



ecTHE REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

[REPORTABLE]

**High Court Ref. No: 121226
Case No. : TSOC 73/12
Magistrate/s Serial No: 26/12**

Coram: Fourie J, Steyn J et Henney J

In the matter between:

J

Applicant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 21 AUGUST 2013

HENNEY, J

[1] This is an automatic review in terms of the provisions of s 85(1)(a) of the Child Justice Act 75 of 2008, ('the CJA').

[2] The accused, at the time of the commission of the offence, was a 14 year old minor. He was charged with 3 counts of rape in contravention of s 3 of the

Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 ('the Sexual Offences Act'), in that he raped, by anally penetrating, three young boys, one being 7 years old and the other two being 6 years old.

[3] The fourth charge was one of assault with the intent to do grievous bodily harm, where the accused had allegedly stabbed a 12 year old girl with a knife.

[4] The accused was legally represented, he pleaded guilty to all these charges, was convicted and in respect of the three rape convictions he was sentenced to compulsory residence in Eureka, a Child and Youth Care Centre, for a period of five (5) years, in terms of the provisions of s 76(1) of the CJA.

[5] In addition, he was sentenced to three (3) years imprisonment after the completion of the five (5) years compulsory residence, in terms of the provisions of s 76(3) of the CJA.

[6] In respect of the conviction of assault with intent to do grievous bodily harm, he was sentenced to six (6) months imprisonment suspended for a period of three (3) years on condition that he is not convicted of assault committed in the period of suspension.

[7] In addition to the sentence, an ancillary order in terms of s 50(2) of the Sexual Offences Act was made, which had the effect that the accused's name would be entered in the National Register for Sexual Offenders ('the Register').

[8] The question was raised by the High Court with the Regional Magistrate and the Director of Public Prosecutions Western Cape ('the DPP') whether it was competent for the court to make an order in terms of s 50(2) of the Sexual Offences Act if regard is to be had to the provisions of s 2, 3 and 4 of the CJA dealing with the objects of the Act as well as the provisions of s 28 of the Constitution of the Republic of South Africa, 108 of 1996. The DPP was requested to provide this court with an opinion on the matter.

[9] Both the Regional Magistrate, in his detailed reasons for the order, as well as the DPP concluded that an order in terms of s 50(2)(a)(ii) of the Sexual Offences Act was a competent order for the Court to make and recommended that this court should confirm the order.

[10] The Acting Judge President of this division, due to the importance of this issue, directed that a full bench of this court be constituted with Justice *Fourie* as the Presiding Judge, *Steyn J* and I. The hearing of this special review took place on **3 May 2013**.

[11] Mr Klopper appeared for the accused. Ms Skelton on behalf of the Centre for Child Law acted as *amicus curiae* and presented argument in this matter. Ms Currie-Gamwo appeared on behalf of the office of the DPP and Mr Tsegari appeared on behalf of the Minister of Justice and Constitutional Development, (the 'Minister').

[12] In terms of s 50(2)(a)(i) of the Sexual Offences Act, a court that has convicted a person of a sexual offence against a child or a person who is mentally disabled, and after sentence has been imposed by that Court for such an offence, in the presence of a convicted person, must make an order that the particulars of the person be included in the Register. (Own emphasis here as elsewhere).

[13] Given the particular facts of this matter and given that the accused ('the child') was a 14 year old boy who had been dealt with in terms of the CJA, various crucial questions arise out of the granting of an order that the child's name be entered in the Register.

[14] These are, whether such an ancillary order is a competent order for a Child Justice Court to make in terms of the Child Justice Act; and, if so, whether a Court is compelled to make such an order in respect of a minor who has been convicted of a sexual offence against a child, irrespective of the circumstances of the case.

Applicable Legal Provisions

[15] The Sexual Offences Act, which came into operation on 27 December 2007, has as its purpose ... *'To comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to*

sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute ...'

[16] Its further purpose is to repeal the common law offence of rape and indecent assault and also to create a number of new statutory offences in dealing with certain instances of deviant sexual behaviour.

[17] The offences are created and set out in Chapters 2, 3 and 4 of the Act. Chapter 2 of the Act deals with rape, compelled rape, sexual assault, and compelled sexual assault. Chapter 3, Parts 1, 2 and 3, deal specifically with sexual offences against children and has as its object specifically the protection of children against sexual exploitation. A number of sexual acts against children are outlawed, including acts of consensual sexual penetration and consensual sexual violation, sexual exploitation of children, etc. Chapter 4 deals with sexual offences committed against persons who are mentally disabled.

[18] Section 42 of the Sexual Offences Act, in its endeavour to further protect children, makes provision for the establishment of a National Register for Sex Offenders and in terms of this section it is the responsibility of the Minister of Justice and Constitutional Development to designate a fit and proper person as the Registrar of the National Register for Sex Offenders.

[19] The object of this register is set out in s 43 of the Sexual Offences Act and is aimed at protecting children and persons who are mentally disabled by:

(a) *establishing and maintaining a record of persons who-*

(i) have been convicted of a sexual offence against a child or a person who is mentally disabled, whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic; or

(ii) are alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court, whether before or after the commencement of this Chapter-

(aa) in the Republic has made a finding and given a direction in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977; or

(bb) outside the Republic has made a finding and given a direction contemplated in subparagraph (aa) in terms of the law of the country in question;

(b) informing an employer applying for a certificate as contemplated in this Chapter whether or not the particulars of an employee contemplated in section 45 (1) (a) or (b) are contained in the Register;

(c) informing a licensing authority applying for a certificate as contemplated in this Chapter whether or not the particulars of an applicant contemplated in section 47 are contained in the Register; and

(d) informing the relevant authorities dealing with fostering, kinship care-giving, temporary safe care-giving, adoption or curatorship applying for a certificate as contemplated in this Chapter whether or not the particulars of an applicant, as contemplated in section 48, have been included in the Register.

Definitions

[20] Certain definitions are set out in s40 which are important for the purposes of the Register. These are:

[21] **'Employer'** refers to persons who employ employees who in any manner during the course of their employment will be placed in a position to work with a child (or mentally disabled person) or in a position of authority, supervision or care of a child (or mentally disabled person) or will gain access to a child (or mentally disabled person) or places where children (or mentally disabled persons) are present or congregate.

