IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 97/18
98/18
99/18
100/18

In the matters between: -

THE STATE

and

LM AND THREE OTHER RELATED MATTERS Accused(s)

and

CENTRE FOR CHILD LAW *Amicus Curiae*

SUBMISSIONS OF THE CENTRE FOR CHILD LAW

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INTRODUCTION

1. This matters concerns the treatment of children charged with allegedly contravening section 4(b) of the Drugs and Drug Trafficking Act.[1] It arises as a consequence of four matters that were sent on urgent special review on 28 November 2018.[2] It will be recalled, in this regard, that:

1.1. In each of the four matters the child was "referred"[3] 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.[4]

1.2. In each case the assessment of the child by a probation officer before his first appearance was dispensed with for the generic reason that *"after due consideration of the nature of the offence, possible delays in having the child*

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1 Drugs and Drug Trafficking Act 140 of 1992 ("**Drug Trafficking Act**").

2 The documents provided to the Centre for Child ("***amicus***") have not been indexed and paginated. The *amicus*, in an attempt to overcome this issue, will - when referencing any particular document - particularise it and designate it an acronym that will be used throughout the course of these submissions.

3 The term 'referred" is used as it is unclear from the parts of the record in our possession whether the children concerned were arrested, in terms of sec. 20 of the Child Justice Act 75 of 2008 ("**CJA**"), summoned, in terms of sec. 19 of the CJA, or issued with a written notice to appear, in terms of sec. 18 of CJA. It is likely, from our experience in training members of the South African Police Service ("**SAPS**"), that they were arrested. It is concerning though, and in any event, that this issue is not clearly indicated on the record of proceedings.

4 See the respective Department of Social Development Assessment Report for Child in Conflict with the Law ("**DSD Assessment Report**") for the four children at para G. The children were, at the time, **aged 16, 14, 15 and 15**, respectively: See the document titled *"Diversion: Child Justice Act 75 of 2008: Sections 41 and the Order of the Court ito Section 42"* ("**Diversion T&Cs**") compiled in respect of each of the children at para 1.

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 …".[5]

1.3. The children were thereafter diverted and ordered, on strict and onerous conditions, to attend the *"Drug Child Programme"*[6] for a period a period of three months.

1.4. The children in each of these matters allegedly did not comply with the programme (or a condition attached to the programme) and were brought back before the court.[7]

1.5. They were thereafter, and despite no enquiry being held in terms of section 58(2) of the CJA, ordered pursuant to section 58(4)(c) of the CJA to attend a residential diversion programme, for an unspecified period, at the Mogale Leseding Child and Youth Care Centre owned and operated by BOSASA.[8]

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5 See document styled *"Court order ito section 42(1) Act 75 of 2008: Diversion ito section 41 Act 75/2008"* compiled in respect of each child at bullet point 4.

6 A programme designed and implemented by the prosecutors situated at the Krugersdorp Court some 15 years ago. See, generally, the Heads of Argument ("**DPP HOA #1**"), dated 21 February 2019, and filed on behalf of the Director of Public Prosecutions, Johannesburg ("**DPP**").

7 *S v LM and 3 Similar Case* (97/18; 98/18; 99/18 & 100/18) (05 February 2019) ("**Judgment #1**"), para 4.7.

8 See, Judgment #1, para 4.7, 4.8, 4.12, & 9. See also, regarding the programmes the children were enrolled in, annexure A1 – A4, Supplementary Heads of Argument ("**DPP HOA #2**"), dated 05 March 2019, and filed on behalf of the DPP.

2. The matter raises several issues of fundamental importance. The issues are not only fundamentally important to the children whom this review relates (and who have already been released)[9] but to all children similarly situated, and particularly those attending schools in the Krugersdorp area.[10] The issues include, and those that are addressed, the following:

2.1. First, and foremost, the crime of contravening section 4(b) of the Drug Trafficking Act. In this regard three sub-issues are analysed and discussed, namely:

2.1.1. The status of the offence in respect of children and its continued constitutionality.

2.1.2. The "legal act" required by the offence and whether testing positive for cannabis, in particular, satisfies the necessary requirements to be held accountable.

2.1.3. The lawfulness of the use of processes and procedure under the South African Schools Act[11] to draw children into the criminal justice system and

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9 Judgment #1 para 15.3.

10 It is clear from submissions filed by the DPP that they intend to continue treating children charged with contravening sec. 4(b) of the Drug Trafficking Act in the same way and, in fact, suggest that they intend to deal with children accused of bullying in the same way. In respect of the latter, see pars 31-8, pgs. 12-4, Second Supplementary Heads of Argument ("**DPP HOA #3**"), dated 16 April 2019, filed on behalf of the DPP

11 South African Schools Act 84 of 1996 ("**SASA**").

the constitutionality of any such evidence obtained by the SAPS (and the National Prosecuting Authority).

2.2. Second, the (mis)interpretation of the provisions of the CJA by the prosecutors in exercising their statutory mandate.

2.3. Lastly, and perhaps most importantly, we deal with the question of whether (or not) a child accused of committing a "schedule 1"[12] may be ordered to undergo a period of temporary residence as part of his/her diversion programme in terms of section 54(2) read with section 58(4)(c) of the CJA.

3. We now turn to address the issue identified, separately, in turn and under their own respective headings.

CONTRAVENING SECTION 4(1)(b) OF THE DRUG TRAFFICKING ACT

4. This court, in its judgment dated 05 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*

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[12] A schedule 1 offence, for the sake of completeness, 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.

arises <u>whether they committed an offence at all, and whether these proceedings were appropriate, at all</u>. … ."[13] (own emphasis added)

5. The observation, although made *obiter*, raises at least three distinct (and vitally important) issues:

5.1. <u>First</u>, is it still a criminal offence for children to use or be found in possession of cannabis?

5.2. <u>Second</u>, did the children, by testing positive for cannabis, contravene section 4(b) of the Drug Trafficking Act?

5.3. <u>Third</u>, is it permissible for a child to be "referred" to the criminal justice system after failing a drug test administered by his/her school?

6. In what follows the *amicus* will seek to answer these three questions with reference to inter alia the rights (and concomitant obligations) imposed by the Constitution.

