

Diversion in the South African criminal justice system: Emerging jurisprudence

JAMIL DDAMULIRA MUJUZI*

ABSTRACT

On 1 April 2010 the South African Child Justice Act (CJA or the Act) commenced. The long title of the Act states, inter alia, that the purpose of the Act is 'to establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic'. The Act provides, inter alia, that a child who has committed any offence may be diverted from the criminal justice system. Case law has started emerging from South African courts dealing with some of the sections of the Act. The purpose of this article is to highlight how courts have interpreted or applied some of the sections of the Act.

1 Introduction

The crime rate in South Africa is very high. These crimes are committed by and against both adults and children. Some of the children who commit these offences are prosecuted and convicted.¹ For example, the National Prosecuting Authority (NPA) reports in its 2013/2014 annual report that during 2013/2014, 561 children were convicted of various offences.² However, not all children who commit offences are prosecuted. Some children are diverted from the formal court procedures. This is done in terms of the Child Justice Act 75 of 2008 (CJA or the Act), which came into force on 1 April 2010. For example, during 2012/2013, a total of 6 605 children, and during 2013/2014, 6 352 children, were diverted in terms of the CJA.³ It is important

* LLB Hons (Makerere) LLM (Pretoria) LLM (UFS) LLD (UWC), Associate Professor of Law, Faculty of Law, University of the Western Cape (UWC) and Research Fellow, Community Law Centre, UWC. I am indebted to the anonymous reviewers and to Prof Israel Leeman (UWC) for their comments on the earlier draft of this article. The usual caveats apply.

¹ The Department of Correctional Services website shows that in 2012 there were over 500 children sentenced to prison in South Africa. See <http://www.dcs.gov.za/AboutUs/StatisticalInformation.aspx>, accessed on 22 October 2014.

² National Prosecuting Authority of South Africa *Annual Report* (NPA) 2013/2014 (2014) 52, available at <http://www.npa.gov.za/UploadedFiles/NPA%20Annual%20Report%20-%202014%20-%204th%20Draft.pdf>, accessed on 15 February 2015.

³ NPA *Annual Report 2013/2014* op cit (n2) 51.

to briefly deal with the history of the inclusion of the sections on diversion in the CJA. The earliest report, as far as the author could establish, in which the South African Law Commission (SALC) dealt with diversion was the issue paper entitled 'Sexual Offences Against Children' published in May 1997.⁴ In this report the Law Commission dealt with the advantages and disadvantages of diverting children who are alleged to have committed sexual offences from the criminal justice system.⁵ It is clear that the recommendations in the report were limited to children who had allegedly committed sexual offences. This approach was followed in the subsequent discussion paper.⁶ In the same year, the South African Law Commission published another report, in an issue paper, entitled 'Juvenile Justice', which dealt with diversion in detail.⁷ This issue paper dealt with juvenile justice comprehensively and diversion is dealt with in detail. The issue paper deals with the then South African practice on diversion (showing how many children were being diverted each year, the role players in the diversion programmes, the different diversion programmes, and the challenges faced in implementing those programmes);⁸ the international perspectives on diversion (here the report mentioned the United Nations Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'));⁹ and referrals.¹⁰ The most important recommendation made in the report is that diversion should be provided for in law and that legislation should ensure, inter alia, that the rights of children are respected in the implementation of diversion programmes.¹¹ The issue paper on 'Juvenile Justice' was followed by the discussion paper on 'Juvenile Justice' of 1999.¹² The discussion paper highlighted, inter alia, the fact that most respondents supported the introduction of legislation that would regulate all aspects of diversion in South Africa. The recommendations in the report were based on best practices from international law and countries such

⁴ South African Law Commission (SALC) Issue Paper 10 (Project 108) 'Sexual Offences Against Children' (1997).

⁵ SALC Issue Paper 10 op cit (n4) at para 5.11.

⁶ See also South African Law Commission Discussion Paper 85 (Project 107) 'Sexual Offences: The Substantive Law' (1997) at para 3.6.2.2.

⁷ South African Law Commission Issue Paper 9 (Project 106) 'Juvenile Justice'. (The date of publication is not mentioned in the report. However, the deadline for comments is mentioned as 31 August 1997.)

⁸ SALC Issue Paper 9 op cit (n7) at paras 7.1 – 7.8.

⁹ SALC Issue Paper 9 op cit (n7) at para 2.2.

¹⁰ SALC Issue Paper 9 op cit (n7) at ch 6.

¹¹ SALC Issue Paper 9 op cit (n7) at paras 7.14 – 7.19.

¹² South African Law Commission Discussion Paper 79 (Project 106) 'Juvenile Justice' [1999].

as New Zealand, Uganda and Scotland. This discussion paper was a clear indicator that legislation on diversion was in the process of being introduced in South Africa. The importance of diversion has featured in different issue papers or discussion papers published by the Law Commission dealing with issues such as sentencing,¹³ simplification of criminal procedure,¹⁴ sexual offences,¹⁵ and out of court settlements in criminal matters.¹⁶ The 'Juvenile Justice' discussion paper was the basis for the drafting of the CJA.¹⁷

Since the coming into force of the CJA, some scholars have written on various aspects of diversion, such as the National Director of Public Prosecution's (NDPP) directives on diversion,¹⁸ the unexplained reasons for the decrease in the number of children being diverted from the criminal justice system,¹⁹ and the increased official interest in diversion.²⁰ This author is not aware of any article or chapter in any book discussing the South African cases on diversion. South African courts have recognised the importance of the Child Justice Act in the criminal justice system. For example, in *S v CKM*²¹ the high court held that the Act:

[I]ntroduced a comprehensive system of dealing with child offenders and children coming into conflict with the law that represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care, and correcting errant actions as far as possible by diversion,

¹³ South African Law Commission Discussion Paper 94 (Project 73) 'Simplification of Criminal Procedure (Sentence Agreements)' [2001] 20.

