic review if a Judicial Officer has held a substantive rank of Magistrate for less than 7 years and if a fine imposed of more than R6000 is imposed by a Judicial Officer who has held the substantive rank for more than 7 years it would be subject to review.

14If ever such a child could ever be without legal representation or assistance, if regard is to be had to Section 82 or 83 read with Regulation 48 of Chapter 10 of the Regulations.

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