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

<u>Introduction:</u>

7. The Constitutional Court, in the matter of *Prince*,[14] provisionally decriminalised: -

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13 Judgment #1, para 14.

14 *Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening);*

7.1. the use or possession of cannabis by an adult in private and for his/her own consumption;[15] and

7.2. the cultivation of cannabis by an adult in private and for his/her own consumption.[16]

8. The judgment and order of the Constitutional Court expressly related to adults only.[17] 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 trite 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"*.[18] The facts, in this particular matter, related exclusively to adults.

National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton 2018 (10) BCLR 1220 (CC) ("***Prince***").

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

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

17 The Constitutional Court in this regard, and for the avoidance of doubt, makes this abundantly clear at para 109 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. …"* (own emphasis added)

18 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (7) BCLR 637 (CC) at para 42.

9. 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.[19] The use and/or possession of cannabis, is in fact, now considered to be socially, morally, and legally acceptable for this class of people.

10. 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, as we will demonstrate, is constitutionally indefensible.

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

11. A status offence is an offence that *"criminalises actions for only certain groups of people, most commonly because of their religion, sexuality or age"*.[20] In apartheid South Africa several such offences existed, these included: -

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19 In the submissions filed by the DPP it is plain that they regard the use or possession of cannabis by children a criminal offence. The submissions, moreover, make it plain that they intend to continue criminally pursuing these children (or to use the pejorative term used frequently and often by the DPP "drug addict children"). See, in this regard, and for example, DPP HOA #3, pars 7 & 8, pgs. 6-7.

20 Child Rights International Network. (2016). *Discrimination and Disenfranchisement: A Global Report on Status Offences*. Third Edition. Available at <https://archive.crin.org/sites/default/files/crin_status_offences_global_report_0.pdf> [accessed on 05 May 2019].

11.1. the failure of Black South African's to carry a reference book (colloquially a *"dompas"*) whenever travelling outside of the designated homelands created by the apartheid state;[21]

11.2. the prohibition of interracial marriages;[22] and

11.3. the use of "European" amenities by "Non-Europeans".[23]

12. 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:

13. It is accepted, at the level of international law, that status offences violate several fundamental rights of children.[24] That, and as a consequence, they must be abolished.

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21 The offences were contained in the Native Urban Areas Consolidation Act 25 of 1945. An exposé on this law, and similar laws, is available at <https://www.sahistory.org.za/article/pass-laws-south-africa-1800-1994> [accessed on 05 May 2019].

22 Prohibition of Mixed Marriages Act 55 of 1949.

23 Separate Amenities Act 49 of 1953.

24 The rights violated include: art. 2, 3, 4, 16, 37 and 40 of the United Nations Convention on the

13.1. 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."*[25] (own emphasis added)

13.2. The United Nations Committee on the Rights of the Child has similarly repeated this call for the abolishment 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 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."*[26] (own emphasis added)

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. Available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [accessed on 05 May 2019].

25 United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines): *resolution / adopted by the General Assembly*, 14 December 1990, A/RES/45/112, available at < https://www.un.org/documents/ga/res/45/a45r112.htm> [accessed 05 May 2019]

26 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, available at <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf> [accessed 05 May 2019].

13.3. The Committee 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".*[27] (own emphasis added)

14. 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.[28] In this regard:

14.1. 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:

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27 United Nations Human Rights Council, *Human rights in the administration of justice, including juvenile justice : resolution / adopted by the Human Rights Council,* 8 October 2013, A/HRC/RES/24/12, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/178/82/PDF/G1317882.pdf?OpenElement> [accessed 05 May 2019].

28 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). Available at <http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf> [accessed on 05 May 2019].

"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."[29] (own emphasis added)

14.2. 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."[30] (own emphasis added)

15. In its recent report on status offences the Child Rights International Network ("**CRIN**") makes several important observations that, we submit, 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

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29 Art. 47. African Child Policy Forum. (2012). *Guidelines on Action for Children in the Justice System in Africa*. Available at <https://archive.crin.org/en/library/legal-database/guidelines-action-children-justice-system-africa?qt-countr-tabs=3> [accessed on 05 May 2019].

30 Item 15(iv). Report of the Ministers' Meeting. (2017) *Youth, Health and Development: Overcoming the Challenges towards Harnessing the Demographic Dividend.* STC-HPDC-2/MIN/RPT. Available at <https://au.int/sites/default/files/pages/32900-file-ministers_report_-_stc-hpdc-2_final_sa19686_e_original.pdf> [accessed on 05 May 2019]. It is perhaps worth noting that our own Deputy Minister of Social Development, Mme Hendrietta Bogopane-Zulu, was present at this meeting, and by all accounts, aligned South Africa with the position adopted by the various Ministers.

> *"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 acceptable once above the age of majority. Thus, limits are placed on children's behaviour that are not tolerated by adults."*[31] (own emphasis added)

16. There, accordingly, can be no debate then that at the level of international and regional law that status offences must be abolished. The import of this is that we are obliged to view these offences through the prism of abolishment when evaluating their constitutionality.[32]

Status Offences and the Constitution:

17. 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 offence (and in this regard the

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31 CRIN Report (*supra* n 20), pg. 5.

32 See, sec. 39(1)(b) of the Constitution. See also, secs. 232-3 of the Constitution.

criminalisation of cannabis related offences, specifically) violate the constitutional rights of children in the South African context.

18. There can be no debate that children are the individual bearers of rights. This was made plain most recently 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]."*[33] (footnotes omitted)

19. In addition, children also enjoy specific rights that are independent of the other rights they enjoy.[34] These include the right: -

19.1. to family care or parental care, or to appropriate alternative care when removed from the family environment;[35]

19.2. to be protected from maltreatment, neglect, abuse or degradation;[36]

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33 *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 (12) BCLR 1429 (CC).

34 See, generally, sec. 28(1) of the Constitution.

35 Sec. 28(1)(b) of the Constitution.

36 Sec. 28(1)(d) of the Constitution.

19.3. 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.[37]

20. A child, moreover, enjoy the right to have his/her best interests considered of paramount importance.[38] 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)."*[39]

21. *Skelton* correctly goes onto add that: -

> *"… <u>As much as s[ection] 28(2) is a self-standing right, it also appears alongside and strengthens other rights.</u> 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*

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37 Sec. 28(1)(g) of the Constitution.