¹⁴ South African Law Commission Discussion Paper 96 (Project 73) 'Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure – Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials)' (The date of publication is not mentioned in the report. However, the deadline for comments is mentioned as 30 June 2001.) at para 3.18.

¹⁵ South African Law Commission Discussion Paper 102 (Project 107) 'Sexual Offences: Process and Procedure' [2001] Vol 1 at paras 15.3.3 – 15.3.5.15.

¹⁶ South African Law Commission Project 73 'Sixth Interim Report on Simplification of Criminal Procedure Out of Court Settlements in Criminal Cases' (2002) at paras 2.9 – 2.26.

¹⁷ F du Bois *Wille's Principles of South African Law* 9ed (2007) 175; A Skelton and C Frank 'Conferencing in South Africa: Returning to our future' in A Morris & G Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 103 at 113 – 114.

¹⁸ N Murungi 'An appraisal of the NDPP's section 97(4) Directives of 2010' (2011) 13 *Article 40*, 9–11.

¹⁹ C Badenhorst 'The Child Justice Act: What's happening after two years?' (2012) 14 *Article 40*, 7 at 8.

²⁰ SS Terblanche 'The Child Justice Act: Procedural sentencing issues' (2013) 16 *PELJ* 321 at 322.

²¹ 2013 (2) SACR 303 (GNP).

community-based programmes, the application of restorative-justice processes and reintegration of the child into the community.²²

Section 1 of the CJA defines 'diversion' to mean 'diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by Chapter 6 and Chapter 8'. Section 51 of the Act gives the following as the objectives of diversion: deal with a child outside the formal criminal justice system in appropriate cases; encourage the child to be accountable for the harm caused by him or her; meet the particular needs of the individual child; promote the reintegration of the child into his or her family and community; provide an opportunity to those affected by the harm to express their views on its impact on them; encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm; promote reconciliation between the child and the person or community affected by the harm caused by the child; prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system; reduce the potential for re-offending; prevent the child from having a criminal record; and promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society. In *S v Gani NO*, the court observed that:

'The objectives of diversion are set out very clearly in s 51 of the Act. It is now incumbent on the criminal justice system, including the presiding officers, to give consideration to the objectives of diversion and to remove children from the system where appropriate. The jurisdictional principles to be applied are clearly set out.'²³

The court added that '[t]he statutory introduction by parliament of a new approach to the criminal jurisprudence pertaining to children makes it peremptory that provisions of the Act be applied'.²⁴ The court held that diversion is in line with section 28 of the Constitution, which recognises the best interests of the child.²⁵ There are three situations in which a child in conflict with the law can be diverted. First, diversion

²² *S v CKM* supra (n21) at para [7].

²³ 2012 (2) SACR 468 (GSJ) at para [18].

²⁴ *S v Gani* supra (n23) at para [20].

²⁵ In *De Vos NO v Minister of Justice and Constitutional Development* 2015 (1) SACR 18 (WCC) at para [57], that court held that 'The diversion options set out in s 53 of the CJA are available even in the case of children who are found to have committed crimes that fall within sch 2 to the CJA, which includes murder, culpable homicide, rape and compelled rape. Through s 53 of the CJA, the legislature has afforded courts a wide discretion to deal with child offenders in many different ways that give effect to the right in s 28(1)(g) of the Constitution, to resort to incarceration only as a means of last resort, and in so doing enable courts to give effect to the injunction in s 28(2) to act at all times in the best interests of the child.'

by a prosecutor when a child is alleged to have committed a minor offence – an offence referred to in schedule 1 to the Act (section 41); diversion by a prosecutor when the child is alleged to have committed a serious offence – an offence referred to in schedule 2 to the Act (section 52(2)); and diversion at the indication of the Director of Public Prosecutions (DPP) when the child is alleged to have committed a very serious offence – an offence referred to in schedule 3 to the Act (section 52(3)). A child justice court may also divert a matter on an application by a prosecutor or the DPP (section 67). Statistics from the National Prosecuting Authority show that the majority of children have been diverted after preliminary inquiries.²⁶ The inclusion of diversion in the CJA is in line with international human rights practice. The United Nations Committee on the Rights of the Child, the monitoring body of the Convention on the Rights of the Child, which South Africa has ratified, has called upon countries to include diversion in their criminal justice systems.²⁷ South African case law shows that even before the CJA was enacted, some prosecutors diverted some children from the criminal justice system.²⁸ Service providers such as the National Institute for Crime Prevention and the Rehabilitation of Offenders also worked hand in hand with prosecutors to implement diversion programmes before the CJA was enacted,²⁹ and thousands

²⁶ For example, between 2012 and 2014, 3 864 children were diverted on in terms of section 41; 7 848 children were diverted after a preliminary inquiry; and 310 children were diverted by the Director of Public Prosecutions (schedule 3 offences). See National Prosecuting Authority of South Africa op cit (n2) 52.