[22] This definition is applicable to government departments in all spheres of government, a private person, organisation, institution, club or sports club and association. It is furthermore applicable to anyone who owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business or trade relating to the supervision of a child or mentally disabled person, or who works with or gains access to a child or a person who is mentally disabled. The words **employ, employing, employed** and **employment relationship** have corresponding meanings.

[23] A **'licensing authority'** is defined as any authority which is responsible for the granting of licences or approving the management or operation of any entity, business concern or trade relating to the supervision over or care of a child or a person who is mentally disabled.

[24] **'relevant authority'** refers to: any department of state or administration in the national or provincial sphere of government or any municipality in the local

government sphere; or other functionary or institution when exercising a power or performing a duty in terms of the Constitution of South Africa, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation, which is tasked with considering applications from prospective foster parents, kinship care-givers, temporary safe care-givers, adoptive parents or curators.

[25] Section 44 of the Sexual Offences Act sets out a number of persons/authorities who are entitled to apply for a certificate indicating whether the particulars of a person mentioned in the application has been included in the Register. Such persons include an employer/employee as contemplated in s 45(1), a licensing authority in respect of an applicant mentioned in s 47(1) and a relevant authority in respect of an applicant as contemplated in s 48(1).

Obligations imposed by the Sexual Offences Act in relation to the Register

[26] In terms of s 47(1) a licencing authority has an obligation not to grant a licence to or approve the management or operation of any entity, business concern or trade in relation to the supervision or care of a child or a person who is mentally disabled, without having determined from the Registrar whether or not the particulars of such a person have been recorded in the Register.

[27] In terms of s 47(3) any licencing authority who intentionally contravenes s 47 is guilty of an offence.

[28] In terms of s 48(1) a relevant authority may not consider an application or approve the appointment of a person as a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or curator without having determined, by way of an application whether or not the particulars of such a person have been recorded in the Register.

[29] Similarly, any relevant authority under the circumstances as set out in s 48 who contravenes any of the provisions of the section is guilty of an offence.

[30] In terms of s 46 an employee in the employ of an employer who is or was convicted of a sexual offence against a child or a person who is mentally disabled, or is alleged to have committed a sexual offence against a child or a person who is mentally disabled and who has been dealt with in terms of ss 77(6) or 78(6) of the CPA must disclose such a conviction or finding to his employer.

[31] A person who has been convicted of a sexual offence against a child or a person who is mentally handicapped, or who is alleged to have committed a sexual offence against a child or mentally handicapped person and has been dealt with in terms of ss 77(6) or 78(6) of the CPA, is under an obligation to disclose such fact if he/she applies for a licence in terms of s 47(1) to manage or operate any business, or entity or trade in relation to the supervision or care of a child, or a person who is mentally disabled.

[32] In terms of s 48(2) a person who applies to become a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or a curator, must disclose that he or she has been convicted of a sexual offence against a child or a person who is mentally disabled or is alleged to have done so and has been dealt with in terms of ss 77(6) or 78(6) of the CPA.

[33] In terms of s 45(2) an employer shall, subject to sub-paragraph (d), not continue to employ an employee whose particulars are recorded in the Register. An employer must immediately terminate a person's employment if he or she fails to disclose a conviction of a sexual assault against a child or person who is mentally disabled and who had been dealt with in terms of ss 77(6) or 78(6) of the CPA.

[34] An employer must also in terms of the provisions of s 45(2)(d) take reasonable steps to prevent an employee whose particulars had been entered into the Register from continuing to gain access to a child or a person who is mentally disabled, in the course of his or her employment. Such a person, if it is reasonably possible or practicable, may also be transferred from their current post or position to another post or position. If such steps taken cannot ensure the safety of the child at risk, the employment relationship or, the use or access to services, as the case may be, must be terminated immediately. In terms of s 45(3) an employer who fails to comply with the provisions of s 45 is guilty of an offence.

[35] An employee who fails to disclose that he or she had been convicted of, or had been alleged to have committed, a sexual offence against a child or mentally disabled person and who has been dealt with in terms of ss 77(6) or 78(6), is guilty of an offence in terms of the provisions of s 46(3).

Particulars to be entered in the Register

[36] In terms of s 49(b), apart from the personal particulars of the person whose name must be entered into the Register, *inter alia* the following further information must also be recorded:

(i) The sexual offence against the child or mentally disabled person in respect of which the offender was convicted;

(ii) The sentence imposed and the date and place of conviction and sentence;

(iii) The court where the trial took place and the case number;

(iv) Where it is alleged that a person has committed a sexual offence and had been referred to a medical institution in terms of the provisions of ss 77(6) and 78(6) of the CPA, the name of such institution should also be recorded.

[37] Of further relevance are the provisions of ss 50(1) and 50(2) from which I quote sections:

'(1) The particulars of the following persons must be included in the Register:

- (a) A person who in terms of this Act or any other law –*
 - (i) has been convicted of a sexual offence against a child or a person who is mentally disabled'*

[38] Section 50(2)(a) provides as follows:

'A court that has in terms of this Act or any other law –

- (i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or*
- (ii) ...*

must make an order that the particulars of the person be included in the Register.'

[39] The provisions of ss 50(1) and 50(2) will have far reaching implications for a person convicted of a sexual offence against a child or a mentally disabled person as well as a person against whom an allegation of a sexual offence had been made and who has been dealt with in terms of the provisions of ss 77(6) and 78(6) of the CPA. The net is cast very wide so as to include persons who committed such offences before the commencement of this Act or at least the Chapter dealing with the National Register for Sexual Offences.

Circumstances under which a person's particulars may be removed from the Register

[40] Section 51 deals with the removal of the particulars of a person from the Register. A person's particulars may only be removed from the Register in the following circumstances:

- (i) A person who has been sentenced for a conviction of a sexual offence against a child or a person who is mentally disabled to: a term of imprisonment, periodical imprisonment, correctional supervision, or to imprisonment in terms of s 76(1)(i) of the CPA, without the option of a fine for a period of at least six months but not exceeding eighteen months whether the sentence was suspended or not, may apply to be removed from the Register after a period of ten years has lapsed after that person had been released from prison or the period of suspension has lapsed.
- (ii) A person receiving the same type of sentences set out in (i) but where the period of such a sentence is six months or less, may apply to have his/her particulars removed from the Register after a period of seven (7) years has lapsed after that person has been released from prison or the period of suspension has lapsed.
- (iii) A person who is alleged to have committed a sexual offence against a child or a mentally disabled person in respect of whom a court, whether before or after the commencement of Chapter 6, has made a finding and given a direction in terms of ss 77(6) and 78(6) of the CPA, may apply to

have his/her particulars removed from the Register after a period of five (5) years has lapsed after such person has recovered from the mental illness or mental defect in question and is discharged in terms of the Mental Health Care Act, Act 17 of 2002 from any restrictions imposed on him or her.