38 Sec. 28(2) of the Constitution.

39 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC) at para 17. See also, *J v National Director of Public Prosecutions* 2014 (7) BCLR 764 (CC) at para 35.

dignity; the testimony of child victims and witnesses; the right not to be evicted from a public school on private property without consideration 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."[40] (footnotes omitted) (own emphasis added)

22. 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".[41]

23. As against this backdrop the *amicus* submits that several children's rights are directly violated by the criminalisation of cannabis related offences on account of the (alleged) offenders age.

23.1. First, the criminalisation of the use and possession of cannabis violates a child's right to **equality**.

23.1.1. Section 9 of the Constitution provides, in relevant part, as follows:

> *"(1) Everybody is equal before the law and has equal protection and benefit of the law.*

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40 A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart (ed) *Child Law in South Africa* (2017) at 346-7.

41 *Teddy Bear Clinic* (*supra* n 33) at para 41.

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislation 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.*

…

(4) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*[42]

(own emphasis added)

23.1.2. In *Harksen* the Constitutional Court set out a three-stage test for establishing whether the right to protection from unfair discrimination has been violated:[43] 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:*

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42 Sec. 9 of the Constitution.

43 *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC).

(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 … ."[44] (own emphasis added)

23.1.3. 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.

23.1.3.1. 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 societies intolerance for that type of behaviour. The

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44 *Harksen* (*supra* n 43) at para 50.

underlying rational (or societal norm) is no longer and consequently there can be no legitimate rationale purpose.

23.1.3.2. Second, even if we are wrong, 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.

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

23.2. Second, the criminalisation of the use and/or possession of cannabis violates the *"best-interest"* or *"paramountcy"* principle.[45] The *amicus* submits, in this regard the following:

23.2.1. The imposition of criminal liability may, at worst, lead to imprisonment, and, at best, lead to diversion (and even then, detention is always a possibility considering the stance adopted by the DPP).

23.2.2. There can be no debate that exposure to criminal the 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*

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

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. …"[46](own emphasis added)

23.2.3. The same sentiments apply in respect of the both arraignment and "punishment" (especially when this involves some form of detention).

23.2.4. 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"*.[47]

23.2.5. 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.

23.2.6. The criminalisation, moreover, is a form of stigmatisation which is both degrading and invasive; children accused of such offences risk being label, as the DPP does, as *"drug addict children"* and excluded by their peers in circumstances, yet again where as a society we have accepted this type of a behaviour.

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46 *Raduvha v Minister of Safety and Security* 2016 (10) BCLR 1326 (CC) at para 57.

47 *S v M* 2007 (12) BCLR 1312 (CC) at para 19.

23.2.7. Then finally, it is worth always remembering that the criminalisation has the net-effect of treating children more severally than an adult would be treated in the same identical circumstances.[48]

23.2.8. In the premise, the criminalisation of these offences violates the best interests of the child.

23.3. Lastly, the status offence of criminalising children for the use and/or possession of cannabis violates a child's right to both human dignity and freedom of security. In the latter, the arrest would – as the African Union has noted – deprive them of the freedom in circumstances that is arbitrary and capricious.

24. It being established that the criminalisation of cannabis related offences *viz-a-vis* children limit the rights of children, the next question is whether such a limitation is justifiable. In this regard, and focuses only for the moment on *"less restrictive means"* the *amicus* submits it is not.[49] 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*

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48 See, generally, sec. 3(b) of the CJA.

49 See Currie & De Waal *The Bill of Rights Handbook* (2013) 162 – 172 for a very useful applied summary of the limitation process.

to whether there are less restrictive means available to achieve the stated purpose."[50] (footnotes omitted)

25. The *amicus* submits that there are several alternative *"less restrictive means"* available to prevent children from using cannabis to the extent that it is harmful to them. These kind of means have been employed for decades in relation to other so-called undesirable vices (e.g. pornography, tobacco, and liquor). These means include: criminalising the sale of such items to persons under the age of 18.[51]

Conclusion:

26. In conclusion:

26.1. The *amicus* if of the opinion that the constitutional question arises squarely from the facts of the matter.[52] That, and considering the stance adopted by the DPP, it would be in the interests of justice to for this court to decide the issue.[53]

26.2. The *amicus* also wishes to make it clear that its submissions (and the case it seeks to make) is not directed at allowing children to consume cannabis rather

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50 *Teddy Bear Clinic* (*supra* n 33) at para 95.

51 See Tobacco Product Control Amendment Act 63 of 2008; The Liquor Act 59 of 2003; &0 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

52 *Director of Public Prosecution, Transvaal* (*supra* n 1814) para 37.

53 See *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (11) BCLR 1105 (CC) regarding the inevitable issue of dealing with a matter *per se* in the abstract and the desirability to deal with it promptly.

it is that criminalisation for the sake of prevention is not the answer to this issue.

26.3. The *amicus* requests that the Minister of Justice and Constitutional Development be joined so that the matter may be properly ventilated.

Testing positive for cannabis: a presumption of possession and/or use?

27. If this court, for whatever reason, declines to deal with constitutionality of the offence of possession and/or use of cannabis by children then, and in that event, a further fundamental question remains: Did the children, by testing positive for cannabis, legally commit the offence of contravening section 4(b) of the Drug Trafficking Act?

28. The logical starting point in answer to this question is the section itself, that provides:

> *"No person shall use or have in his possession – any dangerous dependence-producing substances or any undesirable dependence-producing substances …".*[54] (own emphasis added)

29. The elements of the crime include: -

29.1. the act, that is, the possession or use;

29.2. a drug;

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[54] Cannabis is classified, in terms of schedule 2, Part III, as an *"undesirable dependence producing substance"*.

29.3. unlawfulness; and

29.4. intention.