²⁷ See, for example, Committee on the Rights of the Child's concluding observations on the combined third and fourth periodic report of Cyprus, CRC/C/CYP/CO/3-4, 15 June 2012 para 55(c); Committee on the Rights of the Child 'Concluding observations on second periodic report of Mali', CRC/C/MLI/CO/2, 2 February 2007 para 71(b); concluding observations of the Committee on the Rights of the Child 'Concluding observations: Republic of Korea on the consolidated third and fourth periodic reports of the Republic of Korea' CRC/C/KOR/CO/3-4, 6 October 2011 para 81(e); 'Concluding observations on the second periodic report of Malta' adopted by the Committee at its sixty-second session CRC/C/MLT/CO/2, 14 January – 1 February 2013, para 66(e).

²⁸ See, for example, *S v EA* 2014 (1) SACR 183 (NCK) in which the accused was diverted in early 2009 and completed the diversion programme. The court held that although at the time he was diverted there was no law in place governing diversion, it would be unfair to prosecute him for the same crime after he had successfully participated in the diversion programme. *S v Zen* 1999 (1) SACR 427 (E); *S v Cotyi* [2005] JOL 14810 (E) (and the cases discussed therein); and *S v Zingela; Gelebe; Nyila; Magi; Mngomezulu* [1999] JOL 4536 (E). (The high court refers to the diversion guidelines developed by the Attorney-General of the Eastern Cape.)

²⁹ See LM Muntingh and R Shapiro (eds) *NICRO Diversion Options* (1997), available at www.micro.org.za/wp-content/uploads/2011/07/1997-Diversion-Options.pdf, accessed on 13 February 2015.

of children were diverted.³⁰ However, this practice did not have legal backing and the CJA had to be enacted. In *S v EA* the high court held that '[a]lthough juvenile offenders have been diverted on a regular basis prior to the commencement of the Child Justice Act, there was no legislation that regulated the process'.³¹ The purpose of this article is to highlight South African cases on some of the provisions of the CJA. It should be noted at the outset that very few cases on diversion have been reported in South African law reports. This could be attributed to the fact that most of the diversion cases are dealt with by lower courts (regional and district courts), which are not courts of record.³² All the cases that are dealt with in this article, apart from one Constitutional Court case, are high court cases. This article will highlight the principles that have emerged from these cases.

2 Emerging jurisprudence on diversion

All the cases discussed in this article deal with children who were or were not diverted after the commencement of the CJA. The CJA, as the high court correctly observed, 'has no retrospective provision'.³³ What follows highlights these cases and the issues with which the courts have dealt.

2.1 Exposing a diverted child to the criminal justice system

As mentioned earlier, section 1 of the CJA defines 'diversion' to mean 'diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by Chapter 6 and Chapter 8', and one of the objectives of diversion is to deal with a child outside the formal criminal justice system in appropriate cases. One of the objects of the CJA is to prevent children from being exposed to the adverse effects of the formal criminal justice system.³⁴ As the National Prosecuting Authority states, when children are diverted, '[t]hey are offered an opportunity to change their lives instead of going deeper in the criminal justice system and become hardened criminals'.³⁵ However, this does not mean that the child who is suspected of breaking the law will not, for example, be arrested or

³⁰ JM Reyneke and RP Reyneke 'Process and best practice at the Mangaung One-Stop Child Justice Centre' (2011) 24 *SACJ* 137 at 154.

³¹ *S v EA* supra (n28) at para [5].

³² National Prosecuting Authority of South Africa op cit (n2) 51.

³³ *S v EA* supra (n28) at para [4].

³⁴ Section 2(d) of the Child Justice Act.

³⁵ The National Prosecuting Authority of South Africa 'Child Justice', available at <http://www.npa.gov.za/ReadContent414.aspx>, accessed on 15 February 2015.

served a summons for the purpose of prosecuting him. In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development (Justice Alliance of South Africa as amici curiae)*,³⁶ a case that did not deal directly with the issue of diversion but rather with the constitutionality of the sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act³⁷ that criminalised consensual sexual intercourse between children, the applicants argued that the sections were unconstitutional for violating different rights of the children. The respondents argued, inter alia, that the existence of the option of diversion saved the impugned provisions.³⁸ The Constitutional Court per Khampepe J held that:

‘I find myself constrained to agree with the applicants that even the prospect of diversion cannot save the impugned provisions. If the adolescent charged under section 15 or section 16 is ultimately diverted from the formal criminal justice system, he or she may still be arrested and forced to interact with arresting and investigating police officials. If the adolescent is to avoid a formal criminal trial, he or she must acknowledge “responsibility for the offence” to a magistrate. The acknowledgement is made during inquiry or trial proceedings at which various people may be in attendance, including the adolescent’s guardian, the relevant probation officer and the prosecutor. The adolescent will not only experience these interactions with various institutions of state, but in the course thereof will be forced to disclose and have scrutinised details of his or her intimate affairs.’³⁹

The Court added that:

‘The respondents rely extensively on the prosecutorial discretion and diversion measures in other relevant legislation to justify the limitation of the aforementioned rights. However, as already explained, these temper only some of the harm. Adolescents would still be exposed to earlier processes in the criminal justice system such as being arrested and questioned by police and other authorities about their intimate sexual behaviour. A prosecutor choosing to act with circumspection does not do enough to alleviate the invasion of children’s rights occasioned by those earlier processes.’⁴⁰

At the heart of the inquiry was whether the possibility of diversion could save the impugned provisions from being declared unconstitutional. In the above judgment, the Constitutional Court, although it was not called upon to deal directly with the issue of diversion, makes it very clear that the possibility of diversion does not prevent a child from being in contact with law enforcement officers or the prosecutor, but

³⁶ 2013 (12) BCLR 1429 (CC).

³⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³⁸ *Teddy Bear Clinic for Abused Children* supra (n36) at para [32].

