e-MANTSHI

A KZNJETCOM Newsletter

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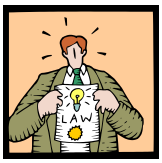
Welcome to the seventy second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), with the approval of the Minister for Justice and Constitutional Development, amended the Rules of the Magistrates' Courts. These amendments were published in the Government Gazette of 30 December 2011.The amended rules read as follows in the Schedule.

SCHEDULE

GENERAL EXPLANATORY NOTE:

[ ] Expressions in bold type in square brackets indicate omissions from existing rules.

_____Expressions underlined with a solid line indicate insertions into existing rules.

Definition

1. In this Schedule "the Rules" means the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa published under Government Notice No. R. 740 of 23 August 2010, as amended by Government Notice Nos. R. 1222 of 24 December 2010 and R. 611 of 29 July 2011.

Substitution of rule 69 of the Rules

2. The following rule is hereby substituted for rule 69 of the Rules:

"Repeal of rules and transitional provisions

69. [(a)] (1) Subject to the provisions of **[paragraph (b)]** sub-rules (3) and (4), the rules published under Government Notice No. R. 1108 of 21 June 1968, as amended by Government Notices Nos. R. 3002 of 25 July 1969, R. 490 of 26 March 1970, R. 947 of 2 June 1972, R. 1115 of 25 June 1974, R. 1285 of 19 July 1974, R. 689 of 23 April 1976, R. 261 of 25 February 1977, R. 2221 of 28 October 1977, R. 327 of 24 February 1978, R. 2222 of 10 November 1978, R. 1449 of 29 June 1979, R. 1314 of 27 June 1980, R. 1800 of 28 August 1981, R. 1139 of 11 June 1982, R. 1689 of 29 July 1983, R. 1946 of 9 September 1983, R. 1338 of 29 June 1984, R. 1994 of 7 September 1984, R. 2083 of 21 September 1984, R. 391 of 7 March 1986, R. 2165 of 2 October 1987, R.1451 of 22 July 1988, R. 1765 of 26 August 1988, R. 211 of 10 February 1989, R. 607 of 31 March 1989, R. 2629 of 1 December 1989, R. 186 of 2 February 1990, R. 1887 of 8 August 1990, R. 1928 of 10 August 1990, R. 1990 of 17 August 1990, R. 1261 of 30 May 1991, R. 2407 of 27 September 1991, R. 2409 of 30 September 1991, R. 405 of 7 February 1992, R. 1510 of 29 May 1992, R. 1882 of 3 July 1992, R. 871 of 21 May 1993, R. 959 of 28 May 1993, R. 1134 of 25 June 1993, R. 1355 of 30 July 1993, R. 1844 of 1 October 1993, R. 2530 of 31 December 1993, R. 150 of 28 January 1994, R. 180 of 28 January 1994, R. 498 of 11 March 1994, R. 625 of 28 March 1994, R. 710 of 12 April 1994, R. 1062 of 28 June 1996, R. 1130 of 5 July 1996, R. 419 of 14 March 1997, R. 492 of 27 March 1997, R. 570 of 18 April 1997, R. 790 of 6 June 1997, R. 797 of 13 June 1997, R. 784 of 5 June 1998, R. 910 of 3 July 1998, R. 1025 of 7 August 1998, R. 1126 of 4 September 1998, R. 569 of 30 April 1999, R. 501 of 19 May 2000, R. 1087 of 26 October 2001, R. 37 of 18 January 2002, R.38 of 18 January 2002, R. 1299 of 18 October 2002, R. 228 of 20 February 2004, R. 295 of 5 March 2004, R. 880 of 23 July 2004, R. 1294 of 5 December 2008, R. 1341 of 12 December 2008, R. 1342 of 12 December 2008, R. 1344 of 12 December 2008, R. 515 of 8 May 2009, R. 517 of 8 May 2009, R. 499 of 11 June 2010 and R. 592 of 9 July 2010 are hereby repealed.

[(b) For a period of 12 months from the date upon which these rules come into operation the use of the forms contained in the First Annexure to the rules published under Government Notice No. R. 1108 dated 21 June 1968, as amended, and repealed by paragraph (a), may, with the necessary variations as circumstances may require, be continued.]

(2) These rules shall apply to all proceedings instituted on or after the commencement date provided for in rule 70.