[41] In terms of s 51(2) the particulars of a person:

(i) convicted of a sexual offence against a child or a mentally disabled person who has received the types of sentences mentioned earlier under paragraph 37(i), without the option of a fine for a period exceeding eighteen (18) months, whether such sentence is suspended or not; or

(ii) Who has two or more convictions of a sexual offence against a child or mentally disabled person, may not be removed from the Register.

[42] In terms of the provisions of s 52, the information contained in the Register is confidential. It may not be disclosed by the Registrar or any other person who assists the Registrar, except for the purposes of giving effect to the provisions of Chapter 6 and when required to do so by any competent court.

[43] Persons who are entitled to apply for information in terms of s 44 may not disclose or publish such information. If such a person wilfully discloses such information, he or she is guilty of an offence.

[44] A 'child' in terms of the Sexual Offences Act means a person under the age of 18 years; or, with reference to ss 15 and 16, a person 12 years or older but under the age of 16 years.

Relevant provisions of the CJA

[45] Of particular importance in the light of the circumstances of this case are some of the provisions of the CJA. The accused in this matter was 14 years of age at the time of the commission of the offences of which he was convicted. Section 4 of the CJA is therefore applicable.

[46] Section 4(1) of the CJA reads as follows:

'Application of Act

(1) Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and—

(a) ...

(b) was 10 years or older but under the age of 18 years when he or she was—

(i) ...

(ii) ...

(iii) arrested in terms of section 20, for that offence.'

[47] The object of the CJA are to be found in s 2 of the Act, and are to:

- ' (a) *protect the rights of children as provided for in the Constitution;*
- (b) *promote the spirit of ubuntu in the child justice system through—*
 - (i) *fostering children's sense of dignity and worth;*
 - (ii) *reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;*
 - (iii) *supporting reconciliation by means of a restorative justice response; and*
 - (iv) *involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children;*
- (a) *provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;*
- (b) *prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion; and*
- (c) *promote co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of this Act.'*

[48] Some of the relevant Guiding Principles are set out in s 3. These are:

‘3. Guiding principles.—*In the application of this Act, the following guiding principles must be taken into account:*

- (a) *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.*
- (b) *A child must not be treated more severely than an adult would have been treated in the same circumstances.’*

Relevant provisions of the Constitution

[49] The provisions of s 28 of the Constitution are also relevant to this case. It reads as follows:

‘28. Children.—(1) Every child has the right-

- (c) ...
- (d) *to be protected from maltreatment, neglect, abuse or degradation;*
- (e) ...

(2) A child’s best interests are of paramount importance in every matter concerning the child.

(3) In this section “child” means a person under the age of 18 years’.

[50] The applicable provisions of the Constitution on which the Register may have an impact are the right to dignity in terms of s 10 of the Constitution; the

right not to be treated or punished in a cruel, inhuman or degrading way in terms of s 12(1)(e) of the Constitution and the right to freedom of trade, occupation and profession in terms of s 22 of the Constitution.

[51] Against this background, I will now deal with the arguments presented by the respective parties.

The Arguments

[52] Mr Klopper submitted that it is trite and an acknowledged fact, that children are not physically or mentally on par with adults and should therefore receive guidance and nurturing. In acknowledgement of these principles South Africa became a signatory to the United Nations Convention on the rights of child ('UNCRC') in 1995 and accordingly, in line with international standards, including the UNCRC and our Constitution, South Africa is obliged to make special provision for the rights of children. Article 40(3) of the UNCRC obliges South Africa to '*establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law*'. To this end, in respect of child offenders, the CJA promotes a restorative justice response, emphasising reconciliation. This would include special treatment of child offenders in order to rehabilitate and integrate such children into society.

[53] Mr Klopper submitted, correctly in my view, that the Regional Magistrate had no discretion to decline to make an order in terms of s 50(2,) that the name

of the accused must be entered in the Register, as the Sexual Offences Act does not distinguish between a child sexual offender and an adult sexual offender.

[54] He conceded that the CJA makes no distinction regarding the application of s 50(2) of the Sexual Offences Act, between child offenders and adult offenders but he argues that this does not make the provisions of s 50(2) of the Sexual Offences Act constitutionally acceptable, compelling a Court to enter the details of child offenders, who have committed sexual crimes against children, in the Register.

[55] Mr Klopper argued that in relation to all sexual offenders, the peremptory inclusion of their particulars in the Register makes serious inroads into the constitutional rights of such offenders. These rights include the right to dignity; the right to privacy; the right to fair labour practices and freedom of trade, occupation and profession.

[56] Such peremptory provisions also, generally, disregard the rights of the child and make inroads into the specific rights set out in s 28 of the Constitution in respect of children. Amongst these are the right of the child to be protected against degradation; and the child's right not to have its well-being, moral or social development placed at a risk.

[57] This special dispensation for child offenders is in line with the provisions in the Constitution and also the laws of criminal procedure, that place child

offenders in a different category from adult offenders, thereby recognising their unique and vulnerable position in society. Mr Klopper further argued that, whilst these limitations may be justifiable with regard to adult offenders in terms of the limitations clause, s 36 of the Constitution, this could not be the case in respect of child offenders if due and proper regard is to be had to the relevant provisions of the CJA and s 28 of the Constitution. In this particular case he submitted on behalf of the accused that the inclusion of the particulars of child offenders could not pass constitutional muster, and that the inclusion disregards the special dispensation for child offenders which is part of our law.

[58] Mr Klopper argued that the relevant factors to be considered when considering whether such a limitation is justifiable would include the weighing up of the rights of the offender against those of the victims. In a case such as this, there is an added dimension at play when the rights of the child offender and child victim are at stake. He therefore argued that the obligation of courts in respect of child offenders in terms of s 50(2) is not a constitutionally acceptable limitation.