³⁹ *Teddy Bear Clinic for Abused Children* supra (n36) at para [74].

⁴⁰ *Teddy Bear Clinic for Abused Children* supra (n36) at para [83].

can prevent detention awaiting trial, trial, and imprisonment, in case of a conviction.

2.2 The lawfulness of a diversion order

The principle of legality is emphasised in South African law. It requires, inter alia, that actions taken by public officials must be based on the relevant legal provisions.⁴¹ The necessary legal requirements have to be complied with for the diversion order to be valid. As mentioned earlier, section 52(3)(a) of the CJA provides that

‘The Director of Public Prosecutions having jurisdiction may, in the case of an offence referred to in Schedule 3, in writing, indicate that the matter be diverted if exceptional circumstances exist, as determined by the National Director of Public Prosecutions in directives...’

In *S v Sobekwa*,⁴² the accused who was 17 years old, was charged before a magistrate’s court with armed robbery. Armed robbery is one of the offences provided for in schedule 3 to the Act. He appeared before a magistrate for a preliminary inquiry, after which the magistrate ordered that the matter should be diverted.⁴³ On review, the magistrate conceded that she had ‘misdirected herself in this regard’.⁴⁴ The high court referred to section 52(3) of the CJA⁴⁵ and held that ‘[i]t is common cause that there has not been such a written indication by the D[irector] [of] P[ublic] P[rosecutions], and the diversion was accordingly wrongly ordered’.⁴⁶ The court concluded that ‘[t]he order for diversion is hereby set aside and the matter is remitted to the court a *quo* for inquiry in terms of section 43 of the Child Justice Act 75 of 2008’.⁴⁷

As mentioned earlier, under section 41 of the CJA, a prosecutor is empowered to divert a matter before a preliminary inquiry. Under section 52(1)(e) a matter may only be diverted if, inter alia, ‘the prosecutor indicates that the matter may be diverted in accordance with subsection (2) or the Director of Public Prosecutions indicates that the matter may be diverted in accordance with subsection (3)’. The question that arises is whether the CJA is capable of being interpreted to allow a child’s lawyer to make an application for the matter to

⁴¹ See *National Director of Public Prosecutions v Freedom under Law* 2014 (4) SA 298 (SCA).

⁴² [2013] JOL 30901 (ECG).

⁴³ *S v Sobekwa* supra (n42) at para [1].

⁴⁴ *S v Sobekwa* supra (n42) at para [4].

⁴⁵ *S v Sobekwa* supra (n42) at para [2].

⁴⁶ *S v Sobekwa* supra (n42) at para [3].

⁴⁷ *S v Sobekwa* supra (n42) at para [6(a)].

be diverted. In *Rabupape v S*,⁴⁸ the accused, a 16-year-old boy, was charged with culpable homicide in that he drove a car negligently and recklessly and without a licence, leading to the death of one of the passengers in the car with which he collided.⁴⁹ The accused's lawyer brought an application for diversion, which was supported by the Probation Officer but opposed by the prosecution.⁵⁰ The magistrate invoked section 69(1) of the CJA and referred the accused for diversion. The matter was postponed for about three months 'for [an] assessment report and to see if the accused complied with the diversion program'.⁵¹ The state opposed the diversion order and submitted that the child had committed a serious offence and 'that the magistrate acted *ultra vires* in diverting the matter for the child to attend a life skills program'.⁵² It is against that background that the matter was referred to the high court for review.⁵³ The high court referred to section 52 of the CJA and held that:

- [8] It is clear from the record that the application for diversion was instituted by the defence. It appears that the presiding officer was persuaded by the defence's submission that the child acknowledged responsibility for the offence. Notwithstanding the public prosecutor's opposition thereto, the presiding officer ordered for diversion without considering the provisions of the Act. In my view, the presiding officer misdirected himself by accepting the child's acknowledgement of responsibility for the offence without considering the provisions of section 52(1)(e). Put differently, the presiding officer erred and acted irregularly.
- [9] Further thereto, the prosecutor may, in the case of an offence referred to in Schedule 2,3 after he/she has considered the views of the victim or any person who has a direct interest in the affairs of the victim, may indicate whether or not the matter should be diverted. There is no evidence of either the deceased's family or any person with direct interest in the affairs of the deceased or of the police official responsible for the investigation of the matter demonstrating that they were consulted before diverting the matter. The evidence on record is just that of the prosecutor opposing diversion. The diversion ordered by the presiding officer is, on this leg as well, irregular.⁵⁴

It is against that background that the high court set aside the order of diversion that had been made by the magistrate and referred the matter to 'the Child Justice Court for the minor child to face the full might of

⁴⁸ Unreported (A907/2014) [2014] ZAGPPHC 948 (2 December 2014).

⁴⁹ *Rabupape v S* supra (n48) at para [2].

⁵⁰ *Rabupape v S* supra (n48) at para [3].

⁵¹ *Rabupape v S* supra (n48) at para [3].

⁵² *Rabupape v S* supra (n48) at para [4].

⁵³ *Rabupape v S* supra (n48) at para [4].

⁵⁴ *Rabupape v S* supra (n48) at paras [8]–[9].

the law'.⁵⁵ It is clear that a child's lawyer may not apply for diversion. This can only be done by the prosecutor or by the DPP. Although a child justice court may divert a matter, it can only do so after an application by the prosecutor or the Director of Public Prosecutions.⁵⁶ Although the high court takes issue with the fact that there was no evidence that the relatives of the deceased were consulted before the matter was diverted, it should be recalled that the prosecutor is not obliged to consult them. The word 'may' is used in section 52, which means that the prosecutor has the discretion whether or not to consult with them. It is submitted that if he does not consult them, he should explain the basis of his decision to the magistrate so that it is put on record. What is not clear from the facts of the case is whether the child had already complied with the diversion order. The issue of whether or not it is permissible for a child who has complied with a diversion order to be prosecuted is discussed below.