(3) (a) These rules shall apply to all proceedings instituted before the commencement date provided for in rule 70, unless:

(i) this would cause prejudice to a party, in which case the applicable rules in force as at the date of institution of the proceedings shall apply: or

(ii) the parties agree that the applicable rules in force as at the date of institution of the proceedings should apply.

(b) In instances where:

(i) there is a dispute between the parties as to which rules should apply; or

(ii) the parties fail to agree as contemplated in paragraph (a) subparagraph (ii):

then any party to the proceedings may apply to court in terms of rule 55(4)(a) for a ruling, as the court directs.

(4) In respect of proceedings instituted prior to the commencement of these rules, subject to sub-rule (3). the use of the forms contained in the First Annexure to the rules published under Government Notice No. R. 1108 dated 21 June 1968, as amended, and repealed by sub-rule (1). may, with the necessary variations as circumstances may require, be continued."

Commencement

3. These rules shall come into operation on **3 February 2012.**

Recent Court Cases

1. S v Nkosi 2012 (1) SACR 87 (GNP)

The mere assumption of control over property is not sufficient to constitute theft. The owner must effectively be excluded from his property.

A tip-off on stock theft in progress led police to a farm where, in the early hours of the morning, they found two of the farmer's nine cattle tied to a post, and about 200 m away, the appellant's bakkie with trailer attached-stuck in mud-with him inside the vehicle. In an appeal against his conviction on charges of theft (read with ss 1, 11 and 14 of the Stock Theft Act 57 of 1959), the forfeiture ordered of the vehicle involved, and the sentence of five years' imprisonment imposed,

Held, that the general shoplifting principle--that a person, who hides an article in a self-service store with the intention of walking out of the shop without paying therefor, is guilty of theft despite not having succeeded in doing so

because of *f* intervention by security officers-should not be lavishly applied to all other cases where a determination has to be made between completed and attempted theft. Theft out of a self-service shop constitutes a special form of theft in that in self-service shops there is always the risk that an intending thief who, for example, hides an item under his clothing will get away with his act and successfully steal the item. (Paragraphs [16] and [18] at *90e-f* and *90h-i.)*

Held, further, that a mere assumption of control over the property is not yet sufficient to constitute theft; it should further be required that the owner effectively be excluded from his property. In the present case the appellant's actions amounted only to acts of execution or consummation of the offence, which constitute an attempted theft. The conviction should therefore be set aside and replaced with one of attempted theft. (Paragraphs [20] and [22] *h* at *9Ib* and 9 *Id-e.*

Held, further, that, in imposing sentence, there is still a need for the court to maintain a healthy and proper balance between the interests of society, the nature of the offence and the offender. The aggravating of sentences to combat increasing prevalence of a particular crime must not lead to an inevitable negation of the accused's personal circumstances. (Paragraph [30] at *92g.)* ·

2. S v Kholane 2012 (1) SACR 8 (FB)

The procedure in section 112(1)(a) of Act 51 of 1977 may only be used if a presiding officer formed the opinion that the offence is a minor crime and that the fine would not exceed R1500.

An unrepresented accused who pleaded guilty in terms of s *112(1)(a)* of the Criminal Procedure Act 51 of 1977 to four counts of theft had been summarily convicted and sentenced to a fine of R5000-an amount in excess of that provided for in the subsection-alternatively, in default of payment, to 90 days' imprisonment. In a special review in terms of s 304(4) of the Act, the district magistrate requested that the High Court confirm the conviction but rescind the sentence.

Held, that, because the sentence flowed from the conviction, it would be wrong to simply adjust the sentence ex post facto without enquiring into the lawfulness of the conviction. Before s 112(1) *(a)* of the Act could be invoked to convict an unrepresented accused on his or her unexplained plea of guilty-and judicial questioning in terms of s 112(1) *(b)* jettisoned-a court

had to form an opinion that the charge concerned a minor crime, that the accused would have the option of paying a fine to stay out of a correctional facility and that such a fine would not exceed the present statutory maximum limit of R1500. (Paragraphs [8] and [6] at *10h-i* and *lle-d.)*

Held, further, that the approach adopted in S *v Addabba;* S *v Ngeme;* S *v Van Wyk* 1992 (2) SACR 325 (T)-that a court proposing to impose a sentence substantially in excess of the statutory limit as laid down in ss (1) *(a)* should, when dealing with an undefended and unsophisticated accused, neverthe-less, for the sake of fair administration of justice, question the accused as if ss (1) *(b)* applied-was not desirable since a configuration of the two procedures blurred the important distinction between them. A court applying ss *(1)(a)* should only import the tool of judicial questioning into the subsection provided the fine component of the sentence it proposed imposing did not exceed the statutory limit. If ss (1) *(a)* was not strictly complied with sentence-wise, then ss (1) *(b)* should not be used as a corrective procedure for a sentence which did not fully fall within the scope of ss *(1)(a).* (Paragraphs [15]-[16] at *12e-i.)* Conviction and sentence set aside on review.