30. Importantly, for the purposes of the present discussion, is the element relating to the 'act'.

30.1. In his seminal work on Criminal Law *Snyman* makes the following observations regarding the terms "use" and "possession":

> *"… As far as the meaning of the word 'use' is concerned, the word is largely self-explanatory and can hardly be elucidated by further definition. Clearly the smoking, inhalation, injection or ingestion of drugs will amount to use of the drug.*
>
> *… There are two ways in which the prosecution may prove that X possessed the drug. The first is by proving possession in the ordinary judicial sense of the word. The second is by relying on the extended meaning given in section 1 [of the Drug Trafficking Act] to the word "possess".*
>
> *(i) Possession in the ordinary judicial sense: … Possession consists of two elements, namely a physical and corporeal element (corpus or detention) and a mental element (animus, that is, the intention of the possessor). The physical element consists in an appropriate degree of physical control over the thing. The precise degree of control required depends upon the nature of the article and the way in which control is ordinarily exercised over such type of article. …*
>
> *The animus element of possession relates to the intention with which somebody exercises control over an article and differs according to the type of possession. … In private law "possess" may be restricted to situations where X exercises control over an article with the intention of keeping or disposing of it as if she were the owner, as opposed to keeping it (temporarily or otherwise) on behalf of somebody else. This is called possession civilis. …*

> *(ii) The extended meaning of possession: What is the position if X does not exercise control over the drug in order to keep it for herself, but merely to look after it (temporarily or otherwise) on behalf of somebody else? The answer to this question is found to be found in the extended meaning of the word 'possession' in section 1. This section provides that the word 'possess' includes, in relation to a drug, 'to keep or to store the drug, or to have it under control or supervision'. Here the animus element is wider: all that is required is that X exercise physical control over the thing. This type of possession is called possession naturalis."*[55] (footnotes omitted) (own emphasis added)

30.2. In his likewise seminal work on Criminal Law *Burchell* makes similar observations regarding the term "possession".[56] He also, and importantly, says the following in respect of the term "use":

> *"The Act penalises not only the possession but also the 'use' of drugs. The primary meaning of the word 'use' is 'to employ for any purpose'. Clearly the smoking, inhalation, injection or ingestion of drugs will amount to using the drug, and such conduct will thus amount to an offence under the Act.*
>
> *It is not clear why the legislature thought to create this particular form of offence, since any instance of use of a drug involves also its possession and as such amounts to an offence under the Act. It is probably for this reason that in practice few if any prosecutions seem to be brought under this particular provision of the Act."*[57] (own emphasis added)

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55 CR Snyman *Criminal Law* (2014) 423.

56 J Burchell *Principles of Criminal Law* (2016) 829.

57 *Ibid*.

30.3. Implicit in *Burchell's* analysis is that the person arrested would be caught actually using the drug and hence, would also still be in possession of the remnants of whatever it was that he was using.

31. Applying these facts to the matter at hand (i.e. simply testing positive for cannabis) it is clear that:

31.1. They cannot be guilty of the offence of "possession" of cannabis. That this is so is as a consequence of, at least, the following:

31.1.1. First, they could not have been said to have met the physical element of possession. They were not found in actual physical possession of cannabis (or related paraphernalia). The fact that it was present in their bodies similarly does not constitute the physical possession required by the element.

31.1.2. Second, they could not have said been said to have met the requisite mental element (in the strict sense). It can hardly be argued that they kept the cannabis with the intention of keeping or disposing of it as owner. They had no such cannabis to keep and could not, even if they wanted to, have held in with such an intention.

31.1.3. Third, they could not have been said to have met the requisite mental element (in the liberal sense). It is logical non-sequitur to suggest that they could have held it on behalf of another in such circumstances. This simply needs to be stated to be rejected.

31.2. They similarly cannot be guilty of the crime of "use" of cannabis. That this is so as a consequence of at least the following:

31.2.1. First, the children were not caught and/or observed "using" (that is otherwise consuming) the cannabis by either a law enforcement officer or an educator or anyone for that matter.

31.2.2. Second, there is no statutory presumption contained in either the CJA, the Criminal Procedure Act[58] or Drug Trafficking Act that allows for such inference to be drawn;[59] such a presumption, in any event, would likely not withstand constitutional scrutiny for it would infringe on inter alia the right to be presumed innocent.[60]

31.2.3. Third, the term "use" in the Drug Trafficking Act is used in the present-tense and not the past-tense (used). It follows, and as is implied by *Burchell*, that the fact that a person may have used it in the past does not render him /her liable under the provisions of the Drug Trafficking Act. If this were not so,

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58 Criminal Procedure Act 51 of 1977.

59 See, in this regard, and by way of example sec. 20 of the Drug Trafficking Act that contains the sole presumption regarding "possession". It provides that: *"If in the prosecution of any person for an offence under this Act it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug"*. If the legislature intended that testing positive would constitute "use" it would have, as it has done in relation to possession, explicitly said so in the Act.

60 See, in this regard, and insofar as the presumption of dealing was concerned, the matter of *S v Bhlwana; Sv Gwadiso* 1995 (12) BCLR 1579 (CC).

the SAPS would be free to arrest anyone and have them tested if they suspected they may have been exposed to some form of drug in the past.

32. In the premise, the *amicus* submits that the testing positive for cannabis cannot on its own cannot constitute an offence for purposes of section 4(b) of the Drug Trafficking Act. This applies not only to the children in respect of the matter at hand, but any child in a similar situation.

Drug testing at public schools: A case of overreaching by zealous educators and law enforcement officials

33. Drug testing at schools is comprehensively regulated by the South African Schools Act.[61] 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 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.*

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

…

(8) The principle 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)

34. 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 learners and his or her parents 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."[62] (own emphasis added)

35. The SASA and its regulations, accordingly, make several things abundantly plain, namely:

35.1. In order for a principal to invoke the provision and consequently test a pupil for drugs he/she must entertain a reasonable suspicion.[63] If there is no

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62 Devices to be used for Drug Testing and the Procedures to be followed for Drug Testing GN 1140 in GG 31417 of 19 September 2008.

63 The term reasonable suspicion, the *amicus* submits, ought to bear the same meaning as that

reasonable suspicion then the search would be not allowed and the results would be susceptible to being challenged in a court.[64]

35.2. No criminal proceedings may be instituted against the learner regardless of whether he/she is found in possession of an illegal drug or simply tests positive for such illegal drug. The tests, as rule, remain strictly confidential.

35.3. 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 his/her parent and, if so requested, refer the child for counselling and/or to a rehabilitation centre. The only sanction authorised in the institution of disciplinary proceedings against the child.