2.3 Is a preliminary inquiry mandatory in all diversion situations?

As mentioned earlier, there are four situations in which a matter may be diverted – diversion by a prosecutor when a child has committed a minor offence (schedule 1); diversion by a prosecutor when a child has committed a serious offence (schedule 2); diversion at the indication of the DPP (schedule 3); and diversion by a court (section 67). In *S v Ngubeni*,⁵⁷ the child was convicted of theft of chocolate worth R59,97. At his trial he was not represented by a lawyer and '[d]uring mitigation of sentence it was ascertained that the accused was 16 years old'.⁵⁸ The magistrate only realised that the accused was a minor after conviction. As a result the 'magistrate set aside his conviction and noted a plea of not guilty'.⁵⁹ On review, the high court set aside all the proceedings in the magistrate's court and held that:

'In terms of the Child Justice Act 75 of 2008, the child must attend a preliminary enquiry [sic] to assess whether the child can be diverted from the criminal justice system. The magistrate directed that the child be sent to Protea Magistrate's Court for this assessment.'⁶⁰

In the above judgment the court does not refer to the relevant provision of the Act that makes it mandatory for a child to attend a preliminary

⁵⁵ *Rabupape v S*, supra (n48) at para [15].

⁵⁶ See s 67 of the Child Justice Act.

⁵⁷ 2014 (1) SACR 266 (GSJ).

⁵⁸ *S v Ngubeni* supra (n57) at para [2].

⁵⁹ *S v Ngubeni* supra (n57) at para [2].

⁶⁰ *S v Ngubeni* supra (n57) at para [4].

inquiry for an assessment to be made of whether or not the child should be diverted from the criminal justice system. It should be noted that it is not a requirement that a preliminary inquiry has to be conducted in all cases before a child is diverted from the criminal justice system. A preliminary inquiry is only mandatory in respect of two of the three options. The matter could have been diverted without a preliminary inquiry being conducted. This is so because section 41(2)(c) of the Act read with schedule 1 provides that a prosecutor may divert a matter where the child has committed theft 'where the amount involved does not exceed R2 500' and that such diversion 'must take place before a preliminary inquiry'. Therefore, it is not a requirement under the Act that for every matter to be diverted the child must attend a preliminary inquiry. In *S v CKM*⁶¹ the court observed that:

'Diversion of children into approved programmes enjoys great importance. The prosecution can divert children into approved programmes in appropriate circumstances after assessment by a probation officer, which must be effected before a decision concerning the potential diversion can be taken. Children who are not diverted by the prosecutor and who are older than 10 years...must appear at a preliminary inquiry, conducted before a magistrate inquisitorially to consider the probation officer's report and to establish whether diversion is possible in the individual case.'⁶²

It is argued that in the above quotation the court's interpretation of relevant provisions of the Act seems to suggest that before a prosecutor makes a decision on whether or not to divert a child from the criminal justice system, an assessment by a probation officer is a prerequisite. It should be noted that section 41(2) of the CJA provides that one of the requirements that has to be met before a prosecutor diverts a child who has committed a minor offence is that the child has to be assessed by a probation officer.⁶³ However, section 41(3) allows a prosecutor to dispense with the probation officer's assessment. It states that

'If the child has not been assessed, the prosecutor may dispense with the assessment if it is in the best interests of the child to do so: Provided that the reasons for dispensing with the assessment must be entered on the record of the proceedings by the magistrate in chambers...'

The above discussion shows, inter alia, that a preliminary inquiry is not a prerequisite before all matters are diverted from the criminal justice system.

⁶¹ *S v CKM* supra (n21).

⁶² *S v CKM* supra (n21) at paras [10]-[11].

⁶³ Section 41(2)(b).

2.4 Prosecuting a child against whom a diversion order has been made or who has complied with a diversion order

Section 59(1)(a) of the Act provides that '[i]f a matter has been diverted...and the diversion order has been successfully complied with, a prosecution on the same facts may not be instituted'. In *S v Dwangu*,⁶⁴ the magistrate requested the high court to set aside the second accused's conviction on the ground that he had been convicted of an offence notwithstanding the diversion order. The court held that:

'We are not placed in possession of the full record or of the judgment but I am nevertheless satisfied that the prosecution against accused 2 continued notwithstanding the diversion order, resulting in his conviction. In terms of section 59(1)(a) of the Child Justice Act 75 of 2008 the further prosecution is prohibited. It follows that the conviction should be set aside against accused 2 and that the matter should be remitted to the East London Regional Court.'⁶⁵

The facts of the case are silent on whether the accused in question was still participating in the diversion programme in question or had successfully complied with the diversion order. However, what is clear is that the court confirms the principle that once a diversion order has been made and the accused is still participating in that order or has successfully complied with the order, he cannot be prosecuted on the basis of the same facts. In *S v CKM*,⁶⁶ one minor had committed common assault and the other housebreaking to commit an unknown crime. They were diverted but later prosecuted because the first minor 'had failed to attend any of the individual counselling sessions that formed part of the programme'⁶⁷ and the second minor 'failed to participate in a diversion programme'.⁶⁸ The magistrate's court committed them to a reformatory school. The high court set aside the magistrate's orders because the magistrate in making the orders in question had not considered the personal circumstances of the accused and the principles applicable to sentencing juvenile offenders. However, the high court did not find that prosecuting children who have failed to successfully complete diversion programmes was not permissible. In *S v EA*, the court observed that '[i]n terms of s 59(1)(a), which specifically deals with the legal consequences of a decision to divert an accused, a prosecution based on the same facts may not be instituted against an accused who has completed a diversion

⁶⁴ [2013] JOL 29977 (ECG).