[59] The obligation of courts to include the particulars of a child offender in the Register fails to take into account the long term effects such inclusion would have on such offender and the law fails to take into consideration the objects of the CJA as set out in s 2 of the CJA and as referred to earlier.

[60] The peremptory inclusion in terms of s 50(2) of the Sexual Offences Act, of the particulars of the child offender, in the absence of a discretion given to a judicial officer, flies in the face of the guiding principles as set out in s 3 of the CJA which stipulate that the consequences arising from the commission of an offence should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.

[61] Mr Klopper further conceded that the crimes that trigger the inclusion of the particulars of an offender in the register are very serious and that the State has a duty to protect citizens from violence. This goal/duty however, in respect of children, is best achieved in terms of the CJA, through the imposition of sentences that strive to achieve the goals of the Act and not through the imposition of a further burden on the child offender that undermines the CJA's goals and is punitive by its nature.

[62] Mr Klopper referred to the court's finding in *S v RB; S v DK and Another 2010 (1) SACR 447, (NCK)* that the inclusion of the particulars of a minor in the Register, if regard is to be had to the purpose of the Register, constitutes a justifiable limitation of the child offender's rights in terms of s 154(3)¹ of the CPA and the right to privacy. Mr Klopper argued that the Court however did not consider the other rights of an accused that may be affected. The court was not called upon to consider the constitutionality of the Register in a broader context.

¹ Section 154(3) prohibits the publication of any information that reveals the identity of an accused under the age of eighteen years or a witness in criminal proceedings except with the Court's authorisation.

[63] He argued that the court in that case did not consider the need for compliance with international conventions and the objects and goals of the CJA. He further argued that the focus of the legislature was adults who may be employed or have authority or supervision over children or the mentally disabled. The Register in respect of child offenders has limited application and only becomes pertinent when the child becomes an adult and aspires to work in a field relating to children or wants to adopt a child. The immediate effect of the placement of a child offender on the Register is that the child is stigmatised. It is for these reasons that this Court should consider the question afresh after having considered all the relevant circumstances.

[64] He further argues that the limitation of the child offender's rights in these circumstances is not reasonable and justifiable in terms of the Constitution. The nature of the rights is such that the inclusion of child offenders in the Register does not afford protection to child victims when the offender is still a child and such offender is unlikely to be placed in the situations stipulated by the legislature.

[65] The Register does not, as is the case in other jurisdictions, serve as a monitoring device for police or members of the public in respect of child offenders and is not an effective mechanism by which the State can protect persons from violence. The objectives of the Register will only come into effect when the child offender becomes older and there is a potential for him/her to come into contact with children. However, the inclusion of the child offender's particulars in the

Register has the immediate effect of encroaching on the child offender's privacy and dignity.

[66] It is further argued that such objectives conflict with the duties imposed by, and the spirit of the CJA, which envisions a justice system that recognises that a child offender, after paying a debt to society, must be given a full opportunity to integrate into the community as a worthy citizen.

[67] Further, in failing to grant a presiding officer a discretion to consider relevant circumstances before making an order, s 50(2) of the Sexual Offences Act does not recognise the individualistic approach which the CJA seeks to underline, namely, that every individual is different, that crimes differ and that not every sex offender should be treated in the same way.

[68] Mr Klopper further argued that in respect of child offenders there are other less restrictive ways to achieve the goal of protection of child victims, such as proper sentencing and programmes aimed at rehabilitating and moulding young offenders to respect the rights and bodily integrity of others, which is the ultimate goal of the CJA.

[69] It was also argued that after a consideration of all relevant factors it would not be in the best interests of child offenders that they should be treated like adults by being included in the Register.

[70] Ms Skelton who appeared as *amicus curiae* on behalf of the Centre for Child Law agreed with the arguments raised by Mr Klopper, particularly that the provisions of s 50(2) of the Sexual Offences Act violate a number of the rights of the accused and that it further undermines the objectives of the Register.

[71] Ms Skelton, after having regard to the discussion in *Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development and Others 2009 (4) SA 222 (CC)* at paragraphs 82 – 84, submitted that if the provisions of s 50(2) of the Sexual Offences Act are incapable of being interpreted in a manner that remedies the purported unconstitutionality, the Court must, after conducting a limitation analysis, consider whether the provision is reasonable and justifiable.

[72] If the provision is not reasonable and justifiable, the Court must make a declaration of constitutional invalidity, as it is empowered to do in terms of s 172 of the Constitution. Ms Skelton so argued, after having regard to the decisions of *Investigating Directorate: Services Economic Offences and Others Hyundai Motor Distributors (Pty) Ltd and Others in re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079 (“Hyundai”) 2001 (1) SA 545 (CC)*; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009 (1) SA 337 (CC)*.

[73] The *amicus curiae* agreed with the Minister of Justice and Constitutional Development, the State, that in this case s 50(2) of the Sexual Offences Act is

not capable of any constitutionally compliant meaning. She argued that due to the fact that such a reading is not possible, it amounts to a *prima facie* constitutional infringement of rights. For such provision to pass constitutional scrutiny it must amount to a reasonable and justifiable limitation in terms of s 36 of the Constitution. The onus of establishing that such limitation is reasonable and justifiable rests on the party seeking to defend the constitutionality of the provisions.

[74] Ms Skelton submits that the impugned provisions do not survive the limitation analysis because it is not properly related to the purpose it seeks to achieve and the provision is overbroad. There are less restrictive means available to achieve the stated purpose.

[75] Ms Skelton argued that the primary aim of the Register is to protect children and persons with mental disabilities from predatory adults by limiting such adults' employment opportunities to job categories which do not involve access to children (or mentally disabled persons). She submitted that the impugned provision is not properly connected to this purpose, because the State has not shown that there is evidence to suggest that children who commit sexual offences against their peers become adult sex offenders who prey on children. Such a fact according to the *amicus* is also not self-evident.

[76] In order to show that the impugned provision is reasonable and justifiable the State has to show that there is a high degree of probability that children who

commit sexual offences against other children will go on to become adult sex offenders who prey on children. The Minister in fact provided the Court with statistics indicating the involvement of children as victims of sexual offences but not as perpetrators.