36. There is nothing unclear or ambiguous about these provisions. The relevant stakeholders (supported by the office of the DPP) however believe that they are somewhat above the law. That under the rubric "best-interests" they are entitled to flout the constitutional rights of learners, the provisions of the SASA, and the protections of the CJA and arrest and initiate criminal proceedings against a

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given to it within the context of arrest under section 40(1)(b) of the Criminal Procedure Act. The meaning has been comprehensively addressed in several decisions, see for example, *De Klerk v Minister of Police* [2018] 2 All SA 597 (SCA); *Minister of Safety and Security v Sekhoto* [2011] 2 All SA 157 (SCA); *Minister of Safety and Security v Seymour* [2007] 1 All SA 558 (SCA).

64 See, generally, Department of Basic Education. (2013). *Guide to Drug Testing in South African Schools*. Available at <https://www.education.gov.za/Portals/0/Documents/Publications/Drug%20Testing%20Guide_FINAL_PRINT.pdf> [accessed on 06 May 2019].

child. This they do in their unlawful self-imposed crusade to fight *"the evil of drug addiction"*.[65]

37. The consequent of this reckless crusade is that:

37.1. 819 learners have had their right to privacy and dignity infringed upon by the stakeholders in testing them, likely without a reasonable suspicion, for use of drugs.[66]

37.2. 178 learners have been referred to the criminal justice system (possibly unlawfully arrested; possibly unlawfully detained) and diverted in instances not permitted by the SASA and where it is likely that no *prima facie* case against them have been made.[67]

37.3. 24 learners have been unlawfully detained for failing to allegedly comply with diversion orders that were, most likely, void *ab initio*.[68]

38. It is worth bearing in mind the following:

38.1. One, it is firmly established principle that *"an adults judgment of a child's best interests cannot override the obligations to respect all the child's rights".*[69]

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65 DPP HOA #2, para 46 read with para 68, pgs. 17 & 22.

66 DPP HOA #1, annexure "D", pg. 3.

67 *Ibid*.

68 *Ibid*. It is also worth pointing out that the sentiments of this court Judgment #1 at pars 7 – 11, likely find equal application to those matters not pending before this court on review.

69 United Nations Committee on the Rights of the Child, *General Comment No. 13 (2011): The right*

38.2. Two, the conduct of the stakeholders fail to heed the warning issued by our Constitutional Court that –

> *"We must be careful … to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development."*[70]

38.3. Lastly, it is worth emphasising that:

> *"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it .... It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."*[71]

39. In conclusion, the *amicus* submits that the conduct of the stakeholders cannot be condoned. Their actions are patently unlawful and unconstitutional and they must be censored.

THE MISAPPLICATION AND MISUNDERSTANDING OF THE CJA

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of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13. Available at <https://www.refworld.org/docid/4e6da4922.html> [accessed on 06 May 2019].

70 *Teddy Bear Clinic* (*supra* n 33) at para 1.

71 U.S. v Lee 106 U.S. 196 at 220.

40. A concerning feature of the matters on review is the seemingly wanton disregard for –

40.1. the constitutional imperatives that should guide the decisions of the stakeholders; and

40.2. the statutory processes outlined by the CJA.

41. In what follows the *amicus* highlights and discusses some of the most egregious instances that are of concern to it.[72]

The use of "informal diversion" to the DCP

42. The DPP, throughout the submissions filed, makes mention of the *"informal diversion"*[73] of matters by the prosecutor to the *"Drug Child Programme"* ("**DCP**")

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[72] The three highlighted are by no means the only concerns identified. Other breaches include:

(1) The dispensing of an assessment of the child following his/her arrest. In terms of sec. 41(3) of the CJA this may only be dispensed with when it is the best interests of the child to do so (and then these reasons must be expressly recorded). If regard is had to the *pro forma* court orders of the respective children the following is recorded: *"[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, with respect, falls foul of what is actually required.

(2) The failure to comply with section 58(2) of the CJA. This has already been comprehensively dealt with by this court in Judgment #1.

(3) The use of unconstitutionally obtained evidence. See, Acting Magistrate Heads of Argument ("**Acting Magistrate HOA #2**"), dated 29 April 2019, pars 1.1 – 1.11.

[73] See, for example, DPP HOA #1, para 15, pg. 6 & para 25, pg. 9.

operated by a *"Mrs M Erasmus (Senior State Prosecutor & Mrs J Steyn (State Advocate) and their team of volunteers"*.[74]

43. The term *"informal diversion"* is not defined (or used) in the CJA. 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 one level diversion option set out in section 53(3) or any combination thereof …"* (own emphasis added)

44. A child is, accordingly, diverted or not. If diverted, however, the prosecutor is bound to comply strictly with all the relevant provisions of the CJA. Importantly, in this regard –

44.1. a prosecutor may only divert a child if the factors referred to in section 52(1)(a) to (d) have been met;[75]

44.2. a prosecutor may only dispense with an assessment if it is in the best interests of the child (expediency alone is insufficient); and

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[74] See, DPP HOA #1, annexure "D", para 1, pg. 1.

[75] Sec. 41(1)(a) of the CJA. Importantly, that there is a prima facie case against the child (sec. 52(1)(c) of the CJA). The lack of such a prima facie case against children in these circumstances has already been discussed elsewhere; suffice to say that the use of the results of drug tests administered by the school is egregiously unconstitutional and, in any event, the testing positive for cannabis does not constitute a prima facie case for purposes of section 4(b) of the Drug Trafficking Act.

44.3. 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.[76]

45. Only if all these requirements are met may a prosecutor divert a child. In diverting the child, however, section 56(1) of the CJA 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 section 2(e)."* (own emphasis added)

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

47. 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 CJA.[77]

48. The programme, accordingly, and at least from the documents available, seems to operate outside of the strictures of the CJA. This is impermissible. It matters not how noble the aim is; the law exists for a reason and the prosecutors (and

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[76] Sec. 41(4) of the CJA.

[77] See, in particular, the DPP HOA #3, annexure "AA".

the office of the DPP) are not simply entitled to ignore it. This would do violence to the rule of law.