3. S v Bruinders 2012(1) SACR 25 (WCC)

Judicial Officers who have presided over a bail application should ordinarily recuse themselves from presiding at the subsequent trial of the accused.

The issue at hand is whether the magistrate's prior hearing of the appellant's bail application precluded her from subsequently presiding over the appellant's trial on the grounds of a reasonable apprehension of bias. To answer this question it is necessary to consider the nature of bail proceedings in our law. The inquiry which a court is required to undertake in bail proceedings may result in the court becoming privy to information about the accused, or the offences with which he/she has been charged, that could result in the court adopting a biased approach even if it is not conscious of doing so. Judicial officers who have presided over such bail applications should ordinarily recuse themselves from presiding over the subsequent trial of the accused to avoid the complications of complaints of reasonable apprehension of bias being raised. After all, even if there were no actual bias on the part of the presiding officer and the later trial is conducted with scrupulous adherence to the prescripts of fairness and due process, it is the public's perception of the possibility of unconscious bias that is the key. (Paragraphs [57], [75]-[78], [79] and [81] at *41c-d, 44g-45g* and *45i*)

In the present case, had the notional reasonable and objective observer been informed that the magistrate in the appellant's criminal trial had presided over his bail application some three months earlier, at which time details of his numerous previous convictions were revealed together with details of how he had allegedly committed one of the offences with which he was charged, and the investigating officer had also testified that the appellant had a tendency to commit crimes involving violence and dishonesty, such an observer would have had grave concerns about whether the appellant would get a fair trial, but would instead reasonably apprehend that the magistrate would not bring an impartial mind to bear upon the appellant's case. In the result, by failing to recuse herself from hearing the appellant's matter the magistrate breached the appellant's constitutional right to a fair trial. The effect of this irregularity is that the proceedings are vitiated for apparent bias and the appellant's conviction and sentence cannot be allowed to stand. (Paragraphs [108]-[110] at *52e-i*)

4. S v Nxopo 2012(1) SACR 13 (ECG)

If there is no real distinction between attempted theft and actual theft there should be no differentiation between sentences for the two offences.

The appellant's theft of a motor vehicle was thwarted by the complainant setting off an alarm and the arrival of the police on the scene. While arresting him, the appellant assaulted one of the policemen with the lock-breaking tool that he had had with him. He was subsequently convicted in a magistrates' court on one count of attempted theft of a motor vehicle and on one count of assault with intent to commit grievous bodily harm, and sentenced to six years' imprisonment on the former count and one year's imprisonment on the latter. In an appeal against the sentences imposed, the appellant submitted, inter alia, that the sentence imposed for attempted theft was too harsh and induced a sense of shock since the case law indicated that, generally, it was met with lesser terms of imprisonment than actual theft.

Held, that no real distinction could be made between an attempt to commit theft of a motor vehicle and the actual theft thereof. It was only due to the intervention of the complainant-by setting off an alarm-and the happen-stance of the police arriving on the scene that the accused was prevented from stealing the vehicle. Had these two events not occurred, the accused would, in all probability, have succeeded in his quest and stolen the complainant's car. In addition, it was clear that a degree of preplanning was involved in that the appellant had either obtained the lock-breaker-a

specialised implement used for stealing vehicles-from someone else or had manufactured it himself for the very purpose of stealing the vehicle, or any vehicle. (Paragraph [8] at 15*e-g.) j*

From The Legal Journals

Liebenberg, J P

" The material law protection of wild animals"

Pretoria Student Law Review 2010

Wolf, L

"Pre- and post-trial equality in criminal justice in the context of the separation of powers"

Potchefstroom Electronic Law Journal 2011 volume 14 no 5

Williams, R C

"The concept of a "decision" as the threshold requirement for judicial review in terms of the Promotion of Administrative Justice Act"

Potchefstroom Electronic Law Journal 2011 volume 14 no 5

Carnelley, M

"Liability for the payment of public school fees"

Potchefstroom Electronic Law Journal 2011 volume 14 no 6

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Sentencing primary caregivers

Before the advent of democracy in 1994, criminal sentencing was governed by the guidelines found in *S v Zinn* (1969 2 SA 537 (A) 540G-H), which require a court - when sentencing an offender - to consider the following triad of factors in determination an appropriate sentence: the nature of the crime, the personal circumstances of the offender, and the interests of the community. No special focus was placed on the interests of minor children as an independent factor. If a criminal was a primary caregiver of minor children, this was merely one of many factors considered in mitigation under the personal circumstances of the offender (Coetzee E "Can the application of the human rights of the child in a criminal case result in a therapeutic outcome?" (2010) 13(3) *Potchefstroom Electronic Law Journal* 126 at 130).