[77] In order for the State to have shown that the impugned provision is properly related to its purpose it should have shown the prevalence of children committing sexual offences against other children and that there is a high probability of such children committing sexual offences against children, as adults.

[78] This, the *amicus* argues, the State failed to do. On this ground alone s 50(2) of the Sexual Offences Act should fail the s 36 limitation analysis and should be struck down.

[79] Ms Skelton further submits that the impugned provision is overbroad and there are plainly less restrictive means for achieving the purpose of the provision. The over breadth of this provision rests in part on the comprehensive definition of sexual assault. A sexual offence for the purposes of s 50(2) includes every offence from rape to kissing. This scheme of the Register has the effect that all children who are convicted of any sexual offence against their peers will end up on the Register for one of the three statutory time periods.

[80] The *amicus curiae* accordingly argued that at first glance it may appear that the Register is graded so that less serious offences attract a shorter period of time on the Register. This is deceptive as more than one count of any sexual offence can land a child on the Register for life. She used as an example the case of a 16 year old boy convicted of more than one count of statutory rape of his 15 year old girlfriend, whose particulars would be entered in the Register for the rest of his life.

[81] The *amicus* disagrees with the State that, because of the fact that the Court *a quo* took all counts together for sentencing purposes, the risk of the particulars remaining on the Register for life, is obviated. This, because on a plain reading of the statute, it is provided that a conviction on more than one sexual offence (regardless of its seriousness) renders an offender's particulars to be entered in the Register for the rest of his or her life. On this further basis the impugned provision fails the s 36 limitations analysis and falls to be struck down. In the light of the above, the *amicus* argues that should the court find the impugned provision unconstitutional for the reason cited above, the appropriate remedial order is the declaration that s 50(2)(a)(i) of the Sexual Offences Act is unconstitutional insofar as it allows for persons who were under the age of 18 years at the time of the commission of the offence, to be placed on the Register.

[82] Ms Skelton proposes that the word 'adult' be read in immediately before the word '*person*', the first time it appears in s 50(2)(a)(i) so that the section reads as follows:

‘A court that has in terms of this Act or any other law –

(i) convicted an adult person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or

(ii) ...

must make an order that the particulars of the person be included in the Register.’

[83] Mr Tsegari who appeared on behalf of the Minister argued that the provisions of the impugned section that creates the Register, are intended to protect children (and persons who are mentally disabled) from sexual predators. The accused in this matter readily admitted that he is a sexual predator of children, in stating in his plea that he lusts for sex with children.

[88] It was argued that to the extent that the inclusion of the particulars of the accused in the National Register infringes upon his (potential) right to choose and practise his trade, occupation or profession (in the event of him choosing to work with children) pursuant to s 22 of the Constitution, such limitation is perfectly justifiable so as to protect children from potential sexual abuse or even rape by him.

[85] The Minister further argues that the inclusion of the accused’s particulars in the Register cannot reasonably be said to be an infringement of his inherent

right to dignity because the contents of the Register are not for public consumption. Such particulars are only available on application in the prescribed manner and only to the categories of persons listed in s 44 of the Sexual Offences Act, for the purpose of complying with the obligations imposed on them by that Act. A person may have an opportunity to apply for his/her particulars to be removed from the Register.

[86] Mr Tsegari further argued that although s 51(2)(b) of the Sexual Offences Act rules out any possibility of the removal from the Register of the particulars of a person who has two or more convictions of sexual offences relating to a child, the Magistrate in this case expressly indicated that all three offences are taken together for the purposes of sentence. He argued that the accused was treated fairly and equitably by the Magistrate and the Department of Justice and Constitutional Development. He was apprised of all his rights during the trial.

[87] The inclusion of his particulars in the Register does not therefore fall foul of the reconciliatory approach demanded by the CJA and it also does not offend any of the objectives or provisions of the Children's Act or s 2 of the CJA.

[88] Mr Tsegari, with reference to the *Hyundai* judgment, argues that the court in interpreting the legislation is under a duty to take account of the objectives and purpose of the Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution. The purpose and object of the Sexual Offences Act is to combat and ultimately eradicate the relatively high

incidence of sexual offences in the Republic. We were referred to statistics of the South African Police Services. For the year 2010/2011, more than 50% of the 56 272 sexual offences cases reported, involved children. For the financial year 2011/12, sexual offences cases reported involving children constituted 40,1%. It was therefore argued that the suggestion that the peremptory provisions of s 50(2) of the Act should not apply to children convicted of rape or other sexual offences, would defeat the very object of the Sexual Offences Act.

[89] It was argued that the courts should be careful in following the principle that judicial officers must prefer interpretation of legislation that falls within constitutional bounds over those that do not. For this proposition the *Hyundai* case was quoted at *para 24*. Mr Tsegari argued that this is not a case where the legislative provision in issue is unclear and imprecise to the extent that it does not lend itself to reasonable understanding by citizens and officials and where it is necessary to apply this principle in order to save the impugned provisions from unconstitutionality.

[90] Accordingly it was argued that the provisions of s 50(2) of the Sexual Offences Act clearly confer upon the court the power to direct that the particulars of a sex offender who has been convicted of rape (including a child sex offender) be included in the Register for the purposes as set out in Chapter 6 and with the overall object of eradicating the high incidence of sexual offences in South Africa. There is no ambiguity or lack of clarity in the legislature's intention.

[91] It was the further contention of Mr Tsegari that even if an interpretation of the impugned provision was to be countenanced that exempts child sex offenders from the provisions of s 50(2) of the Sexual Offences Act; such a construction is not the only possible construction of the section. It was submitted that if proper regard is to be had to the Sexual Offences Act, and the general principles of the Children's Act and the CJA, such a construction would be unreasonable and strained. The State, in terms of the Constitution, and in terms of International Law, is obliged to protect the public in general, and women and children in particular, against the invasion of their fundamental rights by perpetrators of sexual offences. Counsel drew the court's attention to the views expressed by the Constitutional Court in the decisions of *F v Minister of Safety and Security and Other 2012 (1) SA 536 (CC)* at *para 37* and *Carmichele v Minister of Safety and Security and Another (ALS Intervening) 2001 (4) SA 938 (CC)* at *paragraph 62*, regarding the State's duty to protect the public in general and children in particular against perpetrators of sexual offences. Counsel argued that the remarks of the Constitutional Court equally apply to children who are sexual victims of other children.