The terms and conditions of the diversion orders

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

50. In the matters on review (and we presume all other matters referred to the DCP) 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.*

…"[78] (own emphasis added)

51. Three issues bear emphasis in relation hereto:

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78 DPP HOA #1, annexure "C". See also documents in the review relating to the specific children which are identical to the *pro forma*.

51.1. First, the use of a standardised order for all children falls foul of the "best interest" 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'."*[79]

51.2. 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 CJA.[80] The proverbial book is thrown at these children for good measure. The terms of the order border on the obscene in terms of what is required of the child. They must, for example: -

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79 *J* (*supra* n 39) at pars 38-9. See also, *Director of Public Prosecution, Transvaal* (*supra* n 18) at par 120 where the Constitutional Court held that *"individuated justice is required to avert injustice"*.

80 See, in this regard, sec. 53(3) read with sec. 54(2)(a) of the CJA.

51.2.1. perform undefined *"community service"* for an undetermined amount of hours at the discretion (and whim) of their principle and/or his delegate and/or the DCP;

51.2.2. ensure, regardless of aptitude, an increase in their school marks by at 10%; and

51.2.3. partake in some form of sports or cultural event regularly, even if neither interests them.

51.3. Third, it is a fundamental principle of the CJA that a *"[a] child must not be treated more severely than an adult would have been treated in the same circumstances"*.[81] If regard is had to the nature of the offence (testing positive for cannabis) it is safe to conclude than an adult would, at worst, be required to do 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 abuse by those charged with enforcing it.

52. The court order is consequently fatally flawed. So too are the attended process that follow from its use. The generic order is, simply put, unconstitutional.

Criminal proceedings: The most appropriate forum?

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[81] Sec. 3(b) of the CJA.

53. The DPP, in the submission filed on his/her behalf, seems to try make the case that the criminal justice system is the most appropriate forum for dealing with children addicted to a dependence-producing substance. The thrust of the argument, in this regard, seems to be premised on two independent contentions:

53.1. One, that by virtue of the fact that the prosecution and *"DCP"* remain involved in the treatment and monitoring of the child it is fundamentally better for these children to remain in (their) system.[82]

53.2. Two, and in any event, the provisions of the Children Act[83] do not apply as the *"DCP has been developed to provide support to children in conflict with the law"*[84] and consequently the child cannot be found in need of care and protection.

54. Both these contentions are bad as a matter of law and fact for at least the following reasons:

54.1. Firstly, the submission glosses over the fact that exposure to the criminal justice system, generally, is harmful to children.[85]

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82 DPP HOA #3, para 14, pg. 8.

83 Children's Act 38 of 2005 ("**Children's Act**").

84 DPP HOA #3, para 19, pg. 9.

85 See, in this regard, the section on "best interests" elsewhere. See, also, *M* (*supra* n 47) at para 19 regarding avoidable trauma.

54.2. Secondly, and perhaps more importantly, the child justice system is not designed for this purpose. If it were then the systems created by the Children's Act and the Prevention of and Treatment for Substance Abuse Act[86] would be superfluous and redundant, children could simply be dealt with by the child justice system.

54.3. Third, it presupposes that it is better suited to monitoring court orders as opposed to the other systems. This is blatantly incorrect and not supported by any of the evidence tendered by the DPP.

54.4. Fourth, and regarding the use of the care and protection system, the DPP misunderstand the term *"without any support to obtain treatment"* as contained in section 150 of the Children's Act. The term *"support"* does not solely mean financial support. On the contrary the inability of a parent, for whatever reason, to have their child referred to an appropriate rehabilitation centre would constitute *"without support"*.

54.5. Fifth, whether the *"DCP has been developed to provide support"*[87] or not misses the point. Section 41(4) of the CJA expressly requires a prosecutor not to divert where it appears that the child is in need of care and protection. It follows that even before the *"DCP"* provide the alleged support the child ought to be referred to the care and protection system. But even if the *"DCP"* does

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86 Act 70 of 2008.

87 DPP HOA #3, para 19, pg. 9.

provide some support it is not the support envisaged in terms of the Children's Act.

54.6. Lastly, the submissions fail to appreciate the fact that, in addition to the care and protection system, the Prevention of and Treatment for Substance Abuse Act 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.

55. The notion that the child justice system (and the *"DCP"*) are better suited to assist in matters such as the present is, with respect, seriously misplaced and falls to be rejected out of hand.

The duration of the temporary residence

56. This court correctly noted in its judgment that the residential diversion programmes ultimately imposed on the children were indeterminate in length (i.e. there was no fixed duration). This is of grave concern to the *amicus*. 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:

56.1. First, it violates a fundamental tenet of the principles of diversion under the CJA, 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 perverse 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.

56.2. Second, it violates a child right only to be detained as an absolute measure of last resort and then only for the shortest appropriate period of time.[88]

56.3. 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, would amount to cruel, inhuman and degrading punishment at the very least.

57. The fact that the DPP does not take issue with this aspect, or seek to address it despite this court's judgment, yet again demonstrates a lack of understanding by his/her office.

TEMPORARY (COMPULSORY) RESIDENCE AND THE CJA

Introduction

58. The submissions filed by the DPP make an impassioned plea for this court to find that the use of temporary residence is allowed under the CJA for all matters where a child has failed to comply with a non-custodial diversion programme. In this regard the DPP argues that section 58(4)(c) read with section 54(3) of the CJA:

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[88] See, generally, *Centre for Child Law* (*supra* n 53).

> *"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"*.[89]

59. This contention is seemingly premised on the following:

> *"It is submitted that the CJA allows for the development (section 54(3)) of an individual, more onerous, diversion option (section 58(4)(c)) that will assist a schedule 1 drug addict child (sic)."*[90]

60. The contention is, respectfully, and as the *amicus* will demonstrate, wholly misplaced.

The meaning of the respective provisions

61. The principles of statutory interpretation are well-known (and well-settled). They were, most recently, summed up by the Constitutional Court in *Road Traffic Management Corporation* as follows:

> *"… In Endumeni, the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation. The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. This process, it emphasised, entails a simultaneous consideration of –*
>
> *(a) the language used in the light of the ordinary rules of grammar and syntax;*
>
> *(b) the context in which the provision appears; and*
>
> *(c) the apparent purpose to which it is directed.*

---

89 DPP HOA #2, para 21, pg. 9

90 DPP HOA #2, para 50, pg. 18.

… What this Court said in Cool Ideas in the context of statutory interpretation is particular apposite. It said:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) the statutory provision should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso is closely related to the purposive approach referred to in (a).'