The Constitution of the Republic of South Africa, 1996, affords children a constitutional right to parental or family care (s 28(1)) and the child's best interests are of paramount importance in every matter concerning the child (s 28(2)). So, when sentencing a primary caregiver of a child, a court today must consider this, including the effect that an incarceration would have on the child (*S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC)). The Constitutional Court set out guidelines that have to be followed by the sentencing court when sentencing criminals who happened to be the mothers and primary caregivers of minor children:

(1) A sentencing court must always determine whether an accused is a primary caregiver if evidence seems to suggest that this is so – a probation officer's report could be used to ascertain this, although the information could usually be obtained directly from the accused and the prosecution;

(2) If a court was considering a custodial sentence in a case at hand, it would need to ascertain what the effects of such a sentence would be on the children of the convicted offender;

(3) If the application of the *Zinn* triad (consideration of the crime, the offender and the interests of society) determined that the appropriate sentence for an accused caregiver of minor children was a custodial one, then the court would need to address what steps should be taken to ensure that the children would be properly cared for during the caregiver's incarceration;

(4) If the appropriate sentence was non-custodial, then as to which sentencing option should be applied had to be decided with reference to the best interests of the children;
(5) In cases where there was a choice of sentencing options, the court was to be guided by the s 28 'paramountcy' principle in relation to children's best interests when deciding which sentence to impose (paras 30-36).

The crystallised legal principle is thus that the court must balance two opposing considerations: the integrity of the family and best interests of the child on the one hand, and the State's duty to punish criminal conduct on the other (*S v M* at paras 38-39). Although the best interests of the child are of paramount importance, this right is capable of limitation and cannot be used as an unrealistic trump of other rights (*S v M* para 26). There are several relevant judgments. Refer to the earlier cases of *S v Kika* 1998 2 SACR 428 (W) and *S v Howells* 1999 1 SACR 675 (C) as opposed to *Scott-Crossley v S* [2007] JOL 20717 (SCA); the Constitutional Court judgments of *S v M Centre for Child Law as Amicus Curiae* and *S v S Centre for Child Law as Amicus Curiae* 2011(7) BCLR 740 (CC) and the subsequent judgments of *Peterson v S* ([2008] JOL 21655 (C), *S v Moodley* 2008 JDR 0691 (T), *S v Coetzee* [2008] JOL 21623 (E), *S v Clifford* 2009 JDR 0154 (SE), *S v Mkoka* 2009 JDR 0731 (ECG), *S v GL* 2010 2 SACR 488 (WCC), *S v Prinsloo* 2010 JDR 1234 (GNP), *S v EB* 2010 2 SACR 524 (SCA), *Langa v S* [2010] JOL 25604 (KZP), *S v Londe* 2011 1 SACR 377 (ECG), and *S v Pillay* 2011 2 SACR 409 (SCA).

In the reported cases following the Constitutional Court judgment of *S v M*, the guidelines of the Constitutional Court were considered, without exception, before contemplating sentencing (*Peterson* at paras 44 & 64, *Moodley* at paras 5-7, *Coetzee* at paras 5-8, *Clifford* at paras 45-46, *Mkoka* at paras 9-11, *GL* at paras 17-34, *Prinsloo* at paras 31-35, *EB* at paras 12-14, *Langa* at para 12, *Londe* at para 2, *S v S* at paras 25 onwards; and *Pillay* at paras 12-16). In summary, three groups of cases can be identified:

(1) In three post-M judgments, the court set the sentences a quo aside, and referred the matter back to that court to reconsider the sentence afresh, in light of the guidelines of *M* (*Londe* at para 4; *Mkoka* at paras 9-1; and *Pillay* at para 26).
(2) In two matters (as in the earlier judgment of *Howells*), the court ordered the Registrar to approach the Department of Welfare and Population Development to investigate the welfare of the children, to ensure that they remained in contact with the offender during the incarceration, and to ensure their reunification upon release (*Prinsloo* at p 67 and *Langa* at para 13).
(3) In a handful of judgments, the consideration of the guidelines in *M* resulted in an altered sentence: in *Moodley* the sentence was reduced from 15 to 10 years imprisonment (*Moodley* (p 7)), and in *Coetzee* and *Clifford* the

imprisonment was amended to correctional supervision, as was the case in *M* itself (*Coetzee* at p 9 and *Clifford* at para 46). However, in six matters, the court persevered with sentence of imprisonment. In all these matters, the court ensured that the minor children were cared for - in most cases, predictably, by family members (*Peterson* at para 74, *Moodley* at para 8, *Prinsloo* at para 78*, GL* at para 22 and paras 30-31*, EB* at para 13, and *S* at para 63). The court in *EB* even postponed the sentence for four weeks, to enable the offender to make the necessary arrangements for the children (at para 40).

From this overview of the post-*M* judgments - in particular - it is clear that the courts have been sensitised to the interests of the children, when sentencing the primary caregiver. Where the information before the court is inadequate, there rests a duty on the court to obtain the necessary information; and where imprisonment is inevitable, the court must ensure that the welfare of the children is looked after, including making suitable alternative arrangements, either through mobilisation of State machinery or through the family of the child if this is possible.

It interesting to note that there has not been any reference by the courts or the commentators to the studies that deal with the impact of imprisonment of the primary caregiver, on children. It is this aspect that this note now focuses on. There is very little South African literature on the issue of primary caregivers in prison vis-à-vis their minor children, and none interrogates the impact on the children (N du Preez "A comparative analysis of imprisoned mothers' perceptions regarding separation from their children: Case studies from Scotland and South Africa" 2006 *Child Abuse Research in South Africa* 26-35).

There are numerous international studies focusing on the impact of incarceration of the primary caregiver (usually the mother) on children (see *inter alia* C Boudin "Children of incarcerated parents: The child's constitutional right to the family relationship" 2011 *Journal of Criminal Law and Criminology* 77-117; and S Abramowicz "Rethinking parental incarceration" 2011 *University of Colorado Law Review* 793-879).

The research is a result of the unprecedented number of women in prisons over the past few decades, many of them primary caregivers. Research shows that the imprisonment of a primary caregiver has numerous consequences in the short and long term. It inevitably destabilises the family and negatively affects the bond between primary caregiver and child. The outside caregiver, often the grandmother, is subjected to financial, energy and other resource strains.

Several other problems have been identified in the American research. Although there might be visitation rights for children, this is subject to numerous problems, including the availability of a willing adult to accompany the child to the prison, and the limited availability of funding for transport for these visits. This situation is aggravated by the fact that female prisons are geographically spread over the country and not near the family. Isolation may also be aggravated by illiteracy of the primary caregiver (Du Preez 32).

Incarceration of the primary caregiver creates serious emotional problems for the children concerned. The imprisonment has an independent effect on the emotional and behavioural development of the child (HC Hoffman, AL Byrd & AM Kightlinger "Prison programs and services for incarcerated parents and their underaged children: Results from a national survey of correctional facilities" 2010 *The Prison Journal* 397-416 at 398). These children suffer from post-traumatic stress, depression, anger and aggression, eating disorders, anxiousness, sadness, guilt, low self-esteem, promiscuity, substance abuse, gang activity, and school-related problems (Hoffman, Byrd & Kightlinger 389-399). Because these children are dependent on others for their living arrangements, the long-term arrangements are often inadequate, unreliable and irregular, resulting in most children having to move at least once during the incarceration of their primary caregiver (Hoffman, Byrd & Kightlinger 398).

That the impact on South African children is the same as described above is likely, but with no local research, this cannot be conclusively deduced. Skelton has highlighted some of the negative consequences of incarcerating a parent of children (which seem similar to the problems experienced in the U.S.): The psychological and practical effects of separation, the risk of relationship breakdown and of children being taken into care, the stress on the parent (or family) left behind (including financial difficulties). Children are also more vulnerable to neglect/abuse and there could be difficulties in visiting the imprisoned mother (A Skelton "Children of incarcerated parents" at the Committee on the Rights of the Child Day of General Discussion 2011, http://www2.ohchr.org/english/bodies/crc/docs/Discussion2011 _submissions /A_SKELTON_CRC_DGD_2011.pdf (accessed online on 21 December 2011).