[92] On behalf of the Minister this court was requested to confirm the Magistrate's order including the order that the particulars of the applicant be included in the National Register for sex offenders.

[93] Ms BE Currie-Gamwo on behalf of the DPP was of the view that the value of a register containing the names of all sex offenders cannot be minimised and

has been internationally accepted and the court convicting the accused was competent to order that his name be entered into the Register since the wording of the relevant section is peremptory and a court does not have discretion to deviate from the provisions of the section. She also submitted that even if the court did have discretion, an order resulting in the name of a child offender being entered into the Register would not be unconstitutional or offend the spirit and tenure of the CJA.

Analysis

[94] In this particular matter under review the court is dealing with a child offender. As such the court has to deal with him in terms of the provisions of the CJA. In dealing with any child accused regard should be had to the objects of the CJA as set out in s 2 of the CJA and the guiding principles as set out in s 3 of the CJA, which were referred to and discussed earlier.

[95] In my view both the CJA as well as the provisions of the Sexual Offences Act, relating to children, seek to protect and give meaning to the rights of children as set out in the Constitution. They have as a common purpose the protection of the rights of children.

[96] Furthermore, the purpose of the CJA, in accordance with the values underpinning the Constitution, is to grant special protection to children who are in conflict with the law and are accused of committing offences. The focus and

spotlight is entirely on the child offender. The Sexual Offences Act seeks to protect children from sexual abuse and exploitation. There is therefore a shift in emphasis and focus in dealing with children from the offender to the victim. Both seek to promote a constitutionally permissible purpose.

[97] The Sexual Offences Act has as one of its measures to protect children (and mentally disabled persons) from sexual exploitation and abuse, the establishment of a National Register.

[98] In my view, whilst the inclusion of the particulars of a child offender in the Register in certain circumstances may not be consistent with the purpose and objects of the CJA, it may be justified in other well deserved cases where the interest of justice so demands.

[99] Mr Klopper argued that the importance of the Register in respect of child offenders has limited application and only becomes pertinent when the child becomes an adult and has to work in a field requiring contact with children or wants to adopt a child. However, in my view there may well be circumstances in which there is a need to protect other children against such a child offender and which demand the inclusion of the child's particulars in the Register, whilst the offender is still a child.

[100] I am in agreement with the arguments and submissions of Mr Klopper and Ms Skelton that the provisions of s 50(2) of the Sexual Offences Act in requiring

the particulars of a child sexual offender who has committed a sexual offence against another child, to be included in the Register, may violate such child offender's rights.

[101] The question is then, whether the inclusion of the name of such an offender in the Register in terms of the provisions of s 50(2) of the Sexual Offences Act, violates the rights of such an offender?

[102] In my view, because of the consequences and impact of the inclusion of such an offender's name in the Register, the rights of such offender, as referred to earlier, whether a child or an adult, would indeed be violated.

[103] The question to be considered is how does the court then deal with such a situation? As a starting point, the preferred manner in dealing with such a purported violation of rights is for the Court to interpret the impugned legislation in such a manner that gives effect to the fundamental values of the Constitution (s 39(2) of the Constitution). In *Hyundai* it was held as follows:

'[23] In De Lange v Smuts NO and Others, Ackermann J stated that the principle of reading in conformity does "no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution."

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

[24] Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.'

[104] In this particular case, it is not possible, in my view, to interpret s 50(2) in a constitutionally compliant manner as enjoined by s 39(2) of the Constitution.

[105] The rights of a convicted sexual offender who has committed sexual offences against children, are limited by the obligations imposed on courts to enter such offender's particulars in the Register. Such rights, in terms of s 36 of the Constitution, may only be limited by a law of general application, and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[106] In conducting the limitation analysis the Court should consider all relevant factors, including, the nature of the right; the importance of the limitation; the

nature and the extent of the limitation; the relation between the limitation and its purpose; and a less restrictive means to achieve this purpose.

[107] In the instant matter, the purpose of the Register is to maintain a record of persons who have been convicted of a sexual offence against a child or person who is mentally disabled. The ultimate goal is to protect children (and mentally disabled persons) from sexual offenders and to eliminate the possibility that such offenders gain access to them.

[108] Our courts are acutely aware of the extent of sexual violence against women and children in this country. This fact in my view is self-evident. In *F v Minister of Safety and Security and Others 2012 (1) SA 536 (CC)* at para 37 the Constitutional Court made the following remark in this regard:

'The abuse of women and girl-children is rife in this country. The police service is constitutionally required to combat these and other crimes'.

[109] In *DPP, WC V Prins 2012 (2) SACR 183* at page 186 para [1] Wallis JA in a case dealing with the interpretation of the penalty provisions of offences set out in Chapters 2, 3 and 4 of the Sexual Offences Act, made the following comment:

'[1] No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of

full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions² and domestic laws, as South Africa has done in various provisions of our Constitution³ and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). It was rightly stressed in argument, in the light of evidence tendered and admitted in this appeal, that the Act is a vitally important tool in the on-going fight against this scourge in our society.'

[110] This important constitutional purpose, namely, the protection of the dignity, freedom and physical integrity of women and children which the Sexual Offences Act seeks to enforce, was also spelled out in the decision of *S and Another v Acting Regional Magistrate, Boksburg and Another 2011(2) SACR 274 (CC)* at para 23, to which Wallis JA refers to in the *Prins* matter. Mthiyane AJ dealt in that matter with the provisions of s 69 of the Sexual Offences Act where he said:

'Our Constitution sets its face firmly against all violence and in particular sexual violence against vulnerable children, women and men. Given this and the Act's emphasis on dignity, protection against violence against the person, and in particular the protection of women and children, it is inconceivable that the provision could exonerate and immunize from prosecution acts that violated these interests.'

² The principal ones to which we were referred by counsel for the first amicus were the United Nations Convention on the Rights of the Child (Article 19) and the African Charter on the Rights and Welfare of the Child (Article 16). Counsel for the second amicus referred us principally to articles 4 and 23 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 2 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women and Article 4 of the Declaration on the Elimination of Violence against Women.