⁶⁵ *S v Dwangu* supra (n64) at para [2].

⁶⁶ *S v CKM* supra (n21).

⁶⁷ *S v CKM* supra (n21) at para [18].

⁶⁸ *S v CKM* supra (n21) at para [23].

programme successfully'.⁶⁹ For a child who has been diverted to avoid prosecution, he must complete the diversion programme successfully.

2.5 Dealing with all child offenders under the Child Justice Act

One of the objects of the CJA is '[t]o establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic'.⁷⁰ The question which arises is whether all children who are in conflict with the law have to be dealt with under the CJA and if so, what are the legal implications for failure to deal with the child therein under. In *S v Mthumeni*,⁷¹ accused number two pleaded guilty and was convicted of housebreaking with intent to steal and theft. Before imposing sentence, the magistrate realised that the accused was a minor – 17 years old. His age had been correctly reflected on the charge sheet and he was represented by a lawyer at the trial. The high court, in setting aside the conviction and ordering that the case should be referred to the Child Justice Court, observed that the magistrate's 'failure to refer the accused person in question for an assessment prejudiced him because he was not dealt with in the manner envisaged by the Child Justice Act'.⁷² In *S v Mbane*,⁷³ as in *S v Mthumeni*, the accused was 17 years old, pleaded guilty, and was convicted of housebreaking with intent to steal and theft. He was also represented by a lawyer. At the commencement of the sentencing proceedings his attorney informed the court that the accused was a juvenile, aged 17.⁷⁴ In setting aside the conviction, the court referred to the Constitution, the CJA and international human rights instruments⁷⁵ and held that:

'After accused 1 was arrested and later dealt with in terms of the Criminal Procedure Act 51 of 1977 instead of the Child Justice Act 75 of 2008, in my view, he was denied the special justice dispensation provided for in the latter Act. In my view, that was a gross irregularity which has a great potential to result in a miscarriage of justice, and consequently this Court has an inherent jurisdiction to review these proceedings.'⁷⁶

⁶⁹ *S v EA* (n28) at para [4].

⁷⁰ Long title of the Child Justice Act.

⁷¹ [2013] JOL 30656 (ECG).

⁷² *S v Mthumeni* supra (n71) at para [4].

⁷³ [2013] JOL 30083 (ECB).

⁷⁴ *S v Mbane* supra (n73) at paras [2] and [4].

⁷⁵ *S v Mbane* supra (n73) at para [7].

⁷⁶ *S v Mbane* supra (n73) at para [8].

The court ordered that the matter should be remitted to the magistrate's court for the accused to be dealt with in terms of the CJA.⁷⁷ The principle emerging from this jurisprudence is that children in conflict with the law should be dealt with in terms of the CJA. Failure to do so is an irregularity.

2.6 Is diversion possible after a child has been convicted?

Section 52(1) of the Act provides that '[a] matter may, after consideration of all relevant information presented at a preliminary inquiry, or during a trial, including whether the child has a record of previous diversions, be considered for diversion...'. As mentioned above, a child justice court may divert a matter in terms of section 67 if the prosecutor or DPP indicates that the matter must be diverted. Section 67 provides that if a child complies with a diversion order, the proceedings against him are stopped. The case of *S v MK*⁷⁸ dealt with the correct interpretation of section 52(1) of the Act. The accused was 16 years old and was convicted on two counts of rape on the basis of his plea of guilty. He had raped two male minors. After conviction, the social worker presented a pre-sentence report in which he recommended that the court should order the accused to take part in some diversion programmes.⁷⁹ In sentencing the accused to five years' imprisonment, the magistrate held that he was 'of the opinion that this [section of the Child Justice] Act is a diversion option which is available prior to a person being convicted'.⁸⁰ The magistrate also held that 'the seriousness of the crimes outweighed correctional supervision sentence options' and that 'there are sufficient youth prisons in South Africa that are more than equipped with dealing with the accused (sic) disorders as well as programmes to assist him'.⁸¹

On review, the high court held that '[t]he conviction of the accused is in order'.⁸² However, the court took issue with the sentence that was imposed and the interpretation that the magistrate gave to section 52(1). It held that:

'As to diversion, it is at the outset necessary to consider the provisions of s 52(1) of the Act, which provides as follows: "(1) A matter may, after consideration of all relevant information presented at a preliminary enquiry, or during a trial, including whether the child has a record of previous diversions, be considered for diversion if" [Emphasis added.] As is made

⁷⁷ *S v Mbane* supra (n73) at para [11].

⁷⁸ 2012 (2) SACR 533 (GSJ).

⁷⁹ *S v MK* supra (n78) at para [3].