… Where a provision is ambiguous, its possible meaning must be weighed against each other given these factors. For example, a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred. Neither is one that unduly strains the ordinary, clear meaning of words. That text, context and purpose must always be considered at the same time when interpreting legislation has been affirmed on various occasions by this Court.

… Allied to these factors, courts must also interpret legislation to promote the spirit, purport and object of the Bill of Rights. Again, courts should not unduly strain the reasonable meaning of words when doing so. But this obligation entails understanding statutes to 'lay the foundation for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa'."[91] *(footnotes omitted)*

62. The logical starting point, accordingly, is to have regard to the wording of the provisions. They are, due to their centrality to the matter, cited in full.

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91 *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2018] ZACC 12.

62.1. Section 54 of the CJA reads as follows:

> *"(1) The following factors must be considered when a diversion option is selected: -*
>
> *(a) the diversion option must be at the appropriate level in terms of section 53;*
>
> *(b) the child's cultural, religious and linguistic background;*
>
> *(c) the child's educational level, cognitive ability and domestic and environmental circumstances;*
>
> *(d) the proportionality of the option recommended or selected, to the circumstances of the child, the nature of the offence and the interests of society; and*
>
> *(e) the child's age and developmental needs.*
>
> *(2) (a) In the case of an offence referred to in schedule 1, level one diversion options set out in section 53(3) are applicable and may be used in combination.*
>
> *(b) In the case of an offence referred to in schedule 2 or 3, level two diversion options set out in section 53(4) are applicable and may be used in combination, together with any one or more level one diversion options, where appropriate.*
>
> *(3) In addition to the diversion options set out in section 53, a prosecutor, in terms of section 41(1), an inquiry magistrate, in terms of section 49(1)(a), or a presiding officer in a child justice court, in terms of section 67(1)(a), may, where appropriate, after consideration of all available information, develop an individual diversion option which meets the objectives in terms of section 51 and, where applicable, the minimum standards set out in section 55."*
>
> (own emphasis added)

63. Section 58 of the CJA reads, in relevant part, as follows:

> *"….*

(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.

(3) …

(4) If it is found that the failure is due to the child's fault –

(a) the prosecutor, in the case where the matter was diverted by a prosecutor in terms of section 41(1) or at a preliminary inquiry in terms of section 49(1), may decide to proceed with the prosecution, in which case section 49(2) applies with the changes required by the context;

(b) The child justice court, in the case where the matter was diverted by the court in terms of section 67, may record the acknowledgement of responsibility made by the child as an admission referred to in section 220 of the Criminal Procedure Act and proceed with the trial; or

(c) <u>the prosecutor or child justice court must, where the matter does not go to trial, decide on another diversion option which is more onerous than the diversion option originally decided on</u>."

(own emphasis added)

64. If the principles of interpretation are applied to these provisions it is plain that the conclusion sought to be drawn by the DPP is manifestly without merit and incorrect. That this is so is as a consequence of, at least, the following:

64.1. <u>One</u>, the term "onerous", used in section 58(4)(c) of the CJA, must be understood broadly within the context of section 54 of the CJA, generally. The diversion option must, consequently, still for instance –

64.1.1. be at the appropriate level in terms of section 53 (i.e. and in respect of schedule 1 offences a level 1 option);[92] and

64.1.2. be proportionate to *"the circumstances of the child, the nature of the offence, and the interests of society"*.[93]

64.2. It follows then that, if regard is had to the bright line drawn by the legislature between level one and level two diversions, that detention was never to be considered an option for *"petty offences"* (i.e. schedule 1 offences, regardless of circumstances).

64.3. Two, the term "onerous", used in section 58(4)(c) of the CJA, must, moreover, be understood within the context of section 53 that provides for no less than seventeen options that a prosecutor may select. If regard is had to these options, some can be seen to be more onerous than others (e.g. an oral apology versus placement under supervision). It follows then that when considering a more onerous option, this is what was meant.

64.4. Three, the power granted to a prosecutor in terms of section 54(3) of the CJA to develop an *"individual diversion"* option must, similarly, be understood within the confines of section 53 and 54(1) of the CJA. These provisions represent real restraints on the power to be exercised.

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92 Sec. 53(2)(a) of the CJA.

93 Sec. 54(1)(d) of the CJA.

64.5. Four, there is no indication from the wording of the provisions, of the CJA as a whole, that section 58(4)(c) of the CJA must be understood as the gateway to a prosecutor utilising section 54(3) of the CJA. It follows then, and by parity of reasoning, that if prosecutors were free to impose detention as a diversion option in terms of section 54(3) of the CJA then they may do so at the outset and without the need to for a child to have defaulted. This, most certainly, is not what the legislature intended by the inclusion of this sub-section. It would render than the distinction been level one and level two diversions superfluous.

64.6. Lastly, it would run contrary to several established constitutional norms, namely: -

64.6.1. that a child should not be treated more severally than an adult would in the same circumstances;

64.6.2. that detention should be considered as an absolute last resort; and

64.6.3. the child's best interests, properly understood and applied, are of paramount importance.

65. The fact that a residential diversion programme may not be imposed in respect of a schedule 1 offence does not mean, as the DPP contends, that *"the only means to assist the child is to prosecute the child and sentence him/her in terms of section 76 of the CJA to temporary residence"*. On the contrary the prosecutor is not obliged (as the DPP seems to suggest) to prosecute the child; the prosecutor may refer the matter to the children's court or even decline to

prosecute and opt to assist by the child by referring the child in terms of the Prevention of and Treatment for Substance Abuse Act.

Conclusion

66. It is worth emphasising, in conclusion, that a child, if successfully prosecuted for contravening section 4(b) of the Drug Trafficking, would likely not be detained at all. It would simply not be proportional to the offence and would, consequently, not be in accordance with his/her right not to be detained as a measure of last resort. The same exact consideration applies to the present debate; if a child could not be sentenced to a period of detention why then is allowable in the circumstances. It simply is not.

CONDONATION

67. These submissions are filed late. The reason for are, in summary, as follows:

67.1. The *amicus* received the latest iterations of the DPP and Acting Magistrate submissions on or about 16 April 2019 and 29 April 2019.

67.2. The issues raised, in the DPP submissions, prompted it (already then) to ask for an indulgence. The arrival of the Acting Magistrate submissions, and the vital points correctly made therein, caused us to yet again relook our submissions, particularly as we did not want to repeat any submissions made.

67.3. In the process of preparing these submissions we were called upon to make submissions in the Constitutional Court in respect of two matters that will be

heard in the week that this matter is enrolled. These submissions were due in the week of 29 April 2019 – 3 May 2019.

67.4. Despite our best endeavours, that included working over weekends and on public holidays, we were simply not able abide by the timeframes previously granted to us.

67.5. Our inability was most certainly not on account of a lax attitude (or out of disrespect). The issues raised are vitally important and in the spirit of assisting this court we tried, as best we could, to make thorough meaningful submissions. We hope we have achieved this aim.

68. In the premise, we submit that the lateness of one court day (considering 8 May 2019 was a public holiday) should be condoned.

CONCLUSION

69. In closing we submit that: -

69.1. this court should (and is obliged) to deal with the constitutional issue relating to the criminalisation of cannabis related offences in respect of children;

69.2. this court, regardless, should censor the stakeholders for their handling of the matters on review (and the children evidently impacted who are not part of these proceedings); and

69.3. this court must interpret the provisions (section 58(4)(c) and 54(3) of the CJA) in a manner so as to exclude schedule 1 offences from the intended application by the DPP; and

69.4. decline the constitutional challenge advanced by the DPP on his/her perverse understanding of best interests.

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R M Courtenay

Counsel for the Amicus Curiae

08 May 2019

TABLE OF AUTHORITY

Books:

CR Snyman *Criminal Law* (2014)

Currie & De Waal *The Bill of Rights Handbook* (2013)

J Burchell *Principles of Criminal Law* (2016)

Skelton 'Constitutional Protection of Children's Rights' in Boezaart (ed) *Child Law in South Africa* (2017)

Case Law:

Centre for Child Law v Minister of Justice and Constitutional Development 2009 (11) BCLR 1105 (CC).

De Klerk v Minister of Police [2018] 2 All SA 597 (SCA).

Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development 2009 (7) BCLR 637 (CC).

Harksen v Lane NO 1997 (11) BCLR 1489 (CC).

J v National Director of Public Prosecutions 2014 (7) BCLR 764 (CC).

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 (10) BCLR 1220 (CC).

Minister of Safety and Security v Sekhoto [2011] 2 All SA 157 (SCA).

Minister of Safety and Security v Seymour [2007] 1 All SA 558 (SCA).

Minister of Welfare and Population Development v Fitzpatrick 2000 (7) BCLR 713 (CC).

Raduvha v Minister of Safety and Security 2016 (10) BCLR 1326 (CC).

Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd [2018] ZACC 12.

S v Bhlwana; Sv Gwadiso 1995 (12) BCLR 1579 (CC).

S v LM and 3 Similar Case (97/18; 98/18; 99/18 & 100/18) (05 February 2019).

S v M 2007 (12) BCLR 1312 (CC).

The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2013 (12) BCLR 1429 (CC).

Foreign Case Law:

U.S. v Lee 106 U.S. 196

International and Regional Documents:

Organisation of African Unity, *African Charter on the Rights and Welfare of the Child,* 11 July 1990, CAB/LEG/24.9/49 (1990). Available at <http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf> [accessed on 05 May 2019].

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, available at <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf> [accessed 05 May 2019].

United Nations Committee on the Rights of the Child, *General Comment No. 13 (2011): The right of the child to freedom from all forms of violence,* 18 April 2011, CRC/C/GC/13. Available at <https://www.refworld.org/docid/4e6da4922.html> [accessed on 06 May 2019].

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. Available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [accessed on 05

May 2019].

United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines): *resolution / adopted by the General Assembly*, 14 December 1990, A/RES/45/112, available at < https://www.un.org/documents/ga/res/45/a45r112.htm> [accessed 05 May 2019]

United Nations Human Rights Council, *Human rights in the administration of justice, including juvenile justice : resolution / adopted by the Human Rights Council,* 8 October 2013, A/HRC/RES/24/12, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/178/82/PDF/G1317882.pdf?OpenElement> [accessed 05 May 2019].

Regulations:

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

Reports:

African Child Policy Forum. (2012). *Guidelines on Action for Children in the Justice System in Africa*. Available at <https://archive.crin.org/en/library/legal-database/guidelines-action-children-justice-system-africa?qt-countr-tabs=3> [accessed on 05 May 2019].

Child Rights International Network. (2016). *Discrimination and Disenfranchisement: A Global Report on Status Offences*. Third Edition. Available at <https://archive.crin.org/sites/default/files/crin_status_offences_global_report_0.pdf> [accessed on 05 May 2019].

Department of Basic Education. (2013). *Guide to Drug Testing in South African Schools*. Available at <https://www.education.gov.za/Portals/0/Documents/Publications/Drug%20Testing%20Guide_FINAL_PRINT.pdf> [accessed on 06 May 2019].

Report of the Ministers' Meeting. (2017) *Youth, Health and Development: Overcoming*

the Challenges towards Harnessing the Demographic Dividend. STC-HPDC-2/MIN/RPT. Available at <https://au.int/sites/default/files/pages/32900-file-ministers_report_-_stc-hpdc-2_final_sa19686_e_original.pdf> [accessed on 05 May 2019].

Statutes:

Child Justice Act 75 of 2008.

Children's Act 38 of 2005.

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Criminal Procedure Act 51 of 1977.

Drugs and Drug Trafficking Act 140 of 1992.

Native Urban Areas Consolidation Act 25 of 1945.

Prohibition of Mixed Marriages Act 55 of 1949.

Separate Amenities Act 49 of 1953.

South African Schools Act 84 of 1996.

The Liquor Act 59 of 2003.;

Tobacco Product Control Amendment Act 63 of 2008.

Websites:

https://www.sahistory.org.za/article/pass-laws-south-africa-1800-1994 [accessed on 05 May 2019].