³ Particularly ss 9, 10, 12(2), 28(1)(d) and 28(2) of the Constitution.

[111] If regard is therefore to be had to the legitimate and constitutional purpose the Sexual Offences Act seeks to protect, I am of the view that the inclusion of the particulars of an offender who commits a sexual offence against a child, constitutes a limitation that is reasonable and justifiable in an open and democratic society such as ours. It seeks to protect the human dignity and the right of victims of sexual abuse, in this case, including children (and mentally disabled persons).

[112] The right of a sexual offender to gain access to a child, during the course of his or her employment, or to conduct a business wherein he or she would gain access to a child, or to foster or be a guardian of a child, cannot be regarded as more important than those of the child (or mentally disabled person) to be protected from such offenders.

[113] For these reasons I am satisfied that the inclusion of an offender's particulars in the Register is a reasonable and justifiable limitation of such an offender's rights.

The applicability of Section 50(2) of the Sexual Offences Act to Child Offenders

[114] This brings me to the question whether the provisions of s 50(2) undermine the principles of the CJA, in compelling a court to insert the details of a child offender who has committed a sexual offence against another child, in the Register.

[115] A child offender cannot be less of a sex offender merely because such an offender is a child. Such an offender will remain a sex offender, irrespective of whether such a person's particulars will be included in the Register or not. The mere fact that an offender is a child sex offender, in my view, is not sufficient justification *per sé* for not having such a person's particulars entered in the Register. Under certain circumstances, it may well be that entering such details is a reasonable and justifiable limitation of the rights of such an offender, and this would be especially so where such a child sex offender might reasonably pose a threat or harm to children or mentally disabled persons. However, in my view, such decision to do so in the case of children, has to be constitutionally compliant and has to be a measure of last resort given the circumstances of a particular case.

[116] In terms of s 28(2) of the Constitution the best interests of the child are of paramount importance in every matter concerning the child. In the instant case the court has to consider the best interests of the child offender and weigh it up against the best interests of a child who is a victim of sexual abuse and exploitation.

[117] Our courts have held that this principle under certain circumstances is capable of limitation. The following was held in *S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 at [26]*:

'This court, far from holding that s 28 acts as an overbearing and unrealistic trump of other rights, has declared that the best-interests

injunction is capable of limitation. In Fitzpatrick this court found that no persuasive justifications under s 36 of the Constitution were put forward to support the ban on foreign persons adopting South African-born children, which was contrary to the best interests of the child. In De Reuck, in the context of deciding whether the definition and criminalisation of child pornography was constitutional, this court determined that s 28(2) cannot be said to assume dominance over other constitutional rights. It emphasised that “ . . . constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36.”

Similarly, in Sonderup this court stated that the international obligation to return a child to the country of his or her residence for determination of custody would constitute a justifiable limitation, under s 36, of s 28 rights. This limitation on s 28(2) was counterbalanced by the duty of courts to weigh the consequences of the court's decision on children. Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.’

[118] The provisions of the Sexual Offences Act are applicable to all child offenders including the provisions relating to the offender’s particulars to be included in the Register.

[119] A court dealing with a child offender who has committed a sexual offence, must have regard to the aims and objects of the CJA. Therefore, a Court in concluding that a child is a sexual offender in terms of the Sexual Offences Act,

has to deal with such a child in terms of the provisions of the CJA. In giving effect to s 28 of the Constitution, the CJA seeks to protect the rights of the child offender. It further seeks to give consideration to the best interests of the child.

[120] Where a child, however, has committed a serious sexual offence, and there is a need to have the child's particulars entered in the Register, and where there is a need for a Court to counterbalance the rights of the child offender against the particular harm and danger such a child offender would pose to victims of sexual abuse and exploitation, the best interests and paramountcy principle of the child offender may be required to be limited.

The overbreadth of section 50(2)

[121] One of the difficulties I have is that this provision provides that all sexual offenders who commit sexual offences against children or mentally disabled persons, must be included in the Register. In my view, there may be particular circumstances in a case involving a child sex offender and his or her child victim, that do not call for the inclusion of the former's details in the Register, owing to the fact that the ultimate goal of protecting children against sexual abuse and exploitation is not served by such an approach. Considerations that may justify a decision to decline to include the details in the Register, include the seriousness of the offence committed, the presence of the consent of both parties, and the respective ages of the parties involved.

[122] However, the lack of discretion granted to a presiding officer, together with the broad range of offences that fall under the term 'sexual offence', some of which may not be as serious as others, means that courts cannot take the particular circumstances into account, whether or not the child offender truly poses a threat to children, and whether or not the circumstances of a case justify such an approach. The broad range of offences comprising sexual offences is clear from the discussion below.

[123] Section 12 creates a sexual offence between two individuals where there is an incestuous relationship between them as set out in s 12(2). In such a case if the DPP decides to institute a prosecution against a child offender and the victim is also a child, such a child offender, if convicted, will have his or her particulars included in the Register.

[124] In terms of s 16 a person who commits an act of sexual violation with a child despite the latter's consent to the commission of such an act, is guilty of a sexual offence. In terms of s 16(2)(a) the DPP must authorise in writing the prosecution of such an offence where both the 'victim' and the offender were children at the time of the commission of the offence. The definition of sexual violation for the purposes of this section is very wide. It also includes direct or indirect contact between the genital organs or anus of one person or, in the case of a female, her breasts and any part of the body of another person or animal or object, etc. It can also be direct or indirect contact between the mouth of one person and the genital organs or anus of another person or breasts of a female,

or it can be direct or indirect contact between the mouth of one person and another person (kissing).

[125] It could never have been the intention of the legislature to have the particulars of these child sex offenders entered in the Register, where they pose no threat to other children.

Section 50(2) and the Offender's Right to be heard

[126] The further difficulty I have with this provision is that it does not allow a sexual offender an opportunity to make representations to persuade the court not to make such an order. This violates an offender's right to a fair hearing in terms of Section 34 of the Constitution. It offends against the principle of *audi alteram partem*.

[127] In *De Beer NO v North Central Local Council and South Central Local Council and Others 2001 (11) BCLR 1109 (CC) [2002 (1) SA 425]* this principle of our law was reaffirmed as follows by *Yacoob J* at *para [11]* at p 1118:

'This section 34 fair-hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution

courts must interpret legislation and rules of the court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of courts make provision for this. They are not, however, an exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of giving notice to an affected party. If it does, it meets the notice requirements of section 34.'

