CHILD LAW MATTERS

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MINIMUM SENTENCES LEGISLATION FOR CHILD OFFENDERS FOUND UNCONSTITUTIONAL

Introduction

On 12 September 2008 the Pretoria High Court heard an application by the Centre for Child Law against the Minister of Justice and Constitutional Development; the Minister of Correctional Services and the Legal Aid Board, challenging the constitutionality of section 51(1); 51(2); 51(6), 51(5) (b) and 53A (b) of the Criminal Law Amendment Act 105 of 1997(the "Amended Act"), as amended by section 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007(the "Amendment Act"). The Minister of Correctional Services and the Legal Aid Board filed notices to abide by the order of the Court, while the Minister of Justice and Constitutional Development opposed the application.

The Amended Act was brought into operation on 31 December 2007 and makes minimum sentences, ranging from 5, 10, 15, 20 and life imprisonment for certain crimes applicable to 16 and 17 year olds. This new law is similar to a law passed in 1997, which the Supreme Court of Appeal (SCA) already found to be against the constitution and international law in relation to children.

The Centre for Child Law (the "Centre") did not have a client that it was representing, but initiated this case as part of its strategy to end the application of the minimum sentences regime to 16 and 17 year old child offenders. The Minister of Justice and Constitutional Development (the "Minister") opposed the application and also raised a point in limine with regard to the Centre's locus standi to bring the application.

Judgment was delivered on 4 November 2008.

The point in limine

The Centre brought the application in its own interest as a organisation dedicated to upholding and protecting children's rights; on behalf of children at risk of being sentenced to serve a minimum sentence and in the public interest as provided for respectively in section 38(a) ;(c) and (d) of the Constitution as well as section 15(2) (c) and (d) of the Children's Act 38 of 2005.

The Minister argued that the Centre's reliance on section 38(a) and (d) for locus standi was insufficient as courts should not be required to deal with abstract or hypothetical issues. Therefore due to the absence of facts on which the application was based, the application was premature and the court should decline to hear the application.

The court, per Potterill AJ found that the Centre had locus standi to bring the application as

"although not acting on behalf of a specific child within a set of facts, is attacking the Amended Act's constitutional validity on the principle and does not require a set of facts; the facts speak for themselves. The child will be 16 or 17 years old, has committed a serious offence of either rape, robbery or murder and the Presiding Officer will have to start the sentencing process with the minimum sentence prescribed by the Legislature".

The court stated that the application was not hypothetical or academic and that the Centre had a real interest of its own; that of the public and the interest of those children who are at risk of being sentenced in terms of the minimum sentence regime. Therefore the Centre had locus standi to bring the application.

The merits

Counsel for the Centre argued that the Amended Act was inconsistent with Section 28(1) (g) and 28(2) of the Constitution as it made minimum sentences applicable to 16 and 17 year old child offenders convicted of very serious crimes. The effect of the Amended Act is that these child offenders are subject to very long prison sentences, including life imprisonment, as a starting point and the courts may only depart where there are substantial and compelling circumstances to do so. Therefore imprisonment in terms of the Amended Act is a measure of first resort and does not allow the courts to consider the principles of individuality and proportionality.

The Centre further argued that the Amendment Act negated the approach of the court in S v B 2006 (1) SACR 311 (SCA); [2005] 2 All SA 1 (SCA), where the SCA held that when sentencing child offenders aged 16 and 17 years, the court must start with a "clean slate". This approach entailed that where a court sentenced a child offender for a very serious crime, it would be at liberty to impose any sentence. A court would be required to start with a clean slate and work forward to reach a final decision on sentence, guided by the constitutional principle that, when dealing with child offenders, imprisonment is a measure of last resort and for the shortest appropriate period of time.

In reply the Minister argued that the Amended Act was not unconstitutional. According to the Minister the court retains its discretion when interpreting the law

and the Amended Act does not subject child offenders to the same sentencing regime as adult offenders. The courts are always at liberty to consider youthfulness as a mitigating factor when imposing sentence, therefore the question whether the courts start with a “clean slate” or not when sentencing is purely academic.