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *S v MK* supra (n78) at para [2].

clear by the italicised portion of the section, the option of diversion can be considered at any time during the trial. The regional magistrate, accordingly, wrongly jettisoned the option of diversion, resulting in a misdirection which, undoubtedly, seriously prejudiced the accused.⁸³

The court discussed the principles that are applicable to the sentencing of juvenile offenders and also the personal circumstances of the accused and held that:

'[I]t is abundantly clear that the accused is in dire need of guidance, correction, rehabilitation and reintegration into his family and the community...Those objectives, which were seemingly ignored by the trial court...can best be achieved outside the prison environment...by providing appropriate alternative care. Direct imprisonment, exposing the accused to the many detrimental effects of incarceration...would merely be counter-productive to the prospects of rehabilitation...The sentence of five years' imprisonment, accordingly, is strikingly inappropriate and therefore ought to be set aside.'⁸⁴

The court observed further that:

'The social worker's recommendation...was that the accused be dealt with in terms of s 53(4)(c) and (d) of the Act, in the following manner: that he be detained at Sterkfontein Hospital for intensive therapy and treatment; that he thereafter be referred to and be ordered to attend sexual-offender programmes and, finally, that he be placed under the supervision of a probation officer for purposes of monitoring and follow-up...I am satisfied that the recommendation is in the best interests of the accused and that it ought to be implemented. In view, however, of the administrative and other requirements having to be complied with and to be provided for in the sentence to be imposed, I have decided to remit the matter to the trial court for imposing sentence afresh in the light of the findings I have made.'⁸⁵

At least two important issues emerge from this case. First, the court makes it very clear that a juvenile offender can be diverted before and during the trial. This is what section 52(1) clearly states. Secondly, and rather controversially, the court holds that notwithstanding the fact that the accused had been convicted, he could still be ordered to participate in diversion programmes. The authors of one of the leading textbooks on the law of criminal procedure in South Africa are also of the view that the court's reasoning is to the effect that a matter can be diverted during trial and after conviction.⁸⁶ It should be recalled that the court held that the accused's conviction was in order and did not set it aside. What it set aside was the sentence that had been imposed by the magistrate. It is submitted that once a child has been convicted of an offence and the conviction is not set aside, the

⁸³ *S v MK* supra (n78) at para [4].

⁸⁴ *S v MK* supra (n78) at para [7].

⁸⁵ *S v MK* supra (n78) at para [8].

⁸⁶ J Joubert (ed) *Criminal Procedure Handbook* 11ed (2013) 81.

relevant provisions of the CJA that deal with diversion cease to apply to that child. My submission is based on two factors. First, one of the objectives of diversion is to prevent a child from getting a criminal record. Once a child is convicted he automatically gets a criminal record. That criminal record would have to be expunged in terms of section 87 of the CJA.⁸⁷ The second factor flows from the first – in cases where other magistrates have convicted children and a high court on review is of the view that diversion should have been considered, the convictions in question have been set aside and the cases remitted to the magistrates or to the Child Justice Court to deal with them in terms of the CJA. In *S v Gani NO*⁸⁸ for example, the accused, a 17-year-old girl, was convicted of theft by the magistrate on the basis of her guilty plea. Before imposing sentence, the magistrate realised that she was a minor and her counsel submitted that she should have been diverted from the criminal justice system. It is against that background that the magistrate referred the matter to the high court for review. The high court observed that ‘the child has already been found guilty and diversion from the criminal justice system would require a setting-aside of the conviction’.⁸⁹ The court added that:

‘The question of diversion from the criminal justice system was not specifically addressed by the court *a quo* when the child’s plea of guilty was accepted. The input of a probation officer’s report would have been helpful at the point prior to the plea. The failure to consider diversion from the criminal justice system is of itself a fatal factor in the conviction process. The conviction cannot stand.’⁹⁰

Because the child had a previous conviction for theft that had been suspended, the court held that:

‘This is the child’s second conviction. If the principle of diversion had been applied in relation to the first charge she could well have been diverted away from the criminal justice system at that stage. Two criminal convictions before reaching the age of 18 years is the very kind of problem which the Act aims to address. It is clear in my view that the court *a quo* must give consideration to diverting this child from the criminal justice system. The period of suspension for the first crime of theft is still current. The *curatrix ad litem* may want to revisit the first conviction as well in the light of this judgment.’⁹¹

⁸⁷ For the law relating to the expungement of criminal records in South Africa, see JD Mujuzi ‘The expungement of criminal records in South Africa: The drafting history of the law, the unresolved issues, and how they could be resolved’ (2014) 35 *Statute LR* 278–303.

⁸⁸ *Supra* (n23).

⁸⁹ *S v Gani NO supra* (n23) at para [8].

⁹⁰ *S v Gani NO supra* (n23) at para [13].

⁹¹ *S v Gani NO supra* (n23) at paras [15]–[16].

One appreciates that the court in *S v MK* did not want the child in question to be sentenced to direct imprisonment. However, it is doubtful if it was the correct approach for the court to order that the magistrate should invoke section 53(4) of the CJA. In my opinion, the correct approach would have been for the court to order the magistrate to impose the suggested sentences on the basis of section 276 of the Criminal Procedure Act, which allows a magistrate to impose sentences such as committing an offender to a treatment centre or to correctional supervision, as provided for in the CJA.⁹²

2.7 Should all matters involving children be diverted?

As discussed above, children who have committed serious offences, such as rape, can also be diverted from the criminal justice system. However, in some instances courts have emphasised the seriousness of the offence, the child's previous conviction or convictions, his previous diversion and the role he played in the commission of the offence to sentence the child to a lengthy term of imprisonment. For example, in *S v Arends*⁹³, the three accused, including a 17-year-old, were prosecuted for rape and attempted robbery. Although the high court was aware of the fact that the first accused was 17 years old at the time he committed the offence, the issue of diversion was never raised during the trial. At sentencing, the court observed that:

‘Accused 1 was 17 years old when he committed the offences in this matter. He is not a first offender. He has previous convictions for theft and for housebreaking with intent to steal and theft. According to the probation officer's report, the contents of which were admitted, accused 1 was also referred to a diversion program for another offence of housebreaking and for assault. He completed the program for these offences but defaulted in respect of the offences listed in his SAP69.’⁹⁴

The court added that the accused's mother's statement that ‘he is an honest person who always tells the truth...must be treated sceptically in the light of the mendacious evidence he gave in this trial.’⁹⁵ The court noted that the accused had been expelled from school without completing grade 3 and that he was not interested in going back to school.⁹⁶ The court added that the probation officer's view that the accused ‘may have been influenced by his co-accused to commit the offences of which he’ was convicted was not supported by any

⁹² See ss 68–79 of the CJA.

⁹³ Unreported [2010] ZAECGHC 16 (1 March 2010).

⁹⁴ *S v Arends* supra (n93) at para [26].

⁹⁵ *S v Arends* supra (n93) at para [27].

⁹⁶ Ibid.

evidence.⁹⁷ The court emphasised the fact that the accused had played a leading, violent and active role in the commission of the offences.⁹⁸ The court concluded that:

‘Applying the approach to the sentencing of offenders younger than 18 years...I am of the view that given the seriousness of the offences committed by accused 1 as well as the aggravating factors that I have listed, imprisonment is the only appropriate sentence for him. I am mindful too of the fact that I must sentence him to the shortest term of imprisonment that I can justify. In the circumstances that I have set out “and taking into account in particular the barbarity of his conduct” the sentence for the rape of necessity must be a long one. Given the role he played in the attempted robbery with aggravating circumstances, and his previous convictions are relevant in this regard, I am of the view that a shorter term of imprisonment, to run concurrently, is appropriate for this offence. On the rape conviction a sentence of 16 years imprisonment will achieve the balance required by the [Constitutional Court]...within the context of the balance of the interests of society, the nature and seriousness of accused 1’s crimes and his personal circumstances. A sentence of five years imprisonment in respect of the conviction of attempted robbery with aggravating circumstances is, in my view, appropriate.’⁹⁹

It should be noted that although earlier on the court had referred to the fact that the accused had successfully completed a diversion programme, that fact was not emphasised when imposing the sentences in question. However, the court emphasised the accused’s previous convictions. This approach should be understood against the background that the CJA states expressly that ‘a diversion order does not constitute a previous conviction’.¹⁰⁰ In *S v Sekoere*,¹⁰¹ the accused, a 17-year-old, was charged with a co-accused with the offence of housebreaking with intent to steal and theft. He was represented by a lawyer, pleaded guilty, and was convicted.¹⁰² After considering the probation officer’s pre-sentence report, which indicated, inter alia, that the accused had two previous convictions of housebreaking with intent to steal and theft and one conviction of escaping from custody, the magistrate sentenced the accused to 12 months’ imprisonment.¹⁰³ On review, although the high court referred to, inter alia, the relevant provisions of the CJA that deal with diversion,¹⁰⁴ it concluded that in the light of the accused’s previous convictions and the existence

⁹⁷ *S v Arends* supra (n93) at para [28].

⁹⁸ *S v Arends* supra (n93) at paras [28] and [36].

⁹⁹ *S v Arends* supra (n93) at paras [37] – [38].

¹⁰⁰ Section 59(1)(b).

¹⁰¹ 2013 (2) SACR 426 (FB).

¹⁰² *S v Sekoere* supra (n101) at para [3].

¹⁰³ *S v Sekoere* supra (n101) at para [4].

¹⁰⁴ *S v Sekoere* supra (n101) at para [12].

of several cases pending against him '[i]t was not in the interest of justice to impose any other sentence than that imposed by the court *a quo*...In the circumstances...the proceedings were in accordance with justice and that the sentence is in order'.¹⁰⁵

3 Conclusion

The CJA empowers a prosecutor or the DPP to divert a matter from the criminal justice system. A matter may also be diverted by the Child Justice Court if the prosecutor or DPP indicates that it should be diverted. The purpose of this article was to highlight decisions of the South African courts in their interpretation of the CJA. It is of concern that there have been cases where the age of the child has either been incorrectly reflected on the charge sheet or the child's correct age has only been established at the time of sentencing. This is disturbing especially in cases where some of the children were represented by lawyers at their trials. One would have expected any diligent lawyer to have established his client's age at the time he is instructed, especially if there is reason to believe that he could be a minor. One would also have expected the prosecutor to know the age of the person he is to prosecute as this would enable him to determine whether or not diversion should be considered. It is also curious that in all the reported cases the child offenders pleaded guilty to the offences in question. The reasons for this are unclear. Some scholars are of the view that diversion is possible even after conviction. It is argued that once a child has been convicted the matter cannot be diverted from the criminal justice system. However, after conviction a judicial officer could impose a non-custodial sentence, or if necessary, commit a child to a treatment centre. On review, the high court has adopted two approaches in cases where it has set aside an incorrect diversion order. There are cases where the high court has ordered the matter to be remitted to the magistrate's court to be dealt with in terms of the CJA, while in others it has ordered the matter to be referred to the Child Justice Court. It should also be noted that in many cases discussed in this article the child offenders were prosecuted together with adult co-accused. However, the cases do not reveal whether the magistrates considered the possibility of the children in question having been used or influenced by the adult co-accused to commit offences.

¹⁰⁵ *S v Sekoere* supra (n101) at para [31].