[128] In *National Director of Public Prosecutions and Another v Mohamed NO and Another* 2003 (5) BCLR 476 (CC) at para [37] – [38], it was put as follows:

'[37] It is well established that, as a matter of statutory construction, the audi rule should be enforced unless it is clear that the legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it.

[38] For stronger reasons this approach should apply when construing a statutory provision in order to determine its constitutionality. Accordingly, in construing section 38, where no express reference is made to the audi principle, or its exclusion, the question to be asked is not whether the audi principle can be implied in the section, but rather whether it has been excluded from the section by clear necessary implication, or whether there are exceptional circumstances which would justify a court not giving effect to it.'

[129] The question now to be considered is whether s 50(2) can be interpreted to give effect to the *audi* rule. This would be the interpretation a court is obliged to follow in terms of s 39(2) of the Constitution, as laid down in *Hyundai*. However, it is impossible to read such an interpretation into s 50(2), because a court is, upon conviction, obliged to make such an order, although it must explain the contents and implications of such an order to the convicted person.

[130] Further, in my opinion, it cannot be said that the failure to afford an offender the right to be heard before an order is made in terms of s 50(2), is a reasonable and justifiable limitation of the rights of a sexual offender in order to enforce and protect the dignity, freedom and physical integrity of children (and mentally disabled persons) against sexual abuse and exploitation.

[131] In my view, there is no legitimate constitutional purpose in disallowing a court the discretion to decline to make such an order, provided that such discretion is exercised in a judicious manner.

[132] In *DPP v Minister of Justice and Constitutional Development 2009 (7) BCLR 637 (CC) (supra)* which dealt with the discretion of a judicial officer to appoint an intermediary in terms of s 170 of the CPA, *Ncgobo J* (as he then was) stated as follows at para [120]– [122]:

[120] The importance of judicial discretion cannot be gainsaid. Discretion permits judicial officers to take into account the need for tailoring their decisions to the unique facts and circumstances of particular cases.

There are many circumstances where the mechanical application of a rule may result in an injustice. What is required is individualised justice, that is, justice which is appropriately tailored to the needs of the individual case. It is only through discretion that the goal of individualised justice can be achieved. Individualised justice is essential to the proper administration of justice. As Dean Pound pointed out some fifty years ago:

“in no legal system, however minute and detailed its body of rules, is justice administered wholly by rule and without any recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the case before him.”

[121] However, discretion must be confined, structured and checked. This is the function of the Constitution and the law.

[122] In Dawood, albeit in a different context, we held that discretion “permits abstract and general rules to be applied to specific and particular circumstances in a fair manner.” Judicial officers are provided with discretion to ensure that the principles and values with which they work can be applied to the particular cases before them in order to achieve substantive justice. Discretion is a flexible tool which enables judicial officers to decide each case on its own merits. In the context of the appointment of an intermediary, the conferral of judicial discretion is the recognition of the existence of a wide range of factors that may or may not justify the appointment of an intermediary in a particular case.’

[133] Section 50(2) offends against a person’s right to a fair hearing where it does not allow the court a discretion to consider whether or not an order should be made. These concerns, as raised by the respective parties, as well as the Minister, can be adequately addressed if the offender as well as the prosecution is given an opportunity to address the court as to whether it would be in the

interests of justice that an order be made directing that the particulars of the accused person be entered in the Register.

[134] Both Mr Klopper and *the amicus curiae*, Ms Skelton, in argument, conceded, and in my view correctly so, that s 50(2) should be declared unconstitutional and invalid only to the extent that a presiding officer is not allowed a discretion whether or not to make such an order and that an offender is not given an opportunity to make representations before such an order is made. This limitation of the right to a fair hearing cannot be justified. To this extent only, I hold that the provisions of s 50(2) are invalid and inconsistent with the Constitution.

[135] This court *mero moto* raised the constitutional issue with the relevant and interested parties or any party who may be affected by the challenge or who may have a legitimate interest in the case, obtained their detailed submissions and heard their arguments, including the arguments of a duly appointed *amicus curiae*, challenging the constitutionality of s 50(2) or opposing the challenge to the section. Accordingly, in the interests of justice, and in view of the urgency of the matter, the court dispenses with compliance with the provisions of rule 16A of the Rules of Court and to the extent required, condones the non-compliance with the provisions of this rule.

Order:

[136] In respect of this present matter under consideration I propose the following order:

That the convictions and sentences in **S v J**, with High Court Ref no **121226**, the review before court, are in accordance with justice;

[137] I propose the following order in terms of s 172 of the Constitution:

- 1) Section 50(2) of the Criminal Law (Sexual Offences And Related Matters) Amendment Act No. 32 of 2007, is declared invalid and inconsistent with the Constitution, insofar as it does not allow the court to inquire and decide after affording the accused an opportunity to make representations, whether or not the particulars of the accused should be included in the National Register for Sexual Offenders.
- 2) The declaration in para (1) shall not be retrospective and its effect shall be suspended for 18 months to afford the legislature an opportunity to amend s 50(2) so that it can be constitutionally compliant.
- 3) During the period of suspension or until such sooner date as any amendments in para (2) above come into force, s 50(2) shall be

deemed to read as follows: (the words inserted in the existing text are underlined for convenience).

'2(a) A court that has in terms of the Act or any other law

- (i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person;*
or
- (ii) ...*

must subject to the provisions of paragraph (c), make an order that the particulars of the person be included in the Register.

(b) [When] Before making an order contemplated in paragraph (a) the court must explain the contents and the implications of the order, including section 45, to the person in question.

Notwithstanding paragraph (a) above, a court contemplated in that paragraph, may on good cause shown direct that such person's particulars not be included in the Register and shall, before making an order in terms of paragraph (a) inform the convicted person of the court's power to make a direction under this paragraph (c) and afford him or her an opportunity to make representations as to whether such a direction should be made or not.

4) This order is referred to the Constitutional Court for confirmation of the order of constitutional invalidity.

I agree.

HENNEY, J
Judge of the High Court

I agree, it is so ordered.

STEYN, J
Judge of the High Court

FOURIE, J
Judge of the High Court