From all the studies mentioned and discussed, it can be concluded that problems are not limited to the child and the family. They also become a societal problem, given the difficulties that arise later in life for the child (BJ Myers *et al* "Children of incarcerated mothers" (1999)1 *Journal of Child and Family Studies* 11at 12).

It is submitted that in light of the American experience, there is an urgent need for research into the impact of imprisonment of the primary caregiver, on children in

South Africa. In addition, the courts should consider both the short and long term impacts of such prison sentences, on the children concerned. In this regard, as the best interests of the children are the paramount consideration, the court should assess whether imprisonment is really warranted, and if it is, they should ensure that alternative care is adequate. The ultimate question to be asked is whether the primary caregiver should be placed in prison.

All considered, it is submitted that the majority in *S* erred in committing S to incarceration, as justice could have been served just as effectively, by ordering correctional supervision with any other appropriate conditions attached. If this approach had been followed, the best interests of S's children would not have been compromised (as argued by Kampepe J). It is therefore suggested that other sentencing options, such as correctional supervision, should always be more thoroughly considered and interrogated in criminal cases, where minor children stand to be adversely affected on psychological, practical, financial and other levels. Imprisonment should be used sparingly, and the community should not be seen "simply as a vengeful mass uninterested in the moral and social recuperation of one of its members" (S Terblanche "*Sentencing*" 2008 *SACJ* 119-120).

Where incarceration is unavoidable, then the necessity of fully interrogating the relative quality of the alternative parental care that would be available to the children is critical. It is insufficient to establish merely that there is an alternate parent or relative available to care for the children. Far greater scrutiny into the quality of alternate childcare and the possible negative effects of choosing incarceration as a sentencing option, is needed.

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Matters of Interest to Magistrates

CONSTITUTIONAL COURT OF SOUTH AFRICA
Case CCT 55/11
[2012] ZACC 1

In the matter between:
C First Applicant
M Second Applicant
CENTRE FOR CHILD LAW Third Applicant

And

DEPARTMENT OF HEALTH AND SOCIAL
DEVELOPMENT, GAUTENG First Respondent
CITY OF TSHWANE
METROPOLITAN MUNICIPALITY Second Respondent
ITERELENG RESIDENTIAL
FACILITY FOR THE DISABLED Third Respondent
DESMOND TUTU PLACE OF SAFETY Fourth Respondent
PABALELO PLACE OF SAFETY Fifth Respondent
MINISTER FOR POLICE Sixth Respondent
MINISTER FOR SOCIAL DEVELOPMENT Seventh Respondent

Order

[96] The following order is made:

1. Condonation is granted.

2. The declaration of invalidity of section 151 and section 152 of the Children's Act 38 of 2005, made on 27 May 2011 by the North Gauteng High Court under Case No. 47723/2010, is confirmed.

3. The orders of the High Court in paragraph 18 of its judgment are set aside and replaced with the orders in paragraphs 4 to 6 below.

4. An additional paragraph to be numbered 2A is read-in to section 151 of the Children's Act 38 of 2005 as follows:
"(2A) The court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:
(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and

(ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court."

5. An additional paragraph to be numbered (d) is read in to section 152(2) of the Act as follows:
"(d) ensure that:
(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and
(ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court."

6. Section 152(3)(b) is severed and replaced by a section reading:
"(b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that:
(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the referral;
(ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court; and
(iii) the investigation contemplated in section 155(2) is conducted."

7. The Minister for Police and the Minister for Social Development are ordered to pay the applicants costs jointly and severally.

8. The taxing master must assess the reasonableness of counsel fees as if the matter before this Court was not opposed.

A Last Thought

"The constitutional commitment to transformation has been a consistent theme in the jurisprudence of the Constitutional Court, and following it as they are bound to do, of other courts as well. Most recently, in a judgment given at the end of last year, the Constitutional Court again drew attention to the centrality of the constitutional commitment to social justice, to the fact that millions of people were still compelled to live without adequate housing, and to the concern that "seventeen years into our democracy, a dignified existence for all in South Africa has not yet been achieved."

This lack of transformation of the day to day lives of marginalised communities commented on by the Court has not been due to decisions of the courts. There are

other reasons for this which fall beyond the scope of my comments today…… , save to say that given our history, transformation was always going to be difficult. There is, however, no justification for blaming the Courts for this failure."

Former Chief Justice Arthur Chaskalson – "Without fear, favour or prejudice: the courts, the constitution and transformation" University of Cape